COMMENTARIES

ON

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OF ALIENS AND NATIVES.

We are next to consider the rights and duties of citizens in their domestic relations, as distinguished from the absolute rights of individuals, of which we have already treated. Most of these relations are derived from the law of nature, and they are familiar to the institutions of every country, and consist of husband and wife, parent and child, guardian and ward, and master and servant. To these may be added, an examination of certain artificial persons created by law, under the well-known name of corporations. There is a still more general division of the inhabitants of every country, under the comprehensive title of aliens and natives, and to the consideration of them our attention will be directed in the present lecture.

(1.) Natives are all persons born within the jurisdiction and allegiance of the United States. (a) If they were resident citi-

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(a) This is the rule of the common law, without any regard or reference to the political condition or allegiance of their parents, with the exception of the children of ambassadors, who are in theory born within the allegiance of the foreign power they represent. Calvin's case, 7 Co. Lynch v. Clarke, 1 Sandford's Ch. R. 584, 639. In this last case, the doctrine relative to the distinction between aliens and citizens in the jurisprudence of the United States, was extensively and learnedly discussed, and it was adjudged that the subject of alienage, under our national compact, was a *national* subject, and that the law on this subject which prevailed in all the United States, became *the common law of the United States*, when the union of the states was consummated; and the general rule above stated is, consequently, the governing principle or common law of the United States, and not of the individual states separately considered. The right of citizenship, as distinguished from alienage, is a national right, character, or condition, and does not pertain to the individual states separately considered. The question is of national, and not individual sovereignty, and is governed by the principles of the common law which prevail in the United States, and became, under the constitution, to a limited extent, a system of national jurisprudence. It was accordingly held, in that case, that the complainant, who was born in New York, of alien parents, during their temporary sojourn there, and returned while an infant, be-

zens at the time of the declaration of independence, though born elsewhere, and deliberately yielded to it an express or implied sanction, they became parties to it, and are to be considered as natives; their social tie being coeval with the existence of the nation. If a person was born here before our independence, and before that period voluntarily withdrew into other parts of the British dominions, and never returned; yet it has been held that his allegiance accrued to the state in which he was born, as the lawful successor of the king; and that he was to be considered a subject by birth. (*a*.) It was admitted *40 that this *claim of the state to the allegiance of all persons born within its territories prior to our Revolution, might subject those persons who adhere to their former sovereign to great inconveniences in time of war, when two opposing sovereigns claimed their allegiance; and under the peculiar circumstances of the case, it was, undoubtedly, a very strong application of the common-law doctrine of natural and perpetual allegiance by birth. The inference to be drawn from the discussion in the case of *M'Ilvaine* v. *Coxe*, (*b*) would seem to be in favor of the more reasonable doctrine that no *antenatus* ever owed any allegiance to the United States, or to any individual state, provided he withdrew himself from this country before the establishment of our independent government, and settled under the king's allegiance in another part of his dominions, and never afterwards, prior to the treaty of peace, returned and settled here. The United States did not exist as an inde-

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ing the first year of her birth, with her parents to their native country, and always resided there afterwards, was a citizen of the United States by birth. This was the principle of the English common law in respect to all persons born within the king's allegiance, and was the law of the colonies, and became the law of each and all of the states, when the declaration of independence was made, and continued so until the establishment of the constitution of the United States, when the whole exclusive jurisdiction of this subject of citizenship passed to the United States, and the same principle has there remained.[1]

(*a*) Ainslie *v.* Martin, 9 Mass. Rep. 454.

(*b*) 2 Cranch, 280. 4 Ibid. 209.

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[1] In the case of Dred Scott *v.* Sandford, (19 How. U. S. 393,) it was held that a negro, whose ancestors were imported into this country and sold as slaves, is not a citizen within the meaning of the constitution of the United States. But McLean and Curtis, J. J., dissented, and Nelson and Grier, J. J., expressed no opinion.

pendent government until 1776; and it may well be doubted whether the doctrine of allegiance by birth be applicable to the case of persons who did not reside here when the Revolution took place, and did not, therefore, either by election or tacit assent, become members of the newly created state. The ground of the decision in the latter case was, that the party in question was not only born in New Jersey, but remained there as an inhabitant until the 4th of October, 1776, when the legislature of that state asserted the right of sovereignty, and the claim of allegiance over all persons then abiding within its jurisdiction. By remaining there after the declaration of independence, and after that statute, the party had determined his right of election to withdraw, and had, by his presumed consent, become a member of the new government, and was, consequently, entitled to protection, and bound to allegiance. The doctrine in the case of *Respublica* v. *Chapman*, (a) goes *also to deny the claim of allegiance, in the case of a person who though born here, was not here, and assenting to our new governments, when they were first instituted. The language of that case was, that allegiance could only attach upon those persons who were then inhabitants. When an old government is dissolved, and a new one formed, "all the writers agree," said Ch. J. M'Kean, "that none are subjects of the adopted government who have not freely assented to it." The same principle was declared by the Supreme Court of New York, in *Jackson* v. *White*, (b) and it was held, that though a British subject abiding here as a freeholder on the 4th of July, 1776, and was residing here on the 16th of July, 1776, when the convention of the state asserted the right of sovereignty and the claim of allegiance over all such persons, yet, that under the circumstances, the person in question being a British officer, and a few weeks thereafter placed on his parole, and in December, 1776, joining the British forces, was to be deemed an alien, and as having never changed his allegiance, or elected to become a party to our new government. The doctrine in the case of *Ainslie* v. *Martin* was contrary, also, to what had been held by the same

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(a) 1 Dallas, 53.

(b) 20 Johns. Rep. 313.

court in the cases of *Gardner* v. *Ward* and *Kilham* v. *Ward*, (*a*) where it was decided that persons born in Massachusetts before the Revolution, who had withdrawn to a British province before our independence, and returned during the war, retained their citizenship, while the same persons, had they remained in the British province until after the treaty of peace, would have been British subjects, because they had chosen to continue their former allegiance, and there was but one allegiance before the Revolution. This principle was asserted by the same court in the case of *Phipps*, (*b*) and I consider it to be the true and sound law on the subject.[1]

*42 * To create allegiance by birth, the party must be born, not only within the territory, but within the allegiance of the government. If a portion of the country be taken and held by conquest in war, the conqueror acquires the rights of the conquered as to its dominion and government, and children born in the armies of a state while abroad, and occupying a foreign country, are deemed to be born in the allegiance of the sovereign to whom the army belongs. (*c*) It is equally the doctrine of the English common law, that during such hostile occupation of a territory, if the parents be adhering to the enemy as subjects *de facto*, their children, born under such temporary dominion, are not born under the allegiance of the conquered. (*d*)

(*a*) 2 Mass. Rep. 236, 244, note.

(*b*) 2 Pick. Rep. 394, note. See, also, Dupont v. Pepper, State Reports, S. C. p. 5, S. P. In Inglis v. The Trustees of the Sailors' Snug Harbor, 3 Peters's U. S. Rep. 99, 122, 123, it was adjudged, that the rights of election between the new and old government did exist at the Revolution, in 1776, to all the inhabitants; and that the only difficulty was, as to the time and as to the evidence of the election, so as to determine the question of allegiance and alienism. There was a reasonable time allowed to elect to remain a subject of Great Britain, or to become a citizen of the United States. Ibid. 160.

(*c*) Vattel, b. 1, ch. 19, sec. 217; b. 3, ch. 13, sec. 199.

(*d*) Calvin's case, 7 Co. 18, a. Vaughan, Ch. J., in Craw v. Ramsey, Vaugh. Rep. 281. Dyer's Rep. 224, a. pl. 29. An alien, says Lord Coke, in Calvin's case, is a person out of the ligeance of the king. It is not *extra regnum*, nor *extra legem*, but *extra ligeantiam*. To make a subject born, the parents must be under the actual obedience of the king, and the place of birth be within the king's obedience as well as within his dominions.

1 Calais v. Marshfield, 30 Maine R. 511.

It is the doctrine of the English law, that natural-born subjects owe an allegiance, which is intrinsic and perpetual, and which cannot be devested by any act of their own. (*a*) In the case of *Macdonald*, who was tried for high treason in 1746, before Lord Ch. J. Lee, and who, though born in England, had been educated in France, and spent his riper years there; his counsel spoke against the doctrine of natural allegiance as slavish, and repugnant to the principles of their * Revolution. *43 The court, however, said, that it had never been doubted that a subject born, taking a commission from a foreign prince, and committing high treason, was liable to be punished as a subject for that treason. They held, that it was not in the power of any private subject to shake off his allegiance and transfer it to a foreign prince; nor was it in the power of any foreign prince, by naturalizing or employing a subject of Great Britain, to dissolve the bond of allegiance between that subject and the crown. (*b*) Entering into foreign service, without the consent of the sovereign, or refusing to leave such service, when required by proclamation, is held to be a misdemeanor at common law. (*c*)

It has been a question, frequently and gravely argued, both by theoretical writers and in forensic discussions, whether the English doctrine of perpetual allegiance applies in its full extent to this country. The writers on public law have spoken rather loosely, but generally in favor of the right of a subject to emigrate and abandon his native country, unless there be some positive restraint by law, or he is at the time in possession of a public trust, or unless his country be in distress or in war, and stands in need of his assistance. (*d*) Cicero regarded it as

(*a*) Story's case, Dyer's Rep. 298, b. 300, b. 1 Blacks. Com. 370, 371. 1 Hale's P. C. 68. Foster's Crown Law, 7, 59, 183.

(*b*) Foster's Crown Law, 59.

(*c*) 1 East's P. C. 81. 1 Hawk. P. C. b. 1, ch. 2, sec. 3. On the 16th of October, 1807, the king of England declared, by proclamation, that the kingdom was menaced and endangered, and he recalled from foreign service all seamen and seafaring men, who were natural-born subjects, and ordered them to withdraw themselves, and return home, on pain of being proceeded against for contempt. It was further declared, that no foreign letters of naturalization could, in any manner, devest his natural-born subjects of their allegiance, or alter their duty to their lawful sovereign.

(*d*) Grotius, b. 2, ch. 5, sec. 24. Puff. Droit des Gens, liv. 8, ch. 11, secs 2, 3.

*44 one of the firmest foundations of Roman *liberty, that the Roman citizen had the privilege to stay or renounce his residence in the state at pleasure. (*a*) The principle which has been declared in some of our state constitutions, that the citizens have a natural and inherent right to emigrate, goes far towards a renunciation of the doctrine of the English common law, as being repugnant to the natural liberty of mankind, provided we are to consider emigration and expatriation as words intended in those cases to be of synonymous import. But the allegiance of our citizens is due, not only to the local government under which they reside, but primarily to the government of the United States; and the doctrine of final and absolute expatriation requires to be defined with precision, and to be subjected to certain established limitations, before it can be admitted into our jurisprudence as a safe and practicable principle, or laid down broadly as a wise and salutary rule of national policy. The question has been frequently discussed in the courts of the United States, but it remains to be definitively settled by judicial decision. (*b*)

Bynk. Q. J. Pub. ch. 22. Vattel, b. 1, ch. 19, secs. 218, 223, 224, 225. 1 Wyckefort, L'Embass. 117, 119.

(*a*) *Ne quis invitus civitate mutetur: neve in civitate maneat invitus. Haec sunt enim fundamenta firmissima nostrae libertatis, sui quemque juris et retinendi et dimittendi esse dominum.* Orat. pro L. C. Balbo, ch. 13. In the treaty between the United States and Saxony, in 1846, it was declared that every kind of *droit d'Aubaine*, *droit de retraite*, and *droit de détraction*, or tax on emigration, was abolished between the contracting parties and their subjects.

(*b*) In the case of The State *v.* Hunt, in South Carolina, in 1835, (2 Hill's S. C. Rep. 1,) the subject of allegiance, and to whom due under the constitution of the United States, was profoundly discussed, and it was declared by a majority of the Court of Appeals, that the citizens owed allegiance to the United States, and subordinately to the state under which they lived; that allegiance was not now used in the feudal sense, arising out of the doctrine of tenure, and that we owed allegiance or obedience to both governments, to the extent of the constitutional powers existing in each. The court held, that an oath prescribed by an Act of the legislature of December, 1833, to be taken by every militia officer, that he should be *faithful, and true allegiance* bear to the state of South Carolina, was unconstitutional and void, as being inconsistent with the allegiance of the citizens to the federal government. The court consequently condemned the ordinance of the convention of South Carolina of November, 1832, as containing unsound and heretical doctrine, when it declared that the *allegiance* of the citizens was due to the state, and *obedience* only, and not allegiance, could be due to any other delegated power.

A review of those discussions cannot be uninstructive.

In the case of *Talbot* v. *Janson*, (a) the doctrine was brought before the Supreme Court of the United States, in 1795. It was contended, on one side, that the abstract right of individuals to withdraw from the society of which they were members, was antecedent and superior to the law of society, and recognised by the best writers on public law, and by the usage of nations; that the law of allegiance was derived from the feudal system by which men were chained to the soil on which they were born, and converted from free citizens, to be the vassals of a lord or superior; that this country * was colonized and settled upon the doctrine of the right of emigration; and the right was incontestable if exercised in due conformity with the moral and social obligations; that the power assumed by the government of the United States of naturalizing aliens, by an oath of allegiance to this country, after a temporary residence, virtually implies that our citizens may become subjects of a foreign power by the same means. *45

The counsel on the other side conceded, that birth gave no property in the man, and that upon the principles of the American government, he might leave his country when he pleased, provided it was done *bonâ fide*, and with good cause, and under the regulations prescribed by law; and that he actually took up his residence in another country, under an open and avowed declaration of his intention to settle there. This was required by the most authoritative writers on the law of nations; and Heineccius, in particular, required that the emigrant should depart with the desire to expatriate, and actually join himself to another state; that though all this be done, it only proved that a man might be entitled to the right of citizenship in two countries; and proving that he had been received by one country, did not prove that his own country had surrendered him; that the locomotive right finally depended upon the consent of the government; and the power of regulating emigration was an incident to the power of regulating naturalization, and was vested exclusively in Congress; and until they had prescribed

(a) 3 Dallas, 133.

the mode and terms, the character and the allegiance of the citizen continued.

The judges of the Supreme Court felt and discovered much embarrassment in the consideration of this delicate and difficult question, and they gave no definite opinion upon it. One of them (*a*) observed, that admitting the intention of expatriation had been legally declared, it was necessary, * that it should have been carried into effect, and that the party should have actually become a subject of the foreign government; that the cause of removal must be lawful, otherwise the emigrant acts contrary to his duty; that though the legislature of a particular state should, by law, specify the lawful cause of expatriation, and prescribe the manner in which it might be effected, the emigration could only affect the local allegiance of the party, and not draw after it a renunciation of the higher allegiance due to the United States; and that an Act of Congress was requisite to remove doubts, and furnish a rule of civil conduct on this very interesting subject of expatriation. Another of the judges (*b*) admitted the right of individual emigration to be recognized by most of the nations of the world, and that it was a right to be exercised in subordination to the public interest and safety, and ought to be under the regulation of law; that it ought not to be exercised according to a man's will and pleasure, without any restraint; that every man is entitled to claim rights and protection in society, and he is, in his turn, under a solemn obligation to discharge his duty; and no man ought to be permitted to abandon society, and leave his social and political obligations unperformed. Though a person may become naturalized abroad, yet if he has not been legally discharged of his allegiance at home, it will remain, notwithstanding the party may have placed himself in difficulty, by double and conflicting claims of allegiance.

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The majority of the Supreme Court gave no opinion upon the question; but the inference from the discussion would seem to be, that a citizen could not devest himself of his allegiance, except under the sanction of a law of the United States; and that

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(*a*) Patterson, J. (*b*) Iredell, J.

until some legislative regulations on the subject were prescribed, the rule of the common law must prevail.

*In 1797, the same question was brought before the *47 Circuit Court of the United States for the district of Connecticut, in the case of *Isaac Williams*, (a) and Ch. J. Ellsworth ruled, that the common law of this country remained as it was before the Revolution. The compact between the community and its members was, that the community should protect its members, and that the members should at all times be obedient to the laws of the community, and faithful to its defence. No member could dissolve the compact without the consent or default of the community, and there had been no consent or default on the part of the United States. "No visionary writer carried the principle to the extent that a citizen might, at any and all times, renounce his own, and join himself to a foreign country; and no inference or consent could be drawn from the act of the government in the naturalization of foreigners, as we did not inquire into the previous relations of the party, and if he embarrasses himself by contracting contradictory obligations, it was his own folly or his fault."

This same subject was again brought before the Supreme Court in the case of *Murray* v. *The Charming Betsy*, in the year 1804. (b) It was insisted, upon the argument, that the right of expatriation did exist, and was admitted by all the writers upon general law, but that its exercise must be accompanied by three circumstances, viz: fitness in point of time, fairness of intent, and publicity of the act. The court however, in giving their opinion, avoided any decision of this great and litigated point, by observing, that "whether a person born within the United States, or becoming a citizen according to the established laws of the country, can devest himself absolutely of that character, otherwise than in such manner as may be prescribed by law, is a question which it was not necessary to decide. Afterwards, in the Circuit *Court of the United States, *48 at Philadelphia, (c) Judge Washington observed, that he

(a) Cited in 2 Cranch, 82, note.

(b) 2 Cranch, 64.

(c) United States v. Gillies, 1 Peters's C. C. Rep. 159.

did not mean to moot the question of expatriation, founded on the self-will of a citizen, because it was beside the case before the court; but that he could not admit that a citizen of the United States could throw off his allegiance to his country without some law authorizing him to do so. This was the doctrine declared also by the Chief Justice of Massachusetts. (*a*) The question arose again before the Supreme Court of the United States, in February, 1822, in the case of *The Santissima Trinidad*, (*b*) and it was suffered to remain in the same state of uncertainty. The counsel on the one side insisted that the party had ceased to be a citizen of the United States, and had expatriated himself, and become a citizen of Buenos Ayres, by the only means in his power, an actual residence in that country, with a declaration of his intention to that effect. The counsel on the other side admitted, that men may remove from their own country in order to better their condition, but it must be done for good cause, and without any fraudulent intent; and that the slavish principle of perpetual allegiance growing out of the feudal system, and the fanciful idea that a man was authorized to change his country and his allegiance at his own will and pleasure, were equally removed from the truth. Mr. Justice Story, in delivering the opinion of the court, waived the decision of the question, by observing that the court gave no opinion whether a citizen, independent of any legislative Act to that effect, could throw off his own allegiance to his native country; that it was perfectly clear it could not be done without a *bonâ fide* change of domicil, under circumstances of good faith; and that it would be sufficient to ascertain the precise nature and limits of this doctrine of expatriation, when it should become a leading point for the judgment of the court.

*49 * From this historical review of the principal discussions in the federal courts on this interesting subject in American jurisprudence, the better opinion would seem to be, that a citizen cannot renounce his allegiance to the United States without the permission of government, to be declared by law; and that, as there is no existing legislative regulation

(*a*) 9 Mass. Rep. 461. (*b*) 7 Wheaton, 283.

on the case, the rule of the English common law remains unaltered. (*a*)

There is, however, some relaxation of the old and stern rule of the common law, required and admitted under the liberal influence of commerce. Though a natural-born subject cannot throw off his allegiance, and is always amenable for criminal acts against his native country, yet for commercial purposes he may acquire the rights of a citizen of another country, and the place of domicil determines the character of a party as to trade. (*b*) Thus, in the case of *Scot* v. *Schawartz*, (*c*) it was decided, in the Exchequer, 13 Geo. II., that a residence in Russia gave the English mariners of a Russian ship the character of Russian mariners, within the meaning of the British Navigation Act. And in the case of *Wilson* v. *Marryat*, (*d*) it was decided by the Court of K. B. that a natural-born British subject might acquire the character, and be entitled to the privileges of an American citizen, for commercial purposes. So, an American citizen may obtain a foreign domicil, which will impress upon him a national character *for commercial purposes, *50 in like manner as if he were a subject of the government

(*a*) This rule was admitted in Inglis v. The Trustees of the Sailors' Snug Harbor, 3 Peters' U. S. Rep 99, and expressly declared in Shanks v. Dupont, Ibid. 242, where it was held, by the Supreme Court of the United States, that the marriage of a *feme sole* with an alien produced no dissolution of her native allegiance; [1] and that it was the general doctrine that no persons could, by any act of their own, without the consent of the government, put off their allegiance and become aliens. The Court of Appeals of Kentucky, in Alsberry v. Hawkins, 9 Dana's Rep. 178, so late as 1839, did indeed consider expatriation a practical and fundamental American doctrine, and that, *if there be no statute regulation on the subject*, a citizen may, in good faith, abjure his country, and that the assent of the government was to be presumed, and he be deemed denationalized. But from the cases already referred to, the weight of American authority is in favor of the opposite doctrine, and which is founded, as I apprehend, upon the most safe and practicable principles. The naturalization laws of the United States are, however, inconsistent with this general doctrine, for they require the alien who is to be naturalized to abjure his former allegiance, without requiring any evidence that his native sovereign has released it.

(*b*) See vol. i. pp. 74-76.

(*c*) Comyn's Rep. 677.

(*d*) 8 Term Rep. 31. 1 Bos. & Pull. 430, S. C.

[1] Nor is her allegiance dissolved by her residence with him in a foreign country. Beck v. McGillis, 9 Barb. 35?

under which he resided; and yet without losing on that account his original character, or ceasing to be bound by the allegiance due to the country of his birth. (a) The subject who emigrates *bonâ fide*, and procures a foreign naturalization, may entangle himself in difficulties, and in a conflict of duties, as Lord Hale observed; (b) but it is only in very few cases that the municipal laws would affect him. If there should be war between his parent state and the one to which he has attached himself, he must not arm himself against the parent state; and if he be recalled by his native government, he must return, or incur the pain and penalties of a contempt. Under these disabilities, all the civilized nations of Europe adopt (each according to its own laws) the natural-born subjects of other countries.

The French law will not allow a natural-born subject of France to bear arms, in the time of war, in the service of a foreign power, against France; and yet, subject to that limitation, every Frenchman is free to abdicate his country. (c)

(2.) An alien is a person born out of the jurisdiction and allegiance of the United States. There are some exceptions, however, to this rule, by the ancient English law, as in the case of the children of public ministers abroad, (provided their wives be English women,) for they owe not even a local allegiance to any foreign power. (d) So, also, it is said, that in every case,

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(a) United States v. Gillies, 1 Peters's C. C. Rep. 159. Murray v. The Schooner Charming Betsy, 2 Cranch, 64. By the original Magna Charta, granted by King John, art. 33, it was declared, *Ut liceat unicuique exire de regno et redire salvâ fide Domini regis. Vide supra*, p. 33.

(b) 1 Hale's P. C. 68.

(c) Pothier's Traité du Droit de Propriété, No. 94. Code Napoleon, Nos. 17, 21. Toullier, Droit civil Français, tom. i. No. 266. By a decree of the Emperor of Austria, of March 24th, 1832, Austrian subjects, leaving the Austrian dominions without permission of the magistrates and release of Austrian citizenship, and with an intention never to return, become *unlawful emigrants*, and lose all their civil and political rights at home. Accepting foreign citizenship, or entering into foreign service without leave, are decisive proofs of such intention. Encyclo. Amer., tit. Emigration. This is understood to be the consequence attached by the law in France to Frenchmen entering foreign service without leave. They lose their nationality, or civil and political rights as Frenchmen. In the case of the United States v. Wyngall, 5 Hill, N. Y. Rep. 16, it was held to be lawful to enlist aliens into the army of the United States, and the contract would be valid.

(d) Calvin's case, 7 Co. 18, a.

the children born abroad, of English parents, were capable, at common law, of inheriting as natives, if the father went and continued abroad in the character of an Englishman, * with the approbation of the sovereign. (*a*) The statute *51 of 25 Edw. III. stat. 2, appears to have been made to remove doubts as to the certainty of the common law on this subject; and it declared that children thereafter born without the ligeance of the king, whose father and mother, at the time of their birth, were natives, should be entitled to the privileges of native subjects, except the children of mothers who should pass the sea without leave of their husbands. The statute of 7 Anne, ch. 5, was to the same general effect; but the statute of 4 Geo. II. ch. 21, required only that the father should be a natural-born subject at the birth of the child, and it applied to all children then born, or thereafter to be born. Under these statutes it has been held, (*b*) that to entitle a child born abroad to the rights of an English natural-born subject, the father must be an English subject; and if the father be an alien, the child cannot inherit to the mother, though she was born under the king's allegiance.

The Act of Congress of the 14th of April, 1802, establishing a uniform rule of naturalization, affects the issue of two classes of persons: (1.) By the 4th section it was declared that "the children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law on that subject by the government of the United States, may have become citizens of any one of the states, under the laws thereof, being under the age of twenty-one years at the time of their parents being so naturalized, or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States." This provision appears to apply only to the children of persons naturalized, or specially admitted to citizenship; and there is color for the construction, that it may have been intended to be prospective, and to apply as well to the case of *persons *thereafter* to *52

(*a*) Hyde *v.* Hill, Cro. Eliz. 3. Bro. Abr. tit. Descent, pl. 47, tit. Denizen, pl. 14.
(*b*) Doe *v.* Jones, 4 Term Rep. 300.

be naturalized, as to who had previously been naturalized. (*a*) It applies to all the children of "persons duly naturalized," under the restrictions of residence and minority, at the time of the naturalization of the parent. The Act applies to the children *of persons* duly naturalized, but does not explicitly state whether it was intended to apply only to the case where both parents were duly naturalized, or whether it would be sufficient for one of them only to be naturalized, in order to confer, as of course, the rights of citizens upon the resident children, being under age. Perhaps it would be sufficient for the father only to be naturalized; for in the supplementary Act of the 26th of March, 1804, it was declared that if any alien, who should have complied with the preliminary steps made requisite by the Act of 1802, dies before he is actually naturalized, his *widow* and *children* shall be considered as citizens. This provision shows, that the naturalization of the *father* was to have the efficient force of conferring the right on his children; and it is worthy of notice, that this last Act speaks of *children* at large, without any allusion to residence or minority; and yet, as the two Acts are intimately connected, and make but one system, the last Act is to be construed with reference to the prior one, according to the doctrine of the case of *Ex parte Overington.* (*b*) (2.) By a subsequent part of the same 4th section, it is declared, that "the children of persons who now are, or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States; provided that the right of citizenship shall not descend to persons whose fathers have never resided within the United States." This clause is certainly not prospective in its operation, whatever may be the just construction of the one preceding it. It applied only to the children of persons who *then were* or *had been* citizens; and conse- *53 quently the benefit * of this provision narrows rapidly

(*a*) The provision has been since adjudged to be prospective. West *v.* West, 8 Paige's Rep. 433. It was also adjudged, in Peck *v.* Young, 26 Wendell's Rep. 613, that an infant child of a person who became a citizen of the United States in 1776, and always remained such, *was a citizen* though born abroad, and continuing abroad, and an infant until after the peace of 1783, and married abroad after 1783, and under coverture until 1825, and though she never came to this country until 1830.

(*b*) 5 Binney's Rep. 371.

by the lapse of time, and the period will soon arrive when there will be no statutory regulation for the benefit of children born abroad, of American parents, and they will be obliged to resort for aid to the dormant and doubtful principles of the English common law. The proviso annexed to this last provision seems to remove the doubt arising from the generality of the preceding sentence, and which was whether the Act intended by the words, "children of persons," both the father and mother, in imitation of the statute of 25 Edw. III., or the father only, according to the more liberal declaration of the statute of 4 Geo. II. The provision also differs from the preceding one, in being without any restriction as to the age or residence of the child; and it appears to have been intended for the case of the children of natural-born citizens, or of citizens who were original actors in our Revolution, and therefore it was more comprehensive and more liberal in their favor. But the whole statute provision is remarkably loose and vague in its terms, and it is lamentably defective, in being confined to the case of children or parents who were citizens in 1802, or had been so previously. The former Act of 29th January, 1795, was not so; for it declared generally, that "the children of citizens of the United States, born out of the limits and jurisdiction of the United States, shall be considered as citizens of the United States." And when we consider the universal propensity to travel, the liberal intercourse between nations, the extent of commercial enterprise, and the genius and spirit of our municipal institutions, it is quite surprising that the rights of the children of American citizens born abroad, should, by the existing Act of 1802, be left so precarious, and so far inferior in the security which has been given under like circumstances, by the English statutes.[1]

We proceed next to consider the disabilities, rights, and duties of aliens.

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[1] By the Act of February 10, 1855, persons heretofore born or hereafter to be born out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of this country, shall be deemed and are declared to be citizens of the United States. But the rights of citizenship shall not descend to persons whose fathers never resided in the United States.

By the same Act, a woman who might be naturalized under the existing laws, and who is or shall be married to a citizen of the United States, shall be deemed a citizen. 10 U. S. Statutes, 604.

An alien cannot acquire a title to real property by descent, or created by other mere operation of law. The law *quæ nihil frustra*, never casts the freehold upon an alien heir who cannot keep it. This is a well settled rule of the common *54 * law. (*a*) The right to real estate by descent is governed by the municipal law of the individual states. (*b*) Nor can an alien take as tenant by the curtesy or in dower. (*c*) It is understood to be the general rule, that even a natural-born subject cannot take by representation from an alien, because the alien has no inheritable blood through which a title can be deduced. (*d*) If an alien purchase land, or if land be devised to him, the general rule is, that in these cases he may take and hold, until an inquest of office has been had; but upon his death, the land would instantly and of necessity, (as the freehold cannot be kept in abeyance,) without any inquest of office, escheat and vest in the state, because he is incompetent to transmit by hereditary descent. (*e*) If an alien, according to a case put by

(*a*) Calvin's case, 7 Co 25, a 1 Vent. Rep. 417. Jackson *v*. Lunn, 3 Johns. Cas. 109. Hunt *v*. Warnicke, Hardin's Kentucky Rep 61

(*b*) Lynch *v*. Clarke, 1 Sandford's Ch Rep. 583

(*c*) See *infra*, vol iv. pp. 30, 36. By statute of 7 and 8 Victoria, c. 66, foreign women married to British subjects became thereby naturalized.

(*d*) If, therefore, a person dies intestate without issue, and leaves a brother who had been naturalized, and a nephew who had been naturalized, but whose father died an alien, the brother succeeds to the whole estate, for the nephew is not permitted by the common law to trace his descent through his alien father. Levy *v*. McCartee, 6 Peters's U. S. Rep 102. Jackson *v* Green, 7 Wendell, 333. Jackson *v*. Fitz Simmons, 10 Ibid. 1. Redpath *v*. Rich, 3 Sandf. 79.

(*e*) Page's case, 5 Co. 52. Collingwood *v*. Pace, 1 Sid. Rep. 193. 1 Lev. Rep. 59, S. C. Co Litt. 2, b. Plowd. Rep. 229, b, 230, a. Duplessis *v*. Attorney-General, 5 Bro. P. C. 91. Jackson *v*. Lunn *supra*. Fox *v*. Southack, 12 Mass. Rep. 143. 8 Ibid. 445. Fairfax *v*. Hunter, 7 Cranch, 603, 619, 620. Orr *v*. Hodgson, 4 Wheaton, 453. Governeur *v*. Robertson, 11 Ibid. 332. Vaux *v*. Nesbit, 1 M'Cord's S. C. Ch. Rep. 352. 374. 2 Dana's Kentucky Rep. 40. Rouche *v*. Williamson, 3 Iredell's N. C. Rep. 146. In North Carolina, an alien may take by purchase; but he cannot take by devise any more than he can inherit. 2 Haywood's Rep. 37, 104, 108. By the constitution of North Carolina, alien residents may purchase, hold, and transfer real estate. 3 Iredell, 141. Nor can he take by devise, under the statute law of New York. The statute makes the devise void. New York Revised Statutes, vol. ii. p. 57, sec. 4. In Louisiana, aliens can inherit real estate, and transmit it *ab intestato*. Duke of Richmond *v*. Miln. 17 Louis. 312. In England, if a devise be to an alien and citizen, as joint tenants, the state can only seize the moiety of the alien. If he dies before inquest, the other joint tenant takes by survivorship, but the state on office found, would defeat

Lord Coke, (*a*) arrives in England, and hath two sons born there, they are, of course, natural-born subjects; and if one of them purchases land and dies without issue, his brother cannot inherit as his heir, because he must deduce his title by descent, through his father, who had no inheritable blood. But the case, as put by Coke, has been denied to be law by the majority of the court in *Collingwood* v. *Pace*, (*b*) and it was there held that the sons of an alien could inherit to each other, and derive title * through the alien father. The elaborate opinion *55 of Lord Ch. B. Hale was distinguished by his usual learning, though it was rendered somewhat perplexing and obscure by the subtlety of his distinctions, and the very artificial texture of his argument. It is still admitted, however, that a grandson cannot inherit to his grandfather, though both were natural-born subjects, provided the intermediate son was an alien;[1] for the grandson must, in that case, represent his father, and he had no inheritable blood to be represented; and the reason why the one brother may inherit from the other is, that *as to them* the descent is immediate, and they do not take by representation

the survivorship by relation. Gould-b. Rep. 29, pl. 4. Co. Litt. 180, b. Lord Hardwicke, in Knight *v.* Duplessis, 2 Vesey, 362, considered it to be a doubtful point whether an alien may *take* real estate by devise, as well as by deed, but he takes a defeasible estate, and cannot *hold* as against the estate. This is also the English law. Wilbur *v.* Tobey, 16 Pick. 179. Foss *v.* Crisp, 20 Ib. 124. The People *v.* Conklin, 2 Hill's N. Y. R. 67. He may purchase and hold real estate until office found, and bring an action for the recovery of possession. Waugh *v.* Riley, 8 Metcalf, 295.

(*a*) Co. Litt. 8, a.

(*b*) 1 Sid. Rep. 193. 1 Vent. Rep. 413. Bannister's Rep. 410.

[1] Banks *v.* Walker, 3 Barb. Ch. R. 438. It is also held in this case, that if the deceased had two sons, the elder an alien and the younger a citizen, the alienage of the elder son would not prevent the estate descending to the younger as heir, the father having inheritable blood. This is by common law.

In the construction of the Revised Statutes of New York, (vol. i. p. 754, sec. 22,) providing "no person capable of inheriting shall be precluded by the alienism of any *ancestor*," it is held, that this statute does not remove the disability of a person claiming as collateral heir, who must trace his pedigree through an alien, father of the person dying seised, and who was not an *ancestor* of the claimant. Nor does the statute enable a person to inherit, deducing a title through a living alien ancestor, who would himself take if he were a citizen. McLean *v.* Swanton, 3 Kern. 535.

In McCarthy *v.* Marsh, 1 Seldon, 263, it was held that the section above referred to protected the inheritance, whether the claimant derived title through lineal or collateral ancestors, or through both. The word "*ancestor*" embraced both lineals and collaterals.

from the father. The law, according to Lord Hale, respects only the mediate relation of the brothers as brothers, and not in respect of their father, though it be true that the foundation of consanguinity is in the father; and it does not look upon the father as such a medium or *nexus* between the brothers, as that his disability should hinder the descent between them. This distinction in the law, which would admit one brother to succeed as heir to the other, though their father be an alien, and yet not admit a son to inherit from his grandfather, because his father was an alien, is very subtle.[1] The reason of it is not readily perceived, for the line of succession and the degrees of consanguinity must equally, in both cases, be traced through the father. The statute of 11 and 12 Wm. III. ch. 6, was made on purpose to cure the disability and brush away these distinctions, by "enabling natural-born subjects to inherit the estate of their ancestors, either lineal or collateral, notwithstanding their father, or mother, or other ancestor, by, from, through, or under whom they might make or derive their title, were aliens." This statute, however, did not go so far as to enable a person to deduce title, as heir, from a remote ancestor, through an alien ancestor still living. (*a*)

The provision in the statute of Wm. III. is in force in *56 several of the United States, as, for instance, in Maryland, Kentucky, Ohio, Missouri, Delaware, New Jersey, New York, and Massachusetts. (*b*) But in those states where

(*a*) M'Creery *v.* Somerville, 9 Wheaton, 354 The New York statute (N. Y. R. S. vol. i. 754, sec. 22,) goes no further on this point than the English statute. The People *v.* Irvin, 21 Wendell, 128 The New York statute declares, that no person capable of inheriting under the statute law of descent, shall be precluded from the inheritance by reason of the alienism of the ancestor of such person. The statute of New Jersey is to the same effect. R. S., N. J. 1847, p. 341.

(*b*) 9 Wheaton, 354. 2 Mass. Rep 179, note N. Y Revised Statutes, vol. i. p. 754, sec. 22. Statute Laws of Ohio, 1831. Elmer's N. J. Dig. 131. R. S. of Missouri, 1835. In New York, the rule of the common law prevailed until January 1st, 1830, and the provision in the statute of 11 and 12 Wm. III. had not been previously adopted

[1] It was affirmed, however, in McGregor *v.* Comstock, 3 Comst. R. 408. The rule holds between one of the brothers and the representatives of the other, and also between the representatives of both of them.

there are no statute regulations on the subject, the rule of the law will depend upon the authority of Lord Coke, or the justice and accuracy of the distinctions taken in the greatly contested case of *Collingwood* v. *Pace*, and which, according to Sir William Blackstone, was, upon the whole, reasonably decided. The enlarged policy of the present day would naturally incline us to a benignant interpretation of the law of descents, in favor of natural-born citizens who were obliged to deduce a title to land from a pure and legitimate source through an alien ancestor; and Sir Matthew Hale admitted (*a*) that the law was very gentle in the construction of the disability of alienism, and rather contracted than extended its severity. If a citizen dies, and his next heir be an alien who cannot take, the alien cannot interrupt the descent to others, and the inheritance descends to the next of kin who is competent to take, in like manner as if no such alien had ever existed. (*b*)

The distinctions between the *antenati* and the *postnati*, in reference to our Revolution, have been frequently the subject of judicial discussion since the establishment of our independence. It was declared in *Calvin's case*, (*c*) that, "albeit the kingdoms of England and Scotland should, by descent, be divided and governed by several kings; yet all those who were born under one natural obedience while the realms were united, would remain natural-born subjects, and not become aliens by such a matter *ex post facto*. The *postnatus* in such a case, would be *ad fidem utriusque regis*." It was accordingly held, *57

(*a*) 1 Vent. Rep. 427.

(*b*) Co. Litt. 8, a. Com. Dig tit. Alien, C. 1. Orr *v.* Hodgson, 4 Wheaton, 453. Jackson *v.* Lunn, 3 Johns. Cas. 121. Donegani *v.* Donegani, Stuart's Lower Canada Rep 460. In Virginia, by statute, the course of descent is not interrupted by the alienage of any lineal or collateral ancestor; and, therefore, if a citizen dies, leaving a brother, who is a citizen, and a sister, who is an alien, and children of that sister, who are citizens, and the brother, sister, and children be all living, the children of the sister take by descent a moiety of the estate, and the brother takes the other moiety. Jacksons *v.* Sanders, 2 Leigh's Rep. 109. So in North Carolina, alien heirs do not prevent other relations, being citizens, from inheriting. N. C. Revised Statutes, 1837.

(*c*) 7 Co. 1, 27. The Lord Chancellor Ellesmere's opinion, delivered in the Exchequer chamber, in Calvin's case, was, by the king's command, written out at large, and published by the chancellor in 1609, in a neat style, worthy of the strength and learning of the argument.

in that case, that the *postnati* of Scotland, born after the union of the two crowns, were natural-born subjects, and could inherit lands in England. The community of allegiance, at the time of birth and at the time of descent, both existed. The principle of the common law contained in that case, that the division of an empire worked no forfeiture of previously vested rights of property, has been frequently acknowledged in our American tribunals, (*a*) and it rests on the solid foundations of justice. The titles of British subjects to lands in the United States, acquired prior to our Revolution, remained, therefore, unimpaired. But persons born in England, or elsewhere out of the United States, before the 4th of July, 1776, and who continued to reside out of the United States after that event, have been held to be aliens, and incapable of taking lands subsequently by descent. The right to inherit depends upon the existing state of allegiance at the time of the descent cast; and an English subject, born and always resident abroad, never owed allegiance to a government which did not exist at his birth, and he never became a party to our social compact. The British *antenati* have, consequently, been held to be incapable of taking, by subsequent descent, lands in these states, which are governed by the common law (*b*) This doctrine was very liberally considered in respect to the period of the American war, in the case of *Den* v. *Brown*; (*c*) and it was there held, that the British *antenati* were not subject to the disabilities of aliens, as to the acquisition of lands *bonâ fide* acquired, between the

*58 date of our independence and that of * the treaty of peace, in 1783, for the contest for our independence was then pending by an appeal to arms, and remained undecided. But the position was not tenable; and in a case elaborately discussed, and greatly litigated on several grounds, in the Court of Appeals

(*a*) Apthorp *v.* Backus, Kirby's Rep. 413. Kinsey, Ch. J., in Den *v.* Brown, 2 Halsted, 337. Kelly *v.* Harrison, 2 Johns Cas. 29. Jackson *v.* Lunn, 3 Johns. Cas 109.

(*b*) Reed *v.* Reed, cited 1 Munf. 225, and opinion of Roane, J., Appendix to that volume. Dawson *v.* Godfrey, 4 Cranch, 321. Jackson *v.* Burns, 3 Binney, 75. Blight *v.* Rochester, 7 Wheaton, 535.

(*c*) 2 Halsted, 305.

in Virginia, and afterwards in the Supreme Court of the United States, (a) it was the acknowledged doctrine that the British *antenati* could not acquire, either by descent or devise, any other than a defeasible title to lands in Virginia, between the date of our independence and that of the treaty of peace in 1783. The line of distinction between aliens and citizens was considered to be coeval with our existence as an independent nation.

It has been very frequently assumed, on the doctrine in *Calvin's case*, that the same principle might not be considered to apply in England, in respect to the American *antenati*, and that they would, on removing within the British dominions, continue to take and inherit lands in England, as natural-born subjects; but I apprehend the assumption has been made without just grounds. It was contrary to the doctrine laid down by Professor Wooddeson, in his lectures, (b) published as early as 1792; and the late case in the King's Bench, of *Doe* v. *Acklam*, (c) seems entirely to explode it. It was decided, that children born in the United States, since the recognition of our independence by Great Britain, of parents born here before that time, and continuing to reside here afterwards, were aliens, and could not inherit lands in England. To entitle a child born out of the allegiance of * the crown of England to be deemed a *59 natural-born subject, the father must be a subject at the time of the birth of the child; and the people of the United States ceased to be subjects in the view of the English law, after the recognition of our independence, on the third day of September, 1783. If the American *antenati* ceased to be subjects in 1783, they must, of course, have lost their subsequent capacity to take as subjects. In the case of *The Providence*, decided in the Court of Vice-Admiralty at Halifax, in 1810, (d)

(a) Hunter v. Fairfax's Devisee, 1 Munf. 218, and 7 Cranch, 603, S. C. Commonwealth v. Bristow, 6 Call. 60, S. P.

(b) Vol. i. p. 382.

(c) 2 Barnew. & Cress. 779. In Doe v. Mulcaster, 5 Barnew. & Cress. 771, it was held, that the children born in the United States after the peace of 1783, of parents who were born in New York before 1776, *but adhered to the British power afterwards*, were not aliens, but had inheritable blood under the statute of 4 Geo. II. c. 21.

(d) Stewart's Vice-Adm. Rep. 186.

the learned judge met the question directly, and discussed it in a clear and able manner. He held that an American born in this country before the Revolution, and adhering to the United States during the war, and until after the peace of 1783, was an alien discharged from his allegiance to the king, and was an alien to every purpose, and not entitled to any of the privileges of a British-born subject.

The English rule is, to take the date of the treaty of peace in 1783, as the era at which we ceased to be subjects; but our rule is, to refer back to the date of our independence. (a) In the application of that rule, the cases show some difference of opinion. In New York, it has been held, that where an English subject, born abroad, emigrated to the United States in 1779, and lived and died here, he was to be deemed an alien, and the title to land, which he afterwards acquired by purchase, was protected, not because he was a citizen, but on the ground of the treaty of 1794. (b) In Massachusetts, on the strength of an Act passed in 1777, persons born abroad, and coming into that state after 1776, and before 1783, and remaining there voluntarily, were adjudged to be citizens. (c) The Supreme Court, in Connecticut, has adopted the same rule, without the *60 aid of any statute, and it was held (d) that a *British soldier, who came over with the British army in 1773, and deserted, and came and settled in Connecticut in 1778, and remained there afterwards, became, of course, a citizen, and ceased to be an alien; and that the United States were enabled to claim as their citizens all persons who were here voluntarily, at either the period of our independence or of the treaty of peace. The principle of the case seemed to be, that the treaty of peace operated by way of release from their allegiance of all British subjects who were then domiciled here; for it was admitted that the rule would not apply to the subjects of any other nation or kingdom who came to reside here after the declaration of independence, for they would not be within the purview of the

(a) Inglis v. Trustees of the Sailors' Snug Harbor, 3 Peters's U. S. Rep. 99.

(b) Jackson v. Wright, 4 Johns. Rep. 75.

(c) Cummington v. Springfield, 2 Pick. Rep. 394

(d) Hebron v. Colchester, 5 Day's Rep. 169.

treaty. The same principle seems to have been recognized by the Chief Justice of Massachusetts, in *Ainslie* v. *Martin*, (a) though in the case of *Phipps*, a pauper, (b) it was declared, that if a person was not a citizen before the treaty of peace, he did not become such by the mere force of that instrument, and by the mere fact of his being there on the ratification of the treaty. But if he was born in Massachusetts, and had returned during the war, though he had withdrawn himself before the date of independence, he was considered as retaining his citizenship. That was the amount of the cases of *Gardner* v. *Ward* and *Kilham* v. *Ward*, to which the judges referred; and the sound and prevailing doctrine now is, that by the treaty of peace of 1783, Great Britain and the United States became respectively entitled, as against each other, to the allegiance of all persons who were at the time adhering to the governments respectively; and that those persons became aliens in respect to the government to which they did not * adhere. (c) *61 This is the meaning of the treaty of 1783, and it put an end to all conflicting and double allegiance growing out of the Revolution.

Though an alien may purchase land, or take it by devise, yet he is exposed to the danger of being devested of the fee, and of having his lands forfeited to the state, upon an inquest of office

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(a) 9 Mass. Rep. 460.

(b) 2 Pick. Rep. 394, note.

(c) Kilham v. Ward, 2 Mass. Rep. 236. Gardner v. Ward, Ibid. 244, note. Doe v. Acklam, 2 Barnew. & Cressw. 779. Inglis v. The Trustees of the Sailors' Snug Harbor, 3 Peters's U. S. Rep. 99, 164. Shanks v. Dupont, Ibid. 242. In Shanks v. Dupont, it was held, that though a woman was born in South Carolina, before the declaration of independence, and continued there until 1782, and *became a citizen*, yet, as she was involved in the capture of Charleston in 1780, and married a British officer in 1781, and went with him to England in 1782, and remained and died there, after the peace of 1783, she was deemed to be an alien *by the operation of the treaty of peace of* 1783, inasmuch as she was born a British subject, and was, at the time of the treaty of peace adhering to the British crown, and the treaty acted on the state of things as they then existed. So, in Orser v. Hoag, 3 Hill, 79, it was held, that a person born in this country, who left New York in July, 1783, prior to the treaty of peace, with his family, with intent to reside in the British dominions, and never return, was an alien, together with his children who went with him and resided in the British province. They were held incapable of taking from him lands in this state by descent.

found. His title will be good against every person but the state, and if he dies before any such proceeding be had, we have seen that the inheritance cannot descend, but escheats of course. If the alien should undertake to sell to a citizen, yet the prerogative right of forfeiture is not barred by the alienation, and it must be taken to be subject to the right of the government to seize the land. His conveyance is good as against himself, and he may, by a fine, bar persons in reversion and remainder, but the title is still voidable by the sovereign upon office found. (*a*) In Virginia, this prerogative right of seizing lands, *bonâ fide* sold by an alien to a citizen, is abolished by statute; (*b*) and so it was, to a limited degree, in New York, by an Act in 1826. (*c*) An alien may take a lease for years of a house for the benefit of trade. According to Lord Coke, (*d*) none but an alien merchant can lease land at all, and he is restricted to a house, and if he dies before the termination of the lease, the remainder of the term is forfeited to the king, for the law gave him the privilege for habitation only, as necessary to trade, and not for the benefit of his representatives. The force of this rigorous *62 doctrine *of the common law is undoubtedly suspended with us, in respect to the subjects of those nations with whom we have commercial treaties; and it is justly doubted (*e*) whether the common law be really so inhospitable, for it is inconsistent with the established maxims of sound policy, and the social intercourse of nations. Foreigners are admitted to the rights of citizenship with us on liberal terms; and as the law requires five, and only five years residence, to entitle them *and their families* to the benefits of naturalization, it would seem to imply a right, in the mean time, to the necessary use of real

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(*a*) 4 Leon, 84. Sheppard's Touchstone, by Preston, 56, 232. 7 Wheaton, 545. Coke's Reading on Fines, Lec. 22. But by statute in New York, the escheat does not devest the right of a *bonâ fide* purchaser. See *infra*, vol. iv. p. 425.

(*b*) Griffith's Law Register, tit. Virginia.

(*c*) Laws of New York, sess. 49, ch. 297, sec. 3. The exemption from escheat of lands derived from or through an alien, is confined to lands actually possessed by a citizen prior to the 22d of April, 1825. N. Y. Revised Statutes, vol. i. p. 719, sec. 9.

(*d*) Co. Litt. 2, b.

(*e*) Harg. Co. Litt. n. 9, b. 1.

property; and if it were otherwise, the means would be interdicted which are requisite to render the five years' residence secure and comfortable.

Aliens are under the like disabilities as to uses and trusts arising out of real estates. An alien can be seised to the use of another, but the use cannot be executed as against the state, and will be defeated on office found. (a) Nor can an alien be a *cestui que trust*, but under the like disability; and it is said that the sovereign may, in chancery, compel the execution of the trust. (b)

Aliens are capable of acquiring, holding, and transmitting movable property, in like manner as our own citizens, and they can bring suits for the recovery and protection of that property. (c)[1] They may even take a mortgage upon real estate by way of security for a debt, and this I apprehend they may do without any statute permission, for it has been the * English law from the early ages. (d) It is also so held *63

(a) Gilbert on Uses, by Sugden, 10, 367, 445. Preston on Conveyancing, vol. ii. p. 247. By the N. Y. Revised Statutes, vol. i. p. 718, all escheated lands, when held by the state or its grantees, are subject to the same trusts and charges to which they would have been subject had they descended.

(b) Attorney-General v. Sands, 3 Ch. Rep. 20. Hardress, 495, S. C. Com Dig. tit. Alien, C. 3. Gilbert on Uses, by Sugden, 86, 404. Hubbard v. Goodwin, 3 Leigh, 492. It was held, in the last case, that upon a conveyance of land to a citizen upon express trust, to hold for the benefit of an alien in fee, the trust estate is acquired for the state, and a court of equity will compel the trustees to execute the trust for its benefit. The profits do not go to the state when acquired prior to the decree. It is doubted whether equity could raise or imply a *resulting* trust in order to forfeit it. Equity will never raise a resulting trust in fraud of the rights of the state, or of the law of the land. Leggett v. Dubois, 5 Paige, 114, S. P. On the other hand, a conveyance of land to a citizen as a trustee, upon an express trust to sell the same, and pay over the proceeds to a creditor who is an alien, is a valid trust, and the interest of the alien creditor in the proceeds is not subject to forfeiture. The principle of public policy, prohibiting aliens from holding lands in the name of a trustee, does not apply to such a case. Equity holds the proceeds to be personal property, which the alien may take. Craig v. Leslie, 3 Wheaton's Rep. 563. Anstice v. Brown, 6 Paige, 448.

(c) 7 Co. 17. Dyer's Rep. 2, b.

(d) Year Book, 11 Edw. III., cited in the marginal note to 1 Dyer's Rep. 2, b.

[1] An alien resident within a state is entitled to the benefit of the insolvent laws. Judd v. Lawrence, 1 Cush. Mass. R. 531. Aliens are entitled to the protection of the laws relative to trade marks. See *post*, p. [372], note.

in the Supreme Court of the United States, (*a*) and that the alien creditor is entitled to come into a court of equity to have the mortgage foreclosed, and the lands sold for the payment of his debt. The question whether the alien in such a case could become a valid purchaser of the mortgaged premises sold at auction at his instance, is left untouched; and as such a privilege is not necessary for his security, and would be in contravention of the general policy of common law, the better opinion would seem to be, that he could not, in that way, without special provision by statute, become the permanent and absolute owner of the fee. (*b*)

Even alien enemies, resident in the country, may sue and be sued as in time of peace; for protection to their persons and property is due, and implied from the permission to them to remain, without being ordered out of the country by the President of the United States. The lawful residence does, *pro hac vice*, relieve the alien from the character of an enemy, and entitles his person and property to protection. (*c*) The effect of war upon the rights of aliens we need not here discuss, as it has been already considered in a former part of this course of lectures, when treating of the law of nations. (*d*)

During the residence of aliens among us, they owe a local allegiance, and are equally bound with natives to obey all general laws for the maintenance of peace and the preservation *of order, and which do not relate specially to our own citizens. This is a principle of justice and of public safety universally adopted; and if they are guilty of any illegal act, or involved in disputes with our citizens, or with each other, they are amenable to the ordinary tribunals of the country. (*e*)

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(*a*) Hughes *v.* Edwards, 9 Wheaton, 489.

(*b*) If an alien be entitled to hold and dispose of real estate, he may take a mortgage for the purchase-money, and may become a re-purchaser on a sale made to enforce payment. New York Revised Statutes, vol. i. p. 721, sec. 19. R. S. of New Jersey, 1847, tit. 1, ch. 2.

(*c*) Wells *v.* Williams, 1 Lord Raym. 282. Daubigny *v.* Davallon, 2 Anst. Rep. 462 Clarke *v.* Morey, 10 Johns. Rep. 69. Russell *v.* Skipwith, 6 Binney's Rep. 241.

(*d*) See vol. i.

(*e*) Vattel, b. 2, ch. 8, sec. 101, 102, 108.

In New York, resident aliens are liable to be enrolled in the militia, provided they are lawfully seised of any real estate within the state, and they are, in that case, declared to be subject to duties, assessments, taxes, and burdens, as if they were citizens; but they are not capable of voting at any election, or of being elected or appointed to any office, or of serving on any jury. (*a*)

If aliens come here with an intention of making this country their permanent residence, they will have many inducements to become citizens, since they are unable, as aliens, to have a stable freehold interest in land, or to hold any civil office, or vote at elections, or take any active share in the administration of the government. There is a convenient and easy mode provided, by which the disabilities of alienism may be removed, and the qualifications of natural-born citizens obtained. The terms upon which any alien, being a free white person, can be naturalized, are prescribed by the Acts of Congress of the 14th of April, 1802, ch. 28; the 3d of March, 1813, ch. 184; the 22d of March, 1816, ch. 32; the 26th of May, 1824, ch. 186; and the 24th of May, 1828, ch. 116. It is required that he declare, on oath, before a state court, being a court of record with a seal and a clerk,[1] and having common-law jurisdiction, or before a circuit or district court of the United States, or before a clerk of either of the said courts, two years at least before his admission, his intention to become a citizen, and to renounce his allegiance to his own sovereign.[2] This declaration need not be previously

(*a*) New York Revised Statutes, vol. i. p. 721, sec. 20. In the province of New Brunswick, aliens resident for two months in the province, are liable, by a colonial statute, to pay annually an exemption tax of 30*s*. as a substitute for militia service. Watson *v*. Haley, Kerr's Rep. 124.

[1] The requisitions of the Act must be precisely observed. Ex parte Michael Cregg, 2 Curtis, C. C. 98. A court which, though a court of record, has no recording officer distinct from the judge, is not competent within the Act to receive an alien's declaration of his intention to become a citizen.

[2] The reception of this oath is a ministerial and not a judicial duty, and the clerk of the court is therefore competent to perform it. Butterworth's case, 1 Wood. & M. R. 323.

Some of the states have, by recent Acts, forbidden their courts to perform any duties connected with the administration of the naturalization laws. See Laws of Connecticut,

made, if the alien resided here before the 18th June, 1812, *65 *and has since continued to reside here; provided such residence be proved to the satisfaction of the court, and provided it be proved by the oath or affirmation of two witnesses, citizens of the United States, that he has resided, for at least five years immediately preceding the time of such application, within the limits and under the jurisdiction of the United States. The names of the witnesses, and the place or places where the applicant has resided for at least the five years, to be set forth in the record of the court. (*a*) And if the applicant shall have been a minor, under twenty-one years of age, and shall have resided in the United States three years next preceding his arrival to majority, he may also be admitted a citizen without such previous declaration; provided he has arrived at the age of twenty-one years, and shall have resided five years within the United States, including the three years of his minority, and shall make the declaration aforesaid at the time of his admission, and shall declare on oath, and prove, to the satisfaction of the court, that for three years next preceding it had been his *bonâ fide* intention to become a citizen, and shall in all other respects comply with the laws in regard to naturalization. (*b*) In other cases the previous declaration is requisite, and at the time of his admission the alien's country must be at peace with the United States; and he must, before one of the courts above mentioned, take an oath to support the constitution of the United States, and likewise, on oath, renounce and abjure his native allegiance. He must, at the time of his admission, satisfy the court, by other proof than his own oath, that is by the oath or affirmation of at least two *citizens* of the United States, that he has resided five years, at least, within the United States, and one year at least, within the state where the court is held; and if he shall have arrived after the peace of

(*a*) Act of Congress, May 24, 1828, ch. 116.
(*b*) Act of Congress, May 26, 1824, ch. 186.

1855, c. 22. Laws of Massachusetts, 1855, c. 28. Stephens, petitioner, 4 Gray, 559. Beavins's Petition, 33 N.H. 89.

1815, his residence must have been continued for five years next preceding his admission, without being at any time, during the five years, out of the territory of the United States. (a) He must satisfy the court, that during that time he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same. He must, at the same time, renounce any title or order of nobility, if any he hath. The law provides (b) that children of persons duly naturalized, being minors at that time, shall, if dwelling in the United States, be deemed citizens. It is further provided, (c) that if any alien shall die after his declaration, and before actual admission as a citizen, his widow and children shall be deemed citizens.[1]

A person thus duly naturalized, becomes entitled to all the * privileges and immunities of natural-born subjects, except that a residence of seven years is requisite to enable him to hold a seat in Congress, and no person except a natural-born citizen is eligible to the office of Governor in some of the states, or President of the United States. *66

(a) This rigorous provision is in the Act of March 3d, 1813, sec. 12, for the regulation of seamen; and Judge Conkling, in his Treatise, 2d ed. p. 499, makes some useful suggestions as to the practical construction of this enactment. *In the matter of an alien* before the District Court of the United States for the Southern District of New York, in 1845, it was held that the Act of 1813 was still a part of the naturalization laws of the United States, applicable as well to others as to seafaring men who have emigrated since 1813; and that the applicant in that case being engaged in sea voyages as a sailor in American vessels, and having no home or residence in the United States, other than by such employment, and having no fixed residence prior to the Act of 1813, was not entitled to naturalization. 4 N. Y. Legal Observer for March, 1846. In the case Ex parte Paul, the Superior Court of New York construed the Act of Congress of March 3d, 1813, with the strictest severity, and held that where the alien had been out of the United States, *though a few minutes only*, and without any intention of changing his residence, he was not entitled to be naturalized. The Act says he must not *at any time* during the five years have been out of the territory of the United States. 7 Hill's N. Y. R. 56.[2]

(b) Act of Congress, April 14, 1802, ch. 28, sec. 4.

(c) Act of Congress, March 26, 1804, ch. 47.

[1] The jurisdiction vested in the state courts under the naturalization laws is examined in the matter of Clark, 18 Barb. 444. It is held, that the powers thus conferred cannot be delegated to the inferior officers of the court.

[2] By Act of Congress, passed June 26, 1848, the words "without being at any time, during the said five years, out of the territory of the United States," are repealed.

The laws of Congress on the subject of naturalization have been subject to great variations. In 1790, only two years' previous residence was required. In 1795, the period was enlarged to five years; in 1798, to fourteen years; and in 1802, it was reduced back to five years, where it still remains. This period of probation has probably been deemed as liberal as was consistent with a due regard to our peace and safety. A moderate previous residence becomes material to enable aliens to acquire the knowledge and habits proper to make good citizens, who can combine the spirit of freedom with a love of the laws. Strangers on their first arrival, and before they have had time to acquire property, and form connections and attachments, are not presumed to be acquainted with our political institutions, or to feel pride or zeal in their stability and success. (a)

*67 * If an alien dies before he has taken any steps under the act of naturalization, his personal estate goes according to his will, or if he died intestate, then according to the law of distribution of the place of his domicil, at the time of his

(a) During the elevation and splendor of the Athenian power, the residence of foreigners, and especially of merchants, was encouraged, but the privilege of a citizen of Athens was deemed a very distinguished favor. It could only be obtained by the consent and decree of two successive assemblies of the people, and was granted to none but to men of the highest rank and reputation, or who had performed some signal service to the republic. 1 Potter's Greek Antiquities, 44, 45, 150. In the time of Demetrius Phalereus, there were resident in Attica 10,000 freemen, being foreigners, or of foreign extraction, or freed slaves, who had not the rights of Athenian citizens. 1 Mitf. Hist. 354, 355. And yet it is said that foreigners could not dispose of their goods by will, but that they were appropriated, at their death, for the public use. 2 Potter, 344. In Rome, foreigners could not make a will; and the effects of a foreigner, at his death, went to the public, or to his patron, under the *jus applicationis*. Cic. de Orat. 1, 39. Dig. 49, 15, 52. Ibid. lib. 35, ad legem Falcidiam, Præ. Dict. du Dig. tit. Etrangers. But in the time of the imperial code, foreigners could dispose by will, and also inherit. Code, 6, 59, 10. The Romans were noted for their peculiar jealousy of the *jus civitatis*. or rights of a citizen. It was, at first, limited to the *Pomœria* of Rome, and then gradually extended to the bounds of *Latium*. In the time of Augustus, as we were informed by Suetonius, De Aug. sec. 40, the same anxiety was discovered to keep the Roman people pure and untainted of foreign blood; and he gave the freedom of the city with a sparing hand. But when Caracalla, for the purpose of a more extended taxation, levelled all distinctions, and communicated the freedom of the city to the whole Roman world, the national spirit was lost among the people, and the pride of the country was no longer felt, nor its honor observed. 1 Gib. Hist. 268.

death. (*a*) The stationary place of residence of the party at his death determines the rule of distribution, (*b*) and this is a rule of public right, as well as of natural justice. *Mobilia personam sequuntur, immobilia situm.* (*c*) The unjust and inhospitable rule of the most polished states of antiquity prevailed in many parts of Europe, down to the middle of the last century; and Vattel expressed his astonishment that there should have remained any vestiges of so barbarous a usage in an age so enlightened. The law which claimed, for the benefit of the state, the effects of deceased foreigners, who left no native heirs, existed in France as late as the commencement of their revolution. (*d*) This rule of the French law was founded not only on the Roman law, but it was attempted to be justified by the narrow and absurd policy of preventing the wealth of the kingdom from passing into the hands of the subjects of other

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(*a*) 1 Binney's Rep. 336. 3 Johns. Ch. Rep. 210. 1 Mason's Rep. 408. By the treaty between the United States and the Republic of Venezuela, in May, 1836, art. 12, and the Peru-Bolivian confederation in May, 1838, art. 8, and the Republic of Ecuador, in June, 1839, art. 12, not only personal property of the resident alien goes according to his will, or to his lawful representatives if he dies intestate, but his alien heirs, if they cannot lawfully succeed to his real estate, shall have three years to dispose of it. The treaty with Spain of 1795, art. 11, and with Russia of 1832, art. 10, and with Hanover of 20th May, 1840, art. 7, and with Portugal of 23d April, 1841, art. 12. allowed a *reasonable* time to the alien heir or devisee in such cases to dispose of the estate, and abolishes the *Droit d'Aubaine*. See, also, treaties to the same effect with the kingdom of Saxony, August 12th, 1846, and the grand duchy of Hesse, March 26, 1844, and with the king of Bavaria, the 21st of January, 1845, and with the king of the Two Sicilies, the 1st December, 1845. This last treaty is distinguished for its liberal spirit, and commercial and mutual rights and privileges are secured to the subjects of the contracting parties.

(*b*) Pipon *v.* Pipon, Amb. 25. Burn *v.* Cole, Amb. 415.

(*c*) Hub. Prælec. tom. i p. 278; tom. ii. p. 542. De Conflictu Legum, sec. 15. Vattel, b. ii. ch. 8, sec, 110, 111. See, also, *infra*, p. 429. For greater security, this right of succession, in case of intestacy, and of disposal by will, gift, or otherwise, of personal property belonging to aliens, is usually inserted as a *formula* in treaties of navigation and commerce; as, see art. 11 of the treaty between the United States and Spain of 1795; art. 6 of the treaty with Sweden, made in 1683; art. 11 of the treaty with Austria, made in 1829; art. 3 of the treaty with Mexico, made in 1831; art. 10 of the treaty of navigation and commerce between the United States and Russia, made in December, 1832; art. 9 of the treaty between the United States and the Republic of Chili, made in May, 1832; and art. 7 of the treaty between the United States and Hanover in 1840, and art. 3 of the treaty between the United States and Saxony in 1846.

(*d*) 1 Domat, 26, sec. 11.

countries. (*a*) It was abolished by the constitution of the first constituent assembly, in 1791, and foreigners were admitted upon the most liberal terms, and declared capa- *68 ble * of acquiring and disposing of property equally with natural-born citizens. The treaty of commerce between the United States and France, in 1788, provided against the evil effects of this law, by declaring that the inhabitants of the United States were to be exempted from the *droit d'aubaine*, and might dispose, by will, of their property, real and personal, (*biens meubles et immeubles*,) and if they died intestate, it was to descend to their heirs, whether residing in France or elsewhere, and the like privilege was conferred upon Frenchmen dying in this country. The treaties of France with other powers usually contained the same relaxation of her ancient rule; and though the treaty of 1778 was abolished in 1798, yet, in the renewed treaty of 1801, the same provision was inserted, and under it American citizens in France, and French subjects in the United States, could acquire, hold, and transmit, real as well as personal property, equally as if they were natives, and without the necessity of any act of naturalization or special permission. This last treaty expired in 1809, and the rights of Frenchmen arising thereafter, were left, like those of other aliens, to be governed by the general law of the land.[1]

The Napoleon code did not pursue the liberal policy of the French constituent assembly of 1791, and it seems to have revived the harsh doctrine of the *droit d'aubaine*, under the single exception that aliens should be entitled to enjoy in France the same civil rights secured to Frenchmen, *by treaty*, in the country to which the alien belongs. (*b*) It is not sufficient to create the exemption in favor of the alien, that civil rights are granted to Frenchmen by the local laws of the foreign country, unless that concession be founded upon treaty. (*c*) The law in

(*a*) 1 Domat, 555, sec. 13.

(*b*) Code Napoleon, Nos. 11, 726, 912.

(*c*) M. Toullier, in his Droit Civil Français, tom. i. n. 265, cites for this rule, a

[1] See the provisions of article seventh of the consular convention concluded with France, Feb. 23, 1853. 10 U. S. Statutes, 992.

France, until within a recent period, was, *that a stranger could not, except by special favor, dispose of his property by will; and when he died the sovereign succeeded, by right of inheritance, to his estate. (a) But the *droit d'aubaine*, under the articles of Nos. 726 and 912 of the *code civil*, was abolished in France, by a law of the 14th of July, 1819, and aliens can now acquire, enjoy, and transmit by will, and by descent, real and personal property, in the same manner as the other inhabitants of the kingdom. In case of succession among co-heirs, partly French and partly aliens, the French take of the property in France, a portion equal to the value of the property situated in a foreign country, and from which they would be excluded under the foreign law or custom. *69

British subjects, under the treaty of 1794, between the United States and Great Britain, were confirmed in the titles which they then held to lands in this country, so far as the question of alienism existed; and they were declared competent to sell, devise, and transmit the same, in like manner as if they were natives; and that neither they, nor their heirs or assigns, should, as to those lands, be regarded as aliens. The treaty applied to the title, whatever it might be, but it referred only to titles existing at the time of the treaty, and not to titles subsequently acquired.(b) It was, therefore, a provision of a temporary character, and by the lapse of time is rapidly becoming unimportant and obsolete.

The legislature of New York, and probably of many other states, are in the practice of granting to particular aliens, by name, the privilege of holding real property; and by a permanent provision in New York, aliens are enabled to take and hold lands in fee, and to sell, mortgage, and devise, but not demise or lease the same, equally as if they were native *citizens: provided the party previously take an oath that he is a resident in the state, and intends always to reside in the United States, and to become a citizen thereof as *70

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decree of the Court of Cassation in 1806; and he says that this article in the Napoleon code was taken from one in the new Prussian code.

(a) Répertoire de Jurispr. par Merlin, tit. Aubaine, and tit. Etranger, ch. 1, No. 6.

(b) 1 Wheaton, 300. 4 Ibid. 463. 7 Ibid. 535. 9 Ibid. 496. 12 Mass. Rep. 143.

soon as he can be naturalized, and that he has taken the incipient measures required by law for that purpose. The power to sell, assign, mortgage, and devise real estate, is to continue for six years from the time of taking the oath; but the alien is not capable of taking or holding any lands, descended, devised, or conveyed to him previously to his becoming such resident and taking the oath above mentioned; and if he dies within the six years, his heirs, being inhabitants of the United States, take by descent, equally as if he had been a citizen. (*a*) There are statute provisions of the same import in favor of aliens in Maryland, South Carolina, Delaware, and Missouri;[1] and in Louisiana, Pennsylvania, Kentucky, Virginia, Michigan, New Jersey, Illinois, Indiana, and Ohio, the disability of aliens to take, hold, and transmit real property, seems to be essentially removed. (*b*) In North Carolina and Vermont, there is even a

(*a*) N. Y. Revised Statutes, vol. i. p. 720, sec. 15–20. This privilege in New York was further enlarged in 1843, as see below; note *b*.

(*b*) Griffith's Law Register, passim. 1 Const. Rep. S. C. 61, 111. Christy's Dig. tit. Alien A. Q. Review, No. 25, p. 115. Chase's Statutes of Ohio, vol. i. p. 404. Phillips *v.* Rogers, 5 Martin's L. Rep. 700 Act of South Carolina of 1799, prescribing the terms of denization Purdon's Penn. Dig. pp. 56, 57. Elmer's Dig. 5. R. S. of New Jersey, of 1847, tit. 1, ch 1.[2] Territorial Act of Michigan, of March 31st, 1827. Revised Laws of Illinois, edit. 1833, p. 626. Statute of Indiana, of January 14, 1818. Ind. R. S. 1843, p. 414. By the charter of William Penn, as proprietary of Pennsylvania, to the inhabitants, in 1683, it was declared, that in the case of aliens purchasing lands in the province, and dying therein without being naturalized, their estates should descend as if they were naturalized. Proud's Pennsylvania, vol. ii. App. 27. In Pennsylvania, by the Act of March 22d, 1814, aliens who, on the 18th of June, 1812, resided in the state, and continued to reside therein, upon filing a declaration of an intention of becoming citizens, might take, hold, and con-

[1] An alien residing in a foreign country, cannot take land in Missouri, by descent. Wecker *v.* Wecker, 26 Miss. (5 Jones,) 426. In South Carolina, it has been held that if there be no other heir capable of inheriting, the alien widow, resident in the state, of a citizen who died intestate, shall take the whole of the decedent's real property. Ford *v.* Husman, 7 Rich. 165. But she shall have none of it, if the citizen decedent have left a brother, who has become a citizen by naturalization: he shall be the sole heir. Keenan *v.* Keenan, 7 Rich. 345.

[2] It is held in New Jersey, that an Act, which permits aliens "to have and to hold lands to them and their heirs and assigns forever, as fully, to all intents and purposes, as any natural-born citizen of the United States may or can do," does not remove the disability of alienism from those, who, but for that disability, would have been heirs. Colgan *v.* McKeon, 4 Zabr. 566.

provision inserted in their constitutions, that every person of good character, who comes into the state and settles, and takes

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vey lands not exceeding 200 acres, nor in value $20,000, as fully as citizens might do; and by the Act of 24th March, 1818, ch. 4610, aliens, not subjects of any state at war with the United States at the time of the purchase, might purchase and hold lands, not exceeding 5,000 acres, equally as native citizens. This last Act contained no condition with regard to residency. And by the Act of March 21, 1837, purchasers from aliens, and the titles of the heirs and devisees of aliens, were confirmed, *subject to the vested rights of others.* See Dunlop's Laws, p. 908. Under the construction given to the above Act of 1818, (Reese *v.* Waters, 4 Watts & Serg. 145,) an alien husband acquires no title in his wife's estate of inheritance, as tenant by the curtesy initiate. In New York, (Laws of N. Y. sess. 56, (1833,) ch. 300, and sess. 57, (1834,) ch. 37,) the prerogative right of escheat, in the case of aliens dying seised of lands, is much restricted, and the alien heirs, and the persons obliged to deduce title through an alien, are entitled, upon certain moderate conditions, to a release of the interest of the state acquired by the escheat. In New York, it is considered to be a settled rule of construction of statutes permitting aliens to purchase and hold lands within the state, *to them and their heirs and assigns,* that the *alien heirs, devisees, and purchasers* of and from the alien so allowed to purchase, can take and hold in that capacity, without prejudice to their title from alienism. See the Act of April 2d, 1798, ch. 72, and the proviso thereto: and the Acts of March 26th, 1802, ch. 49; and of April 8th, 1808, ch. 175, and the decision in Jackson *v.* Adams, 7 Wendell, 367, thereon. See, also, the cases of Goodell *v.* Jackson, 20 Johnson, 693; of Jackson *v.* Etz, 5 Cowen, 314, and of the Commonwealth *v.* Heirs of André, 3 Pick. Rep. 224, to the same point. Whether the heirs and purchasers of and from the heirs and purchasers of the first alien taker, can so take, may be a question, as the privilege is to the first grantee, *his heirs and assigns,* and does not necessarily extend to the heirs of the heir, or to the purchaser from the purchaser.[1] The decision in the case of Aldrich *v.* Manton, 13 Wendell, 458, seems to limit the privilege to the immediate heirs and purchaser from the first privileged alien. The legislature of New York, by various provisions, have very greatly enlarged the capacity of aliens to take and hold real estate. (1.) Any alien who takes and files in the Secretary of State's office, a deposition of being a resident, and of the intention of his permanent residence, and to become a citizen as soon as the naturalization laws permit, may take and hold real estate in fee, and for six years thereafter may sell, devise, and dispose of the same, except that he shall not lease or demise the same until naturalized. (2.) Such alien shall not, however, take or hold real estate descended, devised, or conveyed to him previously to such residence and deposition, but if he dies within the six years, his heirs being inhabitants, may take by descent as if he had been a citizen. (3.) If any alien sells lands so entitled by him to be held and sold, he may take in fee mortgages as a security for the purchase-money, and repurchase on the mortgage sales. (4.) All

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1 In Cumberland *v.* Graves, 3 Seld. 305, it was held in construction of the Act of 1798, that it was the intention of the Act to remove the disability of alienism from the heirs and assigns of the first alien grantee indefinitely; and a devise by the remote alien heir of an alien grantee to alien trustees, vested in them a legal estate. S. C. 9 Barb. 595.

an oath of allegiance to the same, may thereupon purchase, and by other just means acquire, hold, and transfer land, and after one year's residence, become entitled to most of the privileges of a natural-born subject. In Connecticut, the Superior Court is invested with power at large, upon petition, to grant to resident aliens the right to take, hold, convey, and transmit real estate, in like manner as native citizens. (a)[1]

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such aliens, so holding real estates, are subject to assessments, taxes, and burdens as if they were citizens. (5.) All titles to lands by conveyance, descent, or devise, before the alien was qualified to take and hold, are confirmed on his naturalization, or if not naturalized, if he shall within one year from acquiring the title, file his deposition, he may in that case hold and convey for the term of five years real estate. N. Y. Revised Statutes, vol. ii. 3d edit. pp. 3–6. The Revised Statutes, from p. 3 to p. 5, were doubtless intended to give a clear and condensed view of all the various statute provisions in favor of the rights and capacities of aliens in respect to real property, but such a view has not been answered, and the successive enactments are so tacked together as to lead to repetition and perplexity.[2]

(a) Statutes of Connecticut, 1838, p. 287.

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[1] Resident aliens are now vested with the same rights as native citizens. Rev. St. 1849, tit. 29, ch. 1, sec. 6.

Similar privileges are given to alien friends in Virginia, upon filing a declaration of an intention to remain. Rev. St. 1849, tit. 33, ch. 116, sec. 1. In Maine, by the Act of Feb. 9, 1856, aliens may take, hold, convey, and devise real estate within the state; and all conveyances and transfers of any interest in such estate, heretofore made by or to an alien, are made as effectual as if made by or to a citizen of the state. (Laws, 1856, ch. 198, and see Laws, 1854, ch. 64.)

[2] A later Act in New York (Act of April 30; Laws, 1845, ch. 115, p. 94) has conferred enlarged privileges upon aliens.

1. The deposition, above mentioned, will avail, though filed *subsequent* to the acquisition of title, and the alien holds the land in the same manner and with the same effect as a citizen of the United States.

2. The wife of an alien resident, dying seised, and an alien woman marrying a citizen, are entitled to dower.

3. The grantees or devisees of resident aliens, deceased, are made capable of taking and holding in the same manner as if such alien were a citizen; but if any of such devisees or grantees are aliens and males of full age, they must file a deposition, as *supra*, subject to a like condition as to filing a deposition; the heirs at law of an alien resident may take and hold the real estate of their ancestor.

4. On the same condition, an alien resident may grant or devise to a citizen or alien.

5. Alien women, resident in the state, may take, by devise or under marriage settlements, and may execute a power.

Former grants, &c., are confirmed. See Brown *v.* Sprague, 5 Denio's R. 545.

The provisions of the Act of April 30, 1845, were extended by an Act passed in 1857, (Laws, 1857, ch. 576.)

The constitution of California provides that aliens who were at the time of the adoption of the constitution or should thereafter become *bonâ fide* residents of that state, shall be

These civil privileges, conferred upon aliens by state authority, are dictated by a just and liberal policy; but they must be taken to be strictly local; and until a foreigner is duly naturalized, according to the Act of Congress, he is not *71 entitled in any other state to any other privileges than those which the laws of that state allow to aliens. No other state is bound to admit, nor would the United States admit, any alien to any privileges to which he is not entitled by treaty, or the laws of nations, or the laws of the United States, or of the state in which he dwells. The article in the constitution of the United States, (a) declaring that citizens of each state were entitled to all the privileges and immunities of citizens in the several states, applies only to natural-born or duly naturalized citizens; and if they remove from one state to another, they are entitled to the privileges that persons of the same description are entitled to in the state to which the removal is made, and to none other. The privileges thus conferred are local and necessarily territorial in their nature. The laws and usages of one state cannot be permitted to prescribe qualifications for citizens, to be claimed and exercised in other states, in contravention to their local policy. (b) It was declared in *Corfield* v.

(a) Art. 4, sec. 2.

(b) It is a curious fact in ancient Grecian history that the Greek states indulged such a narrow and excessive jealousy of each other, that intermarriage was forbidden, and none were allowed to possess lands within the territory of another state. When the Olynthian republic introduced a more liberal and beneficial policy in this respect, it was considered as a portentous innovation. Mitford's History, vol. v. p. 9. The Athenians occasionally granted the right of intermarriage, and even the freedom of the city to the inhabitants of foreign states. Schömann's Dissertations on the Assemblies of the Athenians, ed. Cambridge, 1838, p. 319. So, the Byzantines, to evince their deep gratitude to the Athenians for their assistance in the war against Philip of Macedon, broke in upon their ordinary policy, and granted, by law, to the Athenians, the right of intermarriage with their citizens, and the power of purchasing and holding lands in the Byzantine and Perinthian territories. Demost. Orat. de Corona, where the original decree is set forth at large. So, also, the inhabitants and colonists of the Latin cities in Latium, in the 6th century of Rome, were so much regarded as foreigners, that they could not buy or inherit land from Roman citizens,

entitled to enjoy the same rights, in respect to the possession, enjoyment, and inheritance of property as native-born citizens. It has been decided that this clause forbids non-resident aliens to inherit. Siemssen v. Bofer, 6 Cal. 250.

Coryell,(a) that the privileges and immunities conceded *72 by the Constitution of the United States to citizens in the several states, were to be confined to those which were, in their nature, fundamental, and belonged of right to the citizens of all free governments. Such are the rights of protection of life and liberty, and to acquire and enjoy property, and to pay no higher impositions than other citizens, and to pass through or reside in the state at pleasure, and to enjoy the elective franchise according to the regulations of the law of the state. But this immunity does not apply to every right, for some may belong exclusively to resident citizens under the laws of the state; and it was held that a statute of New Jersey confining the right of taking oysters within the waters of the state, to the actual inhabitants and residents of the state, was not an Act infringing the constitution of the United States. The power to regulate the fisheries in the navigable waters of the states, remained in the states respectively, though the United States have a concurrent power, so far as concerns the free navigation of the waters.

The Act of Congress confines the description of aliens capable of naturalization, to "free white persons." I presume this excludes the inhabitants of Africa, and their descendants; and it may become a question, to what extent persons of mixed blood are excluded, and what shades and degrees of mixture of color disqualify an alien from application for the benefits of the act of naturalization. (b) Perhaps there might be difficulties also

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nor had they generally the right of intermarriage with Romans. Arnold's Hist. vol. iii. p. 14.

(a) 4 Wash. Cir. Rep. 371.

(b) By a statute of Virginia, in 1785, every person who hath one fourth part or more of negro blood, is deemed a mulatto, and that Act is still in force. 4 Randolph, 631. The same rule is declared in Indiana. Revised Statutes of Indiana, 1838. It is adjudged, in South Carolina, that *mulattoes* are not white citizens within the meaning of the law, and persons tinged with negro blood are said to be mulattoes. State *v.* Hayes, 1 Bailey's Rep. 275. The term is not precisely defined, nor the line of distinction between whites and men of color accurately ascertained. It means a person of mixed white or European and negro descent, without defining exactly the proportions of blood. A remote taint will not degrade a person to the class of persons of color; but a mere predominance of white blood is not sufficient to rescue a person from that class. It is held to be a question of fact for a jury, upon the evidence of features and complexion, and reputation as to parentage, and that a *distinct*

as to the copper-colored natives of America, or the yellow or tawny races of the Asiatics, and it may well be doubted whether any of them are "white persons" within the purview of the law. It is the declared law of New York, South Carolina, and Tennessee, (a) and probably so understood in other states, that Indians are not citizens, but distinct tribes, living under the protection of the government, and * consequently they *73 never can be made citizens under the Act of Congress. (b)

Before the adoption of the present constitution of the United

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and *visible* admixture of negro blood makes one a mulatto. If the admixture of African blood does not exceed the proportion of one eighth, the person is deemed white. This is the rule in Louisiana, and in the *code noir* of France for her colonies, and it is deemed in Carolina a proper rule. State *v.* Davis, 2 Bailey's Rep. 558. With respect to India, it was the policy of the British Parliament, in 1833, to effect a complete identification of the Europeans and natives in the eye of the law, without regard to color, birth, or religion. Ann. Reg. for 1833. Hist. p. 184. In Ohio, it has been held, that all persons nearer white than black, are *white* persons, within the constitution of the state. Jeffries *v.* Ankeny, 11 Ohio Rep. 372, 375. So, by the case of Lane *v.* Baker, 12 Ohio R. 237, youths of negro, Indian, and white blood, but of *more than one half white blood*, are entitled, under the school law in favor of white children, to the benefit of the common school fund.

(a) Goodell *v.* Jackson, 20 Johns. Rep. 693. State *v.* Managers of Elections for York, 1 Bailey's Rep. 215. The State *v.* Ross, 7 Yerger, 74.

(b) By an Act of the legislature of New York of the 10th of April, 1843, c. 87, 2 R. S. 3d edit. 4, any native Indian may purchase, take, hold, and convey lands, in the same manner as a citizen; and whenever he becomes a freeholder to the value of $100, he becomes subject to taxation, and liable on contracts, and subject to the civil jurisdiction of the courts of law and equity as a citizen. This Act gives to the Indians new and important privileges. Part of the Seneca tribe of Indians now (1843) own and occupy reservation lands in the S. W. part of the state of New York.[1] So the Oneida Indians, owning lands in the counties of Oneida and Madison, were enabled, by the Act of April 18th, 1843, ch. 185, to hold lands in severalty, and to sell and convey the same, under the care of a superintendent on the part of the state. It is admitted that an Indian is a competent witness in a suit between white men. Coleman *v.* Doe, 4 Smedes & Marshall, 40. So, by the Act of Congress of March 3, 1843, ch. 101, provision is made for a just division of the lands belonging to the Stockbridge tribe of Indians, in the territory of Wisconsin, among them individually, and patents to be issued to such individuals, in severalty and in fee; and such Indians are thenceforth to be deemed citizens of the United States, with all the privileges and duties attached thereto, and the powers and usages of those Indians as a tribe thenceforth to cease.

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[1] By a statute of New York, (Laws of N. Y. 1847, p. 464,) various provisions have been made for the internal government and police of the Seneca Indians. The Act may be said to contain the rudimentary provisions of civil and republican government.

States, the power of naturalization resided in the several states; and the constitution of New York, as it was originally passed, (a) required all persons born out of the United States, and naturalized by the legislature, to take an oath abjuring all foreign allegiance and subjection, in all matters, *ecclesiastical* as well as civil. This was intended, and so it operated, to exclude from the benefits of naturalization Roman Catholics, who acknowledged the spiritual supremacy of the Pope, and it was the result of former fears and prejudices (still alive and active at the commencement of our Revolution) respecting the religion of the Romish church, which European history had taught us to believe was incompatible with perfect national independence, or the freedom and good order of civil society. So extremely strong, and so astonishingly fierce and unrelenting was public prejudice on this subject, in the early part of our colonial history, that we find it declared by law in the beginning of the last century, (b) that every Jesuit and popish priest who should continue in the colony after a given day, should be condemned to perpetual imprisonment; and if he broke prison and escaped, and was retaken, he should be put to death. That law, said Mr. Smith, the historian of the colony as late as the year 1756, (c) was worthy of perpetual duration!

(a) Art. 42.

(b) Colony Laws, vol. i. p. 38, Livingston & Smith's edit.

(c) Smith's History of New York, p. 111. In the Act *declaring the rights and privileges of the people of the colony* of New York, in 1691, all persons "professing faith in God, by Jesus Christ, his only son," were allowed the free exercise and enjoyment of their religious profession and worship, with the exception of "persons of the Roman religion," who were not to exercise their manner of worship contrary to the laws of England. Bradford's edition of the Laws of New York, 1719. As late as 1753, the legislature of Virginia passed an Act extremely severe upon popish recusants, placing them under the most oppressive disabilities.

LECTURE XXVI.

OF THE LAW CONCERNING MARRIAGE.

THE primary and most important of the domestic relations is that of husband and wife. It has its foundation in nature, and is the only lawful relation by which Providence has permitted the continuance of the human race. In every age it has had a propitious influence on the moral improvement and happiness of mankind. It is one of the chief foundations of social order. We may justly place to the credit of the institution of marriage a great share of the blessings which flow from refinement of manners, the education of children, the sense of justice, and the cultivation of the liberal arts (a) In the examination of this interesting contract, I shall, in the first place, consider how a marriage may be lawfully made; and, secondly, how it may be lawfully dissolved; and, lastly, I shall take a view of the rights and duties which belong to that relation.

(1.) All persons who have not the regular use of the understanding, sufficient to deal with discretion in the common affairs of life, as idiots and lunatics, (except in their lucid intervals,) *are incapable of agreeing to any contract, and of course to that of marriage. But though marriage with an idiot or lunatic be absolutely void, and no *76

(a) The great philosophical poet of antiquity, who was, however, most absurd in much of his philosophical theory, but eminently beautiful, tender, and sublime in his poetry, supposes the civilization of mankind to have been the result of marriage and family establishments.

Castaque privatæ Veneris connubia læta
Cognita sunt, prolemque ex se videre creatam:
Tum genus humanum primum mollescere cœpit.

Lucret. de Rer. Nat. lib. 5.

sentence of avoidance be absolutely necessary, (a) yet, as well for the sake of the good order of society, as for the peace of mind of all persons concerned, it is expedient that the nullity of the marriage should be ascertained and declared by the decree of a court of competent jurisdiction. (b) The existence and extent of mental disease, and how far it may be sufficient, by the darkness and disorder which it brings upon the human faculties, to make void the marriage contract, may sometimes be a perplexing question, extremely distressing to the injured party, and fatal to the peace and happiness of families. (c) [1] Whether the relation of husband and wife lawfully exists, never should be left uncertain. Suits to annul a marriage, by reason of idiocy or lunacy, have consequently been often instituted and sustained in the spiritual courts in England. (d) The proper tribunal for the investigation of this question, when it is brought up directly, and for the mere purpose of testing the validity of the contract, will depend upon the local institutions of every state. In those states which have equity tribunals, it belongs to them; (e) and where there are no such tribunals distinct from the supreme courts of common-law jurisdiction, for the exercise of equity powers, whatever jurisdiction is exercised over the matrimonial contract, must be in the common-law courts.

A marriage procured by force or fraud is also void, *ab initio*,

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(a) 2 Phillimore's R. 19. Browning v. Reane, Ibid. 69.

(b) Hays v. Watts, 3 Phil. Rep. 44. Sir Wm. Scott, in Pertreis v. Tondear, 1 Hagg. Cons. Rep. 138. Crump v. Morgan, 3 Iredell, N. C. Eq. Rep. 91.

(c) There is a very interesting judicial discussion in M'Elroy's case, 6 Watts & Serg. 451, on the subject of lunacy, and the question is, whether the mind is deranged to such an extent as to disqualify the party from conducting himself with personal safety to himself and others, and from managing and disposing his own affairs, and discharging his relative duties.

(d) Ash's case, Prec. in Ch 203. 1 Eq. Cas. Abr. 278, pl. 6. *Ex parte* Turing, 1 Ves. & Bea. 140. Turner v. Meyers, 1 Hagg. Consist. Rep. 414. Countess of Portsmouth v. Earl of Portsmouth, 1 Hagg. Eccl. Rep. 355. Shelford on Marriage and Divorce, pp. 183–201.

(e) Wightman v. Wightman, 4 Johns. Ch. Rep. 343. Crump v. Morgan, 3 Iredell, N. C. Eq. Cases, 91. In this and many other points relative to domestic rights, the English ecclesiastical law is considered as part of the common law.

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[1] The marriage is void, if one of the parties was at the time insane from *delirium tremens*. Clement v. Mattison, 3 Rich. R. 93.

and may be treated as null by every court in which its validity may be incidentally drawn in question. (a) The basis of the marriage contract is consent, and the ingredient of fraud or duress is as fatal in this as in any other con- *77 tract, for the free assent of the mind to the contract is wanting. (b) [1] The common law allowed divorces *a vinculo*, *causa metus*, *causa impotentiæ*, and those were cases of a fraudulent contract. (c) It is equally proper in this case, as in those of idiocy or lunacy, that the fraud or violence should be judicially investigated, in a suit instituted for the very purpose of annulling the marriage; and such a jurisdiction in the case properly belongs to the ecclesiastical courts in England, and to the courts of equity in this country. It is declared in New York by statute, (d) that when either party to a marriage shall be incapable of consenting to it, for want of age or understanding; or incapable, from physical causes, of entering into the marriage state; or when the consent was obtained by force or fraud, the marriage shall be void from the time its nullity shall be declared by a court of competent authority; and the courts of equity are invested with that power. (e) It is said that error will, in some cases, destroy a marriage, and render the contract void, as if one person be substituted for another. This, however, would be a case of palpable fraud, going to the substance of the contract; and it would be difficult to state a case in which error simply, and without any other ingredient, as to the parties, or one of them, in respect to the other, would vacate the contract. It is

(a) A marriage would be void if made while one of the parties was in a state of intoxication, such as would incapacitate the party from entering into any other contract. The case of Brown v. Johnston, in 1818, is cited by Dr. Irving to this point. (Introduction to the Study of the Civil Law, p. 102, note.)

(b) Voet, ad Pand. lib. 24, 2, 15. Toullier's Droit Civil Français, tom. i. Nos. 501, 504, 506, 512. Reeve's Domestic Relations, 201, 207. Pothier's Traite du Contrat de Mariage, Nos. 307, 308. 2 Haggard's Consist. Rep. 104, 246.

(c) Bury's case, 5 Co. 98, b. Oughton's Ord. Jud. tit. 193, sec. 17.

(d) N. Y. Revised Statutes, vol. ii. p. 139, sec. 4.

(e) Ibid. 142, sec. 20; 168, sec. 2.

[1] The court declared the nullity of a marriage in a case in which the insanity of the woman had been concealed by her friends. Keyes v. Keyes, 2 Foster, 553, and, see True v. Ranney, 1 Foster, 52. Robertson v. Cole, 12 Texas, 356.

well understood that error, and even disingenuous representations, in respect to the qualities of one of the contracting parties, as his condition, rank, fortune, manners, and character, would be insufficient. The law makes no provision for the relief of a blind credulity, however it may have been produced. (a)

*78 (2.) * No persons are capable of binding themselves in marriage until they have arrived at the age of consent, which, by the common law of the land, is fixed at fourteen in males, and twelve in females. The law supposes that the parties, at that age, have sufficient discretion for such a contract, and they can then bind themselves irrevocably, and cannot afterwards be permitted to plead even their egregious indiscretion, however distressing the result of it may be. Marriage, before that age, is voidable at the election of either party, on arriving at the age of consent, if either of the parties be under that age when the contract is made. (b) But this rule of reciprocity, however true in its application to actual marriages, does not apply to other contracts made by a competent party with an infant, nor even to a promise of marriage *per verba de futuro* with an infant, under the age of discretion. The person of full age is absolutely bound, and the contract is only voidable at the election of the infant. This point was ruled by the K. B. in *Holt* v. *Ward Clarencieux*, (c) after the question had been argued by civilians, to see what light might be thrown upon it from the civil and canon law. Though this be the rule of the English law, the civilians and canonists are not agreed upon the question; and Swinburne was of opinion that the contract in that case was not binding upon the one party more than upon the other. (d)

The age of consent, by the English law, was no doubt borrowed from the Roman law, which established the same periods of twelve and fourteen, as the competent age of consent to

(a) Toullier, *ut supra*, Nos. 515, 521. Pothier, *ut supra*, Nos. 310, 314. 1 Phillimore, 137. 2 Haggard's Consist. Rep. 248. Benton *v.* Benton, 1 Day's Rep. 111. Stair's Institutions, by More, vol. i. n. b, p. 14.

(b) Co. Litt. 33 a, 79 b. The Massachusetts Revised Statutes, of 1836, render marriages contracted when either of the parties is within the age of consent, valid, if followed by voluntary cohabitation.

(c) 2 Str. 937.

(d) Harg. Co. Litt. lib. 2, note 45.

render the marriage contract binding. (*a*) Nature has not fixed any precise period; and municipal laws must operate by fixed and reasonable rules. The same rule was adopted *in France, before their revolution: (*b*) but by the Napoleon code, the age of consent was raised to eighteen in males, and fifteen in females, though a dispensation from the rule may be granted for good cause. If without the consent of their parents, or of the father, in case of a difference of opinion, the son must be twenty-five years complete, and the daughter twenty-one years complete, to render them competent to contract marriage. (*c*) *79

(3.) No person can marry while the former husband or wife is living. Such second marriage is, by the common law, absolutely null and void; (*d*) and it is probably an indictable offence in most, if not all of the states in the Union. (*e*) In New York,

(*a*) Inst. 1, 10, De Nuptiis. Co. Litt. 78 b. 1 Blacks. Com. 436.

(*b*) 1 Domat, Prel. b. 24, 25. The incapacity for marriage ceased when the parties had attained the respective ages of fourteen and twelve. But if the children were under paternal authority, the son could not marry unless he was thirty years of age, nor the daughter unless she was twenty-five, without the consent of their parents. Ibid.

(*c*) Code Civil, Nos. 144, 148. The New York Revised Statutes, vol. ii. p. 138, established the ages of consent at seventeen in males, and fourteen in females; but the provision was so disrelished, that it was repealed within four months thereafter, by the Act of 20th April, 1830, which, of course, left the case to stand as before, upon the rule of the common law.[1] In Ohio, Indiana, and Michigan, the age of consent is raised to eighteen years in males, and fourteen in females. Statutes of Ohio, 1831. Territorial Act of Michigan, April, 1832. R. Statutes of Indiana, 1838. In Illinois, to seventeen in males, and fourteen in females. Illinois R. Laws, 1833.

(*d*) Cro. Eliz. 858. 1 Salk. 121.

(*e*) In North Carolina, bigamy was a crime punishable with death. Statutes 1790 and 1800. In Alabama, it is punishable by fine, imprisonment, and *whipping.* Atkins's Dig. 2d ed. p. 107.

[1] But in New York, the court has power by statute to annul marriages in certain cases, when the female was, at the time of the marriage, under the age of fourteen. Bennett *v.* Smith, 21 Barb. 439. In Wisconsin, males may marry at 18, females at 15. R. S. Wisconsin, tit. 21, ch. 78. In Virginia, males may marry at 14, females at 12. Rev. St. 1849, tit. 31, ch. 109, sec. 3. In Ohio, it has been decided that marriages between a male under the age of 18, and a female under the age of 14, are invalid, unless confirmed by cohabitation subsequently to the parties attaining the statutory age. Shafher *v.* State of Ohio, 20 Ohio R. 1. While in Iowa the decision of the court is directly contrary. Goodwin *v.* Thompson, 2 Greene, Iowa R. 329. The statutes in both states are substantially the same in language. The common-law rule which fixes the ages of consent at 14 and 12 years prevails in Massachusetts. Parton *v.* Hervey, 1 Gray, 119.

it is declared by statute to be an offence punishable by imprisonment in a state prison, in all but certain excepted cases. Those cases are, when the husband or wife, as the case may be, of the party who remarries, remains continually without the United States for five years together; or when one of the married parties shall have absented himself or herself from the other by the space of five successive years, and the one remarrying shall not know the other, who was thus absent, to be living within that time; (a) or when the person remarrying was, at the time of such marriage, divorced by the sentence of a competent court, for some other cause than the adultery of such person; or if the former husband or wife of the party remarrying had been sentenced to imprisonment for life; or if the former marriage had been duly declared void, or was made within the age of consent. (b) This is essentially a transcript of the *80 *statute of 1 James I., ch. 11, with a reduction of the time of absence, from seven to five years; and though the penal consequences of such a second marriage do not apply in those excepted cases, yet, if the former husband or wife be living, though the fact be unknown, and there be no divorce *a vinculo* duly pronounced, or the first marriage has not been duly annulled, the second marriage is absolutely void, and the party remarrying incurs the misfortune of an unlawful connection. If there be no statute regulation in the case, the principle of the common law, not only of England, but generally of the Christian world is, that no length of time or absence, and

(a) In Ohio, it is three years of continual and wilful absence, next before the second marriage. Statutes of Ohio, 1831. In Massachusetts, it is seven years; and it is further added, that the legal penalty does not apply if one of the parties had been absent for a year or more at the time of the second marriage, and believed to be dead. Mass. Revised Statutes, 1836.

(b) N. Y. Revised Statutes, vol. ii. pp. 139, 687. Ibid. 688, sec. 11. The statute has further provided on this subject, that if one of the married parties absents himself or herself, for five successive years, without being known to the other party to be living during that time, and the other party marries during the life of the absent person, the marriage is void, *only from the time that its nullity shall be pronounced by a court of competent authority.* And further, that no pardon granted to any person sentenced to imprisonment for life, shall restore to him or her the rights of a previous marriage. N. Y. Revised Statutes, vol. ii. p. 139, sec. 6, 7.

nothing but death, or the decree of a court confessedly competent to the case, can dissolve the marriage tie. (*a*)

By the statute of James I., if one of the married parties continually remained abroad for five years, and was living, even within the knowledge of the other party, or the parties were at the time only under a divorce *a mensa et thoro*, yet the second marriage, though void in law, would not be within the penalties of the Act. It was still a divorce, and the Act did not distinguish between the two species of divorce. (*b*) The crime of bigamy, or of polygamy, as it ought more properly *to be termed, (*c*) has been made a capital offence in *81 some, and punished very severely in other parts of Europe; (*d*) but the new civil code of France (*e*) only renders such second marriage unlawful, without annexing any penalty for the offence. (*f*)

The direct and serious prohibition of polygamy contained in our law, is founded on the precepts of Christianity, and the laws of our social nature, and it is supported by the sense and practice of the civilized nations of Europe. (*g*) Though the Athenians at one time permitted polygamy, yet, generally, it was not tolerated in ancient Greece, but was regarded as the practice of barbarians. (*h*) It was also forbidden by the Romans throughout the whole period of their history, and the prohibition

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(*a*) 1 Roll. Abr. 340, pl. 2, 357, pl. 40, 360, F. Williamson *v.* Parisien, 1 Johns. Ch. Rep. 389. Fenton *v.* Reed, 4 Johns. Rep. 52.

(*b*) 4 Blacks. Com. 163, 164. This point was raised and discussed in Porter's case, Cro. Car. 461; and while the court admitted the second marriage to be unlawful and void, yet they did not decide whether the statute penalty would attach upon such a case of bigamy. The New York Revised Statutes, vol. ii. p. 687, sec. 9, have corrected this imperfection in the English statute, and made the exception to the application of the penalties of bigamy, in the case of divorce, not to rest on a divorce *a mensa et thoro*, but to apply only to the *dissolution* of the former marriage.

(*c*) Harg. Co. Litt. lib. 2, n. 48.

(*d*) Barrington on the Statutes, p. 401.

(*e*) No. 147.

(*f*) If a woman be induced, by fraudulent means, to marry a man who has a wife living, and who represented himself as single, the children born while the deception lasted, are entitled to the rights of legitimate children. Clendenning *v.* Clendenning, 15 Martin's Louis. Rep. 438. (Vol. iii. N. S.) This is also the statute law in New York. New York Revised Statutes, vol. ii. p. 142, sec. 23.

(*g*) Paley's Moral Philosophy, b. 3, ch. 6.

(*h*) Potter's Greek Antiq. 264. Taylor's Elem. Civil Law, 340–344.

is inserted in the Institutes of Justinian. (*a*) Polygamy may be regarded as exclusively the feature of Asiatic manners, and of half-civilized life, and to be incompatible with civilization, refinement, and domestic felicity. (*b*)

(4.) In most countries of Europe in which the canon law has had authority or influence, marriages are prohibited between *82 * near relations by blood or marriage. Prohibitions similar to the canonical disabilities of the English ecclesiastical law were contained in the Jewish laws, from which the canon law was, in this respect, deduced; and they existed also in the laws and usages of the Greeks and Romans, subject to considerable alterations of opinion, and with various modifications and extent. (*c*) These regulations, as far at least as they prohibit marriages among near relations, by blood or marriage, (for the canon and common law made no distinction on this point between connections by consanguinity and affinity,) (*d*), are evidently founded in the law of nature; and incestuous marriages have generally (but with some strange exceptions at Athens) (*e*) been regarded with abhorrence by the soundest writers and the most polished states of antiquity. Under the influence of Christianity, a purer taste and stricter doctrine have ever been inculcated; and an incestuous connection between an uncle and niece, (it being a marriage within the Levitical degrees,) has been adjudged, by a great master of public and municipal law, to be a nuisance extremely offensive to the laws

(*a*) Cic. de Orat. 1, 40. Suet. Jul. 52. Inst. 1, 10, b. *ad fin.* Taylor, Ibid. 344–347. Polygamy was in practice among the Jews in the early patriarchal ages. Selden's Uxor Ebraica, lib. 1, ch. 9. Antiquities of the Hebrew Republic, by Lewis, vol. iii. p. 248.

(*b*) Lieber, in his Political Ethics, vol. ii. p. 9, says that polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot exist long in connection with monogamy. The remark is equally striking and profound.

(*c*) Selden's Uxor Ebraica, lib. 1, ch. 1–5. 1 Potter's Greek Antiq. 170. 2 Ibid. 267, 268, 269. Tacit. Ann. 12, sec. 4, 5, 6, 7. Lewis's Antiquities of the Jewish Republic, vol. iii. p. 252.

(*d*) Co. Litt. 235, a. Gibson's Cod. 412. 1 Phillimore's Rep. 201, 355. Stair's Institutions by More, vol. i. note b, p. 15. Affinity is the relation contracted by marriage between a husband and his wife's kindred, and between a wife and her husband's kindred.

(*e*) Mitford's History of Greece, vol. vii. p. 374.

and manners of society, and tending to endless confusion, and the pollution of the sanctity of private life. (*a*)

It is very difficult to ascertain exactly the point at which the laws of nature have ceased to discountenance the union. It is very clearly established that marriages between relations by blood or affinity in the lineal or ascending or descending lines, are unnatural and unlawful, and they lead to a confusion of rights and duties. On this point the civil, the canon, *and *83 the common law are in perfect harmony. In the learned opinion which Ch. J. Vaughan delivered on this subject, in *Harrison* v. *Burwell*, (*b*) upon consultation with all the judges of England, he considered that such marriages were against the law of nature, and contrary to a moral prohibition, binding upon all mankind. But when we go to collaterals, it is not easy to fix the forbidden degrees by clear and established principles. (*c*)

In several of the United States, marriages within the Levitical degrees, under some exceptions, are made void by statute; but in New York, until 1830, there was not any statute defining the forbidden degrees; and in England the prohibition to marry within the Levitical degrees rests on the canon law, which, in that respect, received the sanction of several statutes passed in the reign of Hen. VIII. (*d*)[1] It was considered in the case of

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(*a*) Burgess *v.* Burgess, 1 Hagg. Consist. Rep. 386. Woods *v.* Woods, 2 Curteis, 516, S. P. Such a connection was held in equal abomination by Justinian's code. Code, 5, 8, 2. Consanguinity and affinity are equally impediments in the case of illegitimate relations, and within the purview of the prohibition. Horner *v.* Horner, 1 Hagg. Consist. Rep. 352, 3. Blackmore *v.* Brider, 2 Phil. 361.

(*b*) Vaughan's Rep. 206. 2 Vent. 9, S. C.

(*c*) Doctor Taylor, in his Elements of the Civil Law, pp. 314–339, has gone deeply into the Greek and Roman learning as to the extent of the prohibition of marriage between near relations; and he says, the fourth degree of collateral consanguinity is the proper point to stop at; that the marriage of cousin-german or first-cousins, and who are collaterals in the fourth degree according to the computation of the civilians, and in the second degree according to the canon law, is lawful, and the civil law properly established the fourth of the first degree that could match with decency. The Territorial Act of Michigan, of April, 1832, stops at the fourth degree, by prohibiting marriages nearer than first-cousins.

(*d*) By the statute of 5 and 6 Wm. IV. c. 54, marriages between persons within

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[1] The subject of the Levitical degrees, as affecting the validity of marriages, has been

Wightman v. *Wightman*, (*a*) that marriages between brothers and sisters in the collateral line were equally, with those between persons in the lineal line of consanguinity, unlawful and void, as being plainly repugnant to the first principles of society, and the moral sense of the civilized world. It would be difficult to carry the prohibition farther without legislative sanction; and it was observed, in the case last referred to, that in New York, independent of any positive institution, the courts would not probably be authorized to interfere with marriages in the collateral line beyond the first degree computed according to the canon law, especially as the Levitical degrees were not *84 considered * to be binding as a mere municipal rule of obedience. (*b*)[1] The Napoleon code (*c*) has adopted precisely the same extent of prohibition, as forming the impassable line between lawful and incestuous marriages; and though the probibition goes deeper into the collateral line, yet the government reserved to itself the power to dispense, at its pleasure, with such further prohibitions. It is evident that the compilers of that code considered the marriage between collaterals in the first degree of consanguinity, prohibited by a rule which was

the prohibited degree of consanguinity or affinity, are declared to be absolutely null and void. Before that Act, such marriages were voidable only by sentence of the ecclesiastical court, pronounced in the lifetime of both the parties. The English statute has not declared what are the prohibited degrees, and we are to look for the Levitical degrees as interpreted by the canon law, and by the statutes of 25 Hen. VIII. c. 22, and 32 Hen. VIII. c. 38, and the table of degrees established by Archbishop Parker in 1563. See Shelford on Marriage and Divorce, ch. 3, sec. 1.

(*a*) 4 Johns. Ch. Rep. 343.

(*b*) By the New York Revised Statutes, vol. ii. p. 139, sec. 3; Ibid. 688, sec. 12, marriages between relatives in the ascending and descending lines, and between brothers and sisters of the half as well as of the whole blood, is declared to be incestuous and void. Such incestuous marriages, and also adultery and fornication committed by such relatives with each other, are indictable, and punishable by imprisonment for a term not exceeding ten years. This is also the law in Massachusetts; and the punishment by imprisonment extends to adultery and fornication committed by any one. Mass. Revised Statutes, 1836, part 4, tit. 1, ch. 130.

In Portugal, the marriage of an uncle and niece is permitted, and not unusual. Maria I. married her father's brother.

(*c*) Nos. 161, 162.

much discussed in a late English case. Reg. *v.* Chadwick, 12 Eng. Jurist Rep. p. 174, 1848. 63 Eng. C. L. 205.

[1] Marriage of a man with his mother's sister is not void by the laws of nature. Sutton *v.* Warren, 10 Met. R. 451. The marriage of a man with the daughter of his sister has been held to be *voidable* by the laws of God. Bonham *v.* Badgley, 2 Gilm. R. 622.

of absolute, uniform, and universal obligation; because, as to the prohibition between brothers and sisters, the sovereign had no dispensing power. In England, the question was considered by the court of delegates in the case of *Butler* v. *Gastrill;* (*a*) and though the court did not agree to admit marriages between brothers and sisters to be against the law of nature, as marriages were so considered between parties connected in the lineal line; yet they admitted them to be against the law of God, and against good morals and policy. In Louisiana, marriages are prohibited among collateral relations, not only between brother and sister, but between uncle and the niece, and the aunt and the nephew. (*b*) It is not consistent with my purpose to pursue this inquiry more minutely. The books abound with curious discussions on the limitations which ought to be prescribed; and in the English cases, in particular, to which I have referred, the courts *bestowed immense *85 labor, and displayed profound learning in their investigations on the subject. (*c*)

(*a*) Gilbert's Eq. Rep. 156.

(*b*) Civil Code, art. 97. In Ohio, marriages are unlawful between nearer of kin than first-cousins. Revised Statutes of Ohio, 1831. In North Carolina, marriages between persons nearer of kin than first-cousins are declared to be void. Laws of 1852, ch. 16.

(*c*) Whether it be proper or lawful, in a religious or moral sense, for a man to marry his deceased wife's sister, has been discussed by American writers. Mr. N. Webster, in his Essays published at Boston, in 1790, No. 26, held the affirmative. Dr. Livingston, in his Dissertation, published in New Brunswick, in 1816, and confined exclusively to that point, maintained the negative side of the question. The Rev. Dr. S. E. Dwight has also, in his Hebrew Wife, a treatise published in 1836, maintained, with much biblical learning and great zeal, that the marriage of a deceased wife's sister was unlawful and incestuous under the Levitical law; and that the biblical law of incest was of general moral obligation, and binding on the whole gentile world. This is the adjudged law in England, and a marriage between a man and his deceased wife's sister is held to be incestuous and void. Hill *v.* Good, Vaugh. Rep. 302. Harris *v.* Hicks, 2 Salk. 548. Ray *v.* Sherwood, 1 Curteis, 173, in the arches court, and affirmed, on appeal, in 1837. 1 Moore, Privy Council R. 395, 396. Shelford on Marriage and Divorce, pp. 172, 178. It is said that marriage with the sister of a deceased wife is lawful in Prussia, Saxony, Hanover, Baden, Mecklenburg, Hamburg, Denmark, and most of the other Protestant states of Europe. In most Catholic countries such marriages are formally prohibited, but dispensations easily obtained. Hayward's Remarks on the Law regarding Marriage with the Sister of a Deceased Wife, London, 1845. In that pamphlet it is shown, upon very strong reason and authority, that the prohibitions in the Levitical law do not reach the case.

(5.) The consent of parents and guardians to the marriage of minors is not requisite to the validity of the marriage.[1] In New York, there was no statute provision in the case until 1830, and marriages were left without parental restraint to the freedom of the common law, and, consequently, with as few checks on the formation of the marriage contract as in any part of the civilized world. (*a*) The matrimonial law of Scotland and of Ireland is equally loose, (*b*) and so was the English law prior to the statute of 26 Geo. II. ch. 33. That statute, among other things, declared all marriages under licenses, when either of the parties were under the age of twenty-one years, if celebrated without publication of bans, or without the consent of the father, or unmarried mother, or guardian, to be absolutely null and void. (*c*) The English statute pursued the policy of the

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It is not my object to meddle with that question; but such a marriage is clearly not incestuous, nor invalid by the municipal law of New York, though it be unlawful in England and in some of the American states. In 1843, a proposition was made and discussed in the British House of Commons, for a law to legalize the marriage of widowers with their deceased wives' sisters, but it was rejected. In Virginia, in 1830, in the case of The Commonwealth *v.* E. & K. Perryman, marriage with a brother's widow was held illegal under the statute code, and it was judicially dissolved. 2 Leigh's Rep. 717. Act of 1792, R. C. Virginia, vol. i. 274. In Massachusetts, the marriage between a man and his deceased wife's sister was formerly lawful. (Parsons, Ch. J., 6 Mass. Rep. 379.) And so it continues to be by the Revised Statutes, 1836, p. 475. The Rev. Doctor Mathews, of New York, in an able argument in favor of the lawfulness of marrying a deceased wife's sister, delivered before the general synod of the Reformed Dutch Church, in June, 1843, states, that in every state in the Union, except Virginia, such marriages are allowed to be lawful. But marriages of this kind, though prohibited by positive law in one state, would be regarded as valid in that and every other state, if made in a state or country where no such prohibition exists. The rule is, however, subject to this limitation, that if a foreign state should allow marriages clearly incestuous by the law of nature, they would not be allowed to have validity elsewhere. Greenwood *v.* Curtis, 6 Mass. Rep. 378.

(*a*) See *infra*, art. 6, from p. 86 to p. 92, showing statute regulations in the several states as to marriage, and requiring the consent of parents and guardians; but they do not make void the marriage without that consent, and only impose penalties on the persons pronouncing the marriage without that consent.

(*b*) Erskine's Inst. vol. i. pp. 89–91, (6th. edit. 61.) M'Douall's Inst. vol. i. p. 112. 2 Addams's Rep. 375. 1 Ibid. 64. Shelford on Marriage and Divorce, p. 91.

(*c*) In Brealy *v.* Reed, 2 Curteis, 833, in the consistory court of London, a mar-

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[1] A condition in a legacy or devise, restraining marriage, is valid in respect to the testator's widow, but is not valid as to any other woman. Lloyd *v.* Lloyd, 10 E. L. & Eq. Rep. 139.

civil law, and of the law of the present day in many parts of Europe, in holding clandestine marriages to be a grievous evil, so far as they might affect the happiness of families and the control of property. (a) Though *the Roman law *86 greatly favored marriages by the famous *jus trium liberorum*, allowing certain special privileges to the parent of three or more children; yet it held the consent of the father to be indispensable to the validity of the marriage of children, of whatever age, except where that consent could not be given, as in cases of captivity, or defect of understanding. (b) Parental restraints upon marriage existed likewise in ancient Greece, (c) and they exist to a very great extent in Germany, (d) Holland, (e) and France. (f) The marriage of minors, under these European regulations, is absolutely void, if had without the consent of the father or mother, if she be the survivor; and the minority in France extends to the age of twenty-five in males

riage was pronounced null by reason of omission of the middle christian name of the husband in the publication of bans, wilfully and knowingly with the consent of the parties, and for a clandestine purpose.

(a) The statute of 4 Geo. IV. c. 76, which reënacted most of the provisions of the statute of Geo. II., punishes clandestine marriages by loss of property, but does not violently make void the contract, when some of the provisions of the statute are broken through. See 1 Addams's Rep. 28, 94, 479. Rex v. Inhabitants of Birmingham, 8 Barnew. & Cress. 29, and *infra*, p. 90. In Wiltshire v. Wiltshire, Haggard's Eccl. Rep. vol. iii. p. 332, it was held, that a marriage by bans, where, by the consent of both parties, one of the christian names of the man (a minor) was omitted for the purpose of concealment, was null and void under the statute. In England, filing a bill in chancery in behalf of an infant, makes her a *ward of the court*, and marrying such an infant without the consent of the court is a contempt of the court in all concerned, and the contempt will not be discharged until a proper settlement be made for the wife. See this point well examined in Shelford on Marriage and Divorce, pp. 309–322.

(b) Inst. 1, 10. Dr. Taylor's Elements of the Civil Law, 310–313. If the parent unreasonably withheld his consent, he might be compelled by the governor of the province, at the instance of the child, to give it. Dig. 23, 2, 19.

(c) Potter's Greek Antiq. vol. ii. pp. 270, 271.

(d) Heinec. Elem. Jur. Ger. lib. 1, sec. 138. Turnbull's Austria, vol. ii. ch. 7, says that the necessity of certificates of *education*, to warrant marriage, is a great impediment to the celebration of marriages.

(e) Van Leeuwen's Com. on the Roman Dutch Law, p. 73.

(f) Pothier, Traité Du Contrat de Mar. Nos. 321–342. Code Napoleon, Nos. 148–160. Touiller, Droit Civil Français, tom. i. pp. 453–463. But a marriage in *France*, by a British subject, *under the age of twenty-five*, and with a French woman, is held

and twenty-one in females, and even after that period the parental and family check continues in a mitigated degree.

(6.) No peculiar ceremonies are requisite by the common law to the valid celebration of the marriage. The consent of the parties is all that is required; and as marriage is said to be a contract *jure gentium*, that consent is all that is required by natural or public law. (*a*) The Roman lawyers *87 *strongly inculcated the doctrine, that the very foundation and essence of the contract consisted in consent freely given, by parties competent to contract. *Nihil proderit signasse tabulas, si mentem matrimonii non fuisse constabit. Nuptias non concubitus, sed consensus facit.* (*b*) This is the language equally of the common (*c*) and canon law, and of common reason.

If the contract be made *per verba de præsenti*, and remains without cohabitation, or if made *per verba de futuro*, and be followed by consummation, it amounts to a valid marriage in the absence of all civil regulations to the contrary, and which the parties (being competent as to age and consent) cannot dissolve, and it is equally binding as if made *in facie ecclesiæ*. (*d*) [1]

valid in England, where there is no such restriction. At least the court would not allow the marriage to be impeached, when the marriage was solemnized according to the directions of an English statute. Lloyd *v.* Petitjean, 2 Curteis, 251.

(*a*) Grotius, b. 2, ch. 5, sec. 10. Bracton, lib. 6, ch. 5, sec. 7.

(*b*) Dig. 35, 1, 15. Id. 24, 1, 13. Id. 50, 17, 30. Code 5, 4, 9, and 22.

(*c*) Co. Litt. 33, a.

(*d*) The Supreme Court of the United States, in Jewell *v.* Jewell, 1 How. U. S. 219, were equally divided in respect to the above paragraph or proposition in the text, and gave no opinion.[2] The case came up on error from the Circuit Court in South Carolina. So, in the case of The Queen *v.* Millis, 10 Clark & Finnelly, p. 534, on appeal from Ireland to the House of Lords, the lords were equally divided on the same question. Lord Brougham, Lord Denman, Ch. J., and Lord Campbell being in favor of the validity of the marriage at common law, and Lord Ch. Lyndhurst, Lord Cottenham, and Lord Abinger, against it. The question had been referred by the lords to

[1] In Turpin *v.* The Public Administrator, 2 Bradford, Rep. 424, the learned surrogate of New York doubted whether a contract *per verba de futuro, cum copula*, constitutes a marriage in New York. And in Cheney *v.* Arnold, 15 N. Y. Rep. (1 Smith) 345, the Court of Appeals held that a contract to marry *per verba de futuro*, though followed by cohabitation, does not amount to a marriage in fact, and never constituted a valid marriage at common law. This decision may be supposed to settle the question in New York.

[2] But see Parsons on Contracts, vol. i. p. 560.

There is no recognition of any ecclesiastical authority in forming the connection, and it is considered entirely in the light of a civil contract. This is the doctrine of the common law, and also of the canon law, which governed marriages in England prior to the Marriage Act of 26 Geo. II.; and the canon law is also the general law throughout Europe as to marriages, except where it has been altered by the local municipal law. (*a*)

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the judges, and Lord Ch. J. Tindal, in behalf of the judges, gave their unanimous opinion against the validity of the marriage and held, that by the law of England, as it existed at the time of the Marriage Act, a contract of marriage *per verba de præsenti* was indissoluble between the parties themselves, and afforded to either of them, by application to the spiritual court, the power of compelling the solemnization of an actual marriage; but that such contract never constituted a full and complete marriage in itself, unless made in the presence and with the intervention of a minister in holy orders. The civil contract and the religious ceremony were both necessary to a perfect marriage by the common law. The question was most elaborately and learnedly discussed. Catherwood v. Caslon, 13 Meeson & Welsby, 261, S. P.[1]

(*a*) Bunting *v.* Lepingwel, 4 Co. 29 S. C. Sir F. Moore, 169. Jesson *v.* Collins, 6 Mod. Rep. 155. 2 Salk. Rep. 437, S. C. Dalrymple *v.* Dalrymple, 2 Hagg. Consist. Rep. 54, 64. Lautour *v.* Teesdale, 8 Taunt. Rep. 830. Fenton *v.* Reed. 4 Johns. Rep. 52. Londonderry *v.* Chester, 2 N. H. Rep. 268. Rose *v.* Clark, 8 Paige's Rep. 574. State *v.* Patterson, 2 Iredell's N. C. Rep. 346. Swinburne on Espousals, sec. 4, cited by Sir Wm. Scott, in Lindo *v.* Belisario. 1 Hagg. Consist. Rep. 232; and see, also, Swinburne on Wills, part 1, ch. 10, sec. 12, and Sir Wm. Scott's opinion in the above case; and in Dalrymple *v.* Dalrymple, *supra*, to the point in the text, that by the canon law, prior to or in the absence of any civil regulations to the contrary, a private marriage, without solemnity, duly attested, and by mutual engagement or betrothment, was good and valid in law without confirmation, and without the intervention of a priest; and by the late statute of 6 and 7 Wm. IV. c. 85, sec. 20, marriages may be solemnized in places registered for the purpose, in the presence of some registrar and two witnesses, according to any forms and ceremonies at the pleasure of the parties. So the English Marriage Act of 1653 treated marriages as a civil contract, to be solemnized before a justice of the peace. It is very clear, that the marriage contract is valid and binding, if made by words *de præsenti*, though it be not followed by cohabitation. M'Adam *v.* Walker, 1 Dow's Rep. 148. Jackson *v.* Winne, 7 Wendell, 47. And it is equally clear, that a promise to marry, given and accepted, with subsequent cohabitation—*subsequente copula*—and without any circumstances to disconnect the mutual promise from the cohabitation, and where there was no previous illicit connection, and marriage was really intended by the parties, is a valid marriage, if made between infants of the respective ages of fourteen and twelve. Shelford on

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[1] The Court of Queen's Bench in Ireland pronounced for the validity of a marriage, in a case in which the bridegroom, who was a clergyman of the Established Church, had duly performed the ceremony and without the presence of witnesses. Beamish *v.* Beamish, 18 Law Rep. 523.

The only doubt entertained by the common law was, whether cohabitation was also necessary to give validity to the contract. It is not necessary that a clergyman should be present to give validity to the marriage, though it is doubtless a very becoming practice, and suitable to the solemnity of the occasion. The consent of the parties may be declared before a magistrate, or simply before witnesses, or subsequently confessed or acknowledged, or the marriage may even be inferred from continual cohabitation, and reputation as husband and wife, except in cases of civil actions for adultery, or in public prosecutions for bigamy or adultery, when actual proof of the marriage is required.[1] Illicit intercourse or concubinage will not raise any such legal presumption of marriage. (a)[2] This facility in forming the

Marriage and Divorce, pp 29, 989, edit London, 1841, and the authorities there cited. This is the rule in the Scotch law, though Lord Chancellor Brougham, in a case on appeal to the House of Lords, exceedingly regretted it. Honyman v. Campbell, 2 Dow & Clarke's Rep. 265. The Scotch law on the formation of marriage is as loose as the common law on the subject. Many decisions in Scotland are cited to the point in Burge's Comm on Colonial and Foreign Laws, vol. i. pp 172, 173, 174. See, also, Bell's Principles of the Law of Scotland, sec. 1506 Lord Stair's Institutions of the Law of Scotland, edit. by More, 1832, vol. i. pp. 25, 26, and note B. pp. 13, 14. Id. vol. ii. 444. Evidence of David Hume, in Dalrymple v. Dalrymple, 2 Hagg. Consist. Rep App. pp. 64, 65.

(a) 1 Salk. Rep. 119. 4 Burr. Rep. 2057. 1 Blacks. Rep. 632 Doug. Rep. 171. The King v. Stockland, Burr. Sett Cases, 509. Wilkinson v. Payne, 4 Term Rep. 468. Cunningham v. Cunningham, 2 Dow Rep. 482. M'Adam v. Walker, 1 Dow's Rep. 148. Fenton v. Reed, 4 Johns. Rep. 52. Jackson v. Claw, 18 Johns. Rep. 346. Ford, J., Halsted's Rep. 18, 19. Hantz v. Sealy, 6 Binney, 405. Doe v. Fleming, 12 J. B. Moore's Rep. 500. Rose v. Clark, 8 Paige's Rep. 574. Lord Kenyon said, in Read v. Passer, 1 Esp. Rep. 213, that a marriage might be inferred from circumstances mentioned in the text, without a register, as well since as before the Marriage

[1] Cohabitation, common reputation, &c. are received merely as evidence of marriage, and may be rebutted by other testimony. Clayton v. Wardell, 4 Comst. R. 230. Weatherford v. Weatherford, 20 Ala. 548. Parties who had lived together twenty years, and were husband and wife by common reputation, were recognized as such by the court, though no marriage ceremony had ever taken place. Hicks v. Cochran, 4 Edw. Ch. 107. Donnelly v. Donnelly, 8 B. Mon. 113. Caujolle v. Ferrie, 26 Barb. (N. Y.) 177. Tummalty v. Tummalty, 3 Bradf. (N. Y.) 369. Grotgen v. Grotgen, 3 Bradf. (N. Y.) 373. Hyde v. Hyde, 3 Bradf. (N. Y.) 509. Ferrié v. Public Administrator, 4 Bradf. (N. Y.) 28. Cunningham v. Burdell, 4 Bradf. (N. Y.) 343.

[2] A conditional promise of marriage, while the parties are living meretriciously, is not such a promise *per verba de futuro* as by a continuance of the relation constitutes a marriage. Cunningham v. Burdell, 4 Bradf. (N. Y.) 424.

* matrimonial contract by the common and ecclesiastical *88 law, exists in those American states where the common law has not been altered on this point, or remains in force, as in New York, South Carolina, and Kentucky. The New York Revised Statutes had, indeed, introduced and prescribed regulations for the due solemnization and proof of marriage. Marriages were directed to be solemnized only by a minister of the gospel or priest, or by a mayor, recorder, or alderman of the cities, or judge of the county courts, or a justice of the peace. Marriage, when solemnized by a minister, was to be according to the forms of his church; and when by a magistrate, without any particular form, except that the parties must solemnly declare that they take each other as husband and wife, and there must be at least one witness present, besides the minister or magistrate. The minister or magistrate was required to ascertain the names and residence of the parties, and their competency as to age, and the name and residence of the witness or witnesses, not exceeding two, if more than one be present, and to satisfy himself of the identity of the parties. It was made a

Act of 26 Geo. II. Leader v. Barry, 1 Esp. Rep. 353, S. P. It would seem to have been a question under the ecclesiastical law, prior to the English statute of 26 Geo. II., whether the contract of marriage, though followed by cohabitation, was not essentially imperfect, unless it was solemnized by the intervention of a priest. There are many cases and dicta, *pro* and *con*, in the English books, which relate to a validity of civil rights of marriage not so solemnized. They are collected in 2 Roper on Husband and Wife, Addenda, by Jacob, 445–475, and in Shelford on Marriage and Divorce, 35–38. Thus it was said that a marriage not duly solemnized would not entitle the wife to dower, (Perkins, sec. 194, 306,) nor entitle the husband to administer on his wife's estate. Haydon v. Gould, in the court of delegates, 1 Salk. Rep. 119. The intervention of a person in holy orders seems to have been assumed in the cases as a material circumstance. The King v. The Inhabitants of Brampton, 10 East. 282. Lautour v. Teesdale, 8 Taunt. Rep. 830. The intervention of a priest was required by the Church of Rome in a decree of the Council of Trent. Before Pope Innocent III., marriage was totally a civil contract. The intervention of a priest to solemnize the contract was merely *juris positivi*; and these private contracts of marriage, as Blackstone observes, (1 Comm. 439,) were "valid marriages to many purposes." In North Carolina, in the case of The State v. Samuel, 2 Dev. & Bat. 177, 181, it was held, that a contract of marriage in *verbis de præsenti*, though followed by cohabitation, was not a legal marriage in that state, unless celebrated by some person in a sacred office, or entered into before some one in a public station and judicial trust. Consequently the marriage of slaves, as usually existing, consisting of cohabitation merely by the permission of the owners, did not constitute the legal relation of husband and wife.

misdemeanor, knowingly to marry persons, when either is under the age of legal consent, or under any legal impediment, or wants understanding. The minister or magistrate was to furnish, on request, to either party, a certificate of the marriage, and of the above facts rendering it lawful. The certificate was to be filed with the city or town clerk where the marriage was had, or where either of the parties resided, within six months, and a due entry thereof made. (*a*) These regulations were found to be so inconvenient that they had scarcely gone into operation when the legal efficacy of them was destroyed, and the loose doctrine of the common law restored by the statute of 20th April, 1830, declaring that the solemnization of marriage *89 need not * be in the manner above prescribed, and that all lawful marriages, contracted in the manner in use before the Revised Statutes, should be as valid as if the article containing those regulations had not been passed. (*b*)

By the Scotch law, a previous publication of the intention of the parties is required, though a clandestine marriage without such public notice is still valid in law, and only subjects the parties to certain penalties. (*c*) It has been the usual practice with nations, to prescribe certain forms and ceremonies, and generally of a religious nature, as being requisite to accompany the celebration of the marriage solemnity. (*d*) In the Roman Catholic Church, marriage is elevated to the dignity of a sacrament, and clothed with religious solemnities. But in France,

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(*a*) New York Revised Statutes, vol. ii pp. 139, 140, sec. 8–19.

(*b*) This would appear to amount to a complete repeal of the above regulations, as a matter of binding obligation; and yet the same Act of the 20th of April, 1830, means to retain those prescriptions, for it makes several amendments to the original regulations, and which are incorporated into the abstract of them given in the text. The regulations amount, therefore, only to legislative *recommendation and advice*. They are not *laws*, because they do not require *obedience!* The statutes of several of the states, as Massachusetts, Connecticut, &c., direct that the justice or minister, before whom marriages shall be solemnized, shall keep a record thereof, and return the same to the town clerk to be recorded. So the statute of New York, of April 28th, 1847, c. 152, has again provided for the registry of births, marriages, and deaths within the state.

(*c*) Ersk. Inst. 91, 93. M'Douall's Inst. vol. i. p. 112.

(*d*) Selden's Uxor Ebraica, b. 2, c. 1, lib. 2, *passim*. 2 Potter's Greek Antiq. 279, 283. Dr. Taylor's Elem. 275, 278. Jewish Antiquities by Th. Lewis, vol. iii. pp. 293–304.

under the revolutionary constitution of 1791, marriage was declared to be regarded in law as a mere civil contract. The same principle was adopted in the Code Napoleon; and now, says Toullier, (a) the law separates the civil contract entirely from the sacrament of marriage, and does not attend to the laws of the church and the nuptial benediction, which bind only the conscience of the faithful. The statute of 26 George II. required all marriages in England, without special license to the contrary, to be solemnized with publication of bans in a parish church or public chapel. *In most cases, the observance of the positive municipal regulations was made necessary to the validity of the marriage; but the painful consequences of such a doctrine recommended a less severe discipline, in respect to the parties themselves and their issue. The statute of 3 George IV. relaxed the rigor of the former statute in some particulars, but that statute was repealed by the 4 Geo. IV. c. 76, which restored much of the former severity, and now forms, with some subsequent variations, the matrimonial law of England. By that statute the bans of matrimony are to be published in the parish church or chapel upon three preceding Sundays, and the marriage is to be solemnized in the same place. The marriage of a minor against the consent of parents, is not absolutely void; (b) but a wilful marriage, made knowingly by both parties, without due publication of bans, or elsewhere than in a parish church or chapel, unless under special license, or celebrated by a person not in holy orders, renders it void. (c) This last statute underwent some modifications by the Act of 6 and 7 Wm. IV. c. 85, relative to marriages not solemnized according to the rites of the Church of England, and for relief as to marriage of dissenters from the established church. (d) *90

(a) Droit Civil Français, tom. i. No. 494.

(b) See *ante*, p. 85, n. a.

(c) Dormer *v.* Williams, 1 Curteis, 870. Rex *v.* Tibshelf, 1 B. & Ad. 195. Rex *v.* Wroxton, 4 B. & Ad. 640. Stat. Geo. IV. c. 76, sec. 22. Both parties must be cognizant of the fraud under this statute. Clowes *v.* Clowes, Arches Court of Canterbury, 1842.

(d) The provisions alluded to in the text are more specially stated as follows: By the Marriage Act of 4 Geo. IV. c. 76, a marriage is absolutely null and void if any

In the states of Maine, New Hampshire, and Massachusetts, it is requisite, by statute, to a valid marriage, that it be made by publication of bans, and in the presence and with the assent of a magistrate, or a stated or ordained minister of the gospel; and if the parties be under the age of twenty-one years if a male, or eighteen if a female, the magistrate or minister is not to solemnize the marriage, without the consent of the parent or guardian, if any there be. But though a marriage without publication of bans, and without the consent of the parents or guardians, will expose the officer to a penalty for breach of the statute, yet a marriage so had would seem to be lawful and binding, provided there was the presence and assent of a magistrate or minister, and the marriage be in other respects lawful, and be consummated with a belief of its validity. (a)[1] The

person shall knowingly and wilfully intermarry, *in any other place* than a church, or such public chapel wherein bans may be lawfully published (unless by special license); or shall knowingly or wilfully intermarry without due *publication of bans*, or *license* from a person having authority to grant the same, first obtained, or shall knowingly and wilfully consent to, or acquiesce in, the solemnization of such marriage by *any person not being in holy orders*. But the subsequent statutes of 6 and 7 Wm. IV. c. 85, and c. 88, 7 Wm. IV. and 1 Vict. c. 22, and 3 and 4 Vict. c. 92, have so far modified these provisions as to allow marriages not only by *special license*, by the *surrogate's license*, and by *bans*, but also by the *superintendent's registrars certificate* without license, or by his *certificate with license*. It is declared further, that the statutes do not extend to marriages by British subjects taking place out of England, and are valid if made in the form requisite by the law of the place where the solemnization is had, and the law is understood to be the same, though the parties eloped from England on purpose to evade the English law of marriage.

(a) Milford v. Worcester, 7 Mass. Rep. 48. Londonderry v. Chester, 2 N. H. Rep. 268. Mass. Revised Statutes, 1836, p. 476. Ligonia v. Buxton, 2 Greenleaf's Rep. 102. By the early laws of the colony of New Jersey, marriage was to be preceded by publication of bans, and the omission subjected the party in default to a penalty. Leaming and Spicer's Collections, p. 235. In Indiana, marriages are required to be solemnized by a clergyman, judge, or justice, under the authority of a license from the clerk of the circuit court of the county; and if the parties be under the ages of 21 and 12, the license must not be granted, without the consent of the parents or guardians. R. Statutes of Indiana, 1838, p. 410.

[1] Parton v. Hervey, 1 Gray, 119. All the notice now required in Massachusetts is the registration of the intention of marriage in the office of the clerk, &c. of the town. The clerk gives a certificate, which is to be delivered to the minister or magistrate. Act of Mass. 1850, c. 121. And see statute of New Hampshire, passed July 14, 1864.

statute law of Connecticut (a) requires the marriage to be celebrated by a clergyman or magistrate, and requires the previous publication of the intention of marriage, and the consent of parents, if the parties be under age, and a certificate of the marriage to be recorded, and it inflicts a penalty on those who disobey the regulation; but it is the opinion of the learned author of the Treatise on the Domestic Relations, (b) that the marriage, if made according to the common law, without observing any of those statute regulations, would still be a valid marriage. This, I should infer, from the case of * *Wyckoff* v. *Boggs*, (c) to be the rule in New Jersey, where the marriage contract is under similar legislative regulations. It is the doctrine judicially declared in New Hampshire, Pennsylvania, and Kentucky,[1] and by statute in Alabama and Vermont; and the marriage is held valid as to the parties, though it be not solemnized in form, according to the requisitions of their statute law. (d) There are probably statutory provisions of a similar import in other states of the Union; and wherever they do not exist and specially apply, the contract is, everywhere in this country, (except in Louisiana,) under the government of the English common law. (e) *91

(a) Statutes of Connecticut, 1838, p. 412.

(b) Reeves's Domestic Relations, pp. 196, 200, 290.

(c) 2 Halsted's Rep. 138. See, also, the opinion of Ford, J., 6 Ibid. 20.

(d) 2 New Hampshire Rep. 268. 3 A. K. Marshall's Rep. 370. 2 Watts's Penn. Rep. 1. Toulmin's Dig. of the Law of Alabama, p. 576. Revised Statutes of Vermont, 1839, p. 318. In Pennsylvania, the statute imposes a penalty on a magistrate or minister for marrying a minor or an apprentice, without the parent's or master's consent.

(e) The statutory regulation of marriage in Ohio is essentially the same. Statutes of Ohio, 1831. The statute in that state regulating marriages, provides that parties of the ages of 18 and 14 may marry; but if the male be under 21, and the female under 18, the previous consent of the parent or guardian is requisite; and there must also be a publication of bans on two several days of public worship, in the presence of the congregation, or else a license from the clerk of the county court where the female resides; and the person who marries the parties without such publication and license, forfeits a heavy penalty. In North Carolina, a succession of statutes, in 1715, 1741, 1766, and 1778, regulated marriages, and Tennessee adopted the statute law of her parent state; and it has been adjudged, that if a marriage be celebrated without the license prescribed by statute, or, in its absence, without a lawful certificate of the

[1] Hargroves v. Thompson, 31 Miss. (2 George,) 211.

(7.) It has been a point much discussed in the English courts, whether a clandestine marriage in Scotland, of English parties, who resided in England, and resorted to Scotland with an intent to evade the operation of the English Marriage Act, could be received and considered in England as valid. Though we may not, in this country, have at present any great concern with that question, the principle is nevertheless extremely important in the study of the general jurisprudence applicable to the marriage contract.

As the law of marriage is a part of the *jus gentium*, the general rule undoubtedly is, that a marriage, valid or void by the law of the place where it is celebrated, is valid or void everywhere. (*a*) An exception to this rule is stated by Huberus, (*b*)

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publication of the bans of marriage, it is an illegal and void marriage, at least in respect to a public prosecution for bigamy. Bashaw *v.* Tennessee, 1 Yerger's Rep. 177. To marry persons without a license from the clerks of the court of ordinary, or instead thereof, without a publication of the bans of marriage three times in some public place of worship, subjects the party to a penalty in Georgia. Prince's Dig 1837, pp. 231, 649. Hotchkiss's Dig. 1845, p. 329.[1]

(*a*) Scrimshire *v.* Scrimshire, 2 Hagg. Consist. Rep. 407, 419. Harford *v.* Morris, 2 Hagg. Consist. Rep. 423–436. Lord Tenterden, in Lacon *v.* Higgins, 3 Starkie's N. P. Cases, 178. But it is not universally true, without exception, that a marriage not valid by the *lex loci*, is also invalid everywhere, for this, in certain cases of insuperable difficulty, might prevent a subject from marrying abroad. Lord Stowell, in 2 Hagg. Consist. Rep. 390, 391. Shelford on Marriage and Divorce, p. 143. An exception to the rule that a marriage valid at the place where it was contracted is valid everywhere, is the case of a marriage involving polygamy or incest, for no Christian country will recognize such marriages. Warrender *v.* Warrender, cited in a note to § 114, 9 Bligh, 112. Story on the Conflict of Laws, § 113–114.

(*b*) De Conflictu Legum, sec 8. Bouhier, Cout. de Bourg. ch. 28, p. 557, and P. Voet, de Statutis, p. 268, are cited in Story's Commentaries on the Conflict of Laws, § 123, to the same point. Burge, in his Comm. on Colonial and Foreign Laws, vol. i. 194, considers that the English decisions are not inconsistent with the doctrine in Huberus, because the going to Scotland to avoid the restraints of the English Marriage Act, and marrying, and returning forthwith to England, is not an evasion of in

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[1] In Virginia, the law requires a license for marriage, to be given by the clerk, &c., of the county, and in the case of minors, the consent of the parents, &c., must be given, in person or in writing, to the clerk. The law requires the marriage to be under the license; but no marriage solemnized by a person professing to be authorized, shall be adjudged invalid if the marriage be in other respects lawful, and be consummated in the belief of the parties that they are lawfully married. Rev. Code of Virginia, tit. 31, ch. 108.

A similar law has been enacted in Wisconsin. Rev. Stat. ch. 30, 1849.

In Wisconsin, the age of consent to marriage is for males, 18 years, and for females, 15; while in Virginia, the age is for males, 14, and for females, 12 years.

who maintains that if two persons, in order to evade the law of Holland, which requires the consent of the guardian or curator, should go to Friesland, or elsewhere, where no such consent is necessary, and there marry, and return to Holland, the courts of Holland would not be bound, by the law of nations, to hold the marriage valid, because it would be an act *ad eversionem juris nostri.*[1] In opposition to this opinion, we have the decision of the court of delegates in England, in 1768, in * *Compton* v. *Bearcroft*, (*a*) where the parties, being English subjects, and one of them a minor, ran away, without the consent of the guardian, to avoid the English law, and married in Scotland. In a suit in the spiritual court, to annul the marriage, it was decided that the marriage was valid. This decision of the spiritual court has been since frequently and gravely questioned. Lord Mansfield, a few years before that decision of the delegates, intimated pretty strongly (*b*) his opinion in favor of the doctrine in Huberus, though he admitted the case remained undecided in England. The settled law is now understood to be that which was decided in the spiritual court. It was assumed and declared by Sir George Hay, in 1776, in *Harford* v. *Morris*, (*c*) to be the established law. The principle is, that, in respect to marriage, the *lex loci contractus* prevails over the *lex domicilii*, as being the safer rule, and one dictated by just and enlightened views of international jurisprudence. This rule was shown, by the foreign authorities referred to, by Sir Edward Simpson, in 1752, in the case of *Scrimshire* v.

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fraud of the Marriage Act, for that Act contains no express prohibition of such marriages, or provision rendering them void. In my view of the subject those Scotch marriages, between English fugitives and transient parties, are palpable evasions of the English statute, and completely within the complaint and the censure of Huberus, and the English courts carry the doctrine in support of such fraudulent marriages as far as any of the Massachusetts decisions to which the learned author refers.

(*a*) Buller's N. P. 114. 2 Hagg. Consist. Rep. 443, 444, and note, S. C.

(*b*) Robinson *v.* Bland, 2 Burr. Rep. 1077.

(*c*) 2 Hagg. Consist. Rep. 428–433. Doe *v.* Vardill, 5 Barnew. & Cress. 438, S. P.

[1] The same principle is established by statute in Massachusetts. But if a marriage be valid where made, and be not contracted in fraud of an express statute, or void by the law of nature, it will be treated as valid in another state, when it would, by its general law, be void if contracted there. Sutton *v.* Warren, 10 Met. R. 451.

Scrimshire, (*a*) to be the law and practice in all civilized countries, by common consent and general adoption. It is a part of the *jus gentium* of Christian Europe, and infinite mischief and confusion would ensue with respect to legitimacy, succession, and other rights, if the validity of the marriage contract was not to be tested by the laws of the country where it was made. This doctrine of the English ecclesiastical courts was recognized by the Supreme Court of Massachusetts, in *Medway* v. *Needham;* (*b*) and though the parties, in that case, left the state on purpose to evade its statute law, and to marry in opposition to it, and being married, returned again, it was held that the *93 *marriage must be deemed valid, if it be valid according to the laws of the place where it was contracted, notwithstanding the parties went into the other state with an intention to evade the laws of their own. It was admitted that the doctrine was repugnant to the general principles of law relating to other contracts; but it was adopted in the case of marriage, on grounds of policy, with a view to prevent the public mischief and the disastrous consequences which would result from holding such marriages void. It was hinted, however, that this comity, giving effect to the *lex loci,* might not be applied to gross cases, such as incestuous marriages, which were repugnant to the morals and policy of all civilized nations. (*c*) This comity has been carried so far as to admit the legitimacy of the issue of a person who had been divorced *a vinculo* for adultery, and who was declared incompetent to remarry, and who had gone to a neighboring state, where it was lawful for him to remarry, and there married. (*d*)

(*a*) 2 Hagg. Consist. Rep. 412–416. See, also, Story's Commentaries on the Conflict of Laws, § 123, *et seq.;* and Lord Stowell, in Dalrymple *v.* Dalrymple, 2 Hagg. Consist. Rep. 59. J. Voet. ad Pand. 23, 2, 4. Merlin's Rép. tit. Mariage, sec. 1.

(*b*) 16 Mass. Rep. 157. Putnam *v.* Putnam, 8 Pick. Rep. 433, S. P.

(*c*) See, also, Greenwood *v.* Curtis, 6 Mass. Rep. 358. Huber. de Conf. Leg. lib. 1, tit. 3, § 8. Heinec. Elem. Jur. Nat. et Gent. lib. 2, c. 2, sec. 41, S. P.

(*d*) West Cambridge *v.* Lexington, 1 Pick. Rep. 506. A person was disabled from remarrying by the laws of Kentucky, and yet his marriage in Tennessee was held valid there, for penal laws have no ex-territorial force. Dickson *v.* Dickson, 1 Yerger, 110. But in Conway *v.* Beazley, 3 Hagg. E. Rep. 639, the *lex loci contractus* as to marriage, was held not to prevail under the law of the domicil, when either of the contracting parties were under a legal incapacity to contract by the law of the domicil.

Huberus, De Conflictu Legum, lib. 1, tit. 3, sec. 8, also admits that an incestuous connection formed abroad, is not to be recognized; nor will the English courts, while they recognize the validity of foreign marriages, admit the legal consequences abroad of a foreign marriage, such as the legitimation of ante-nuptial offspring. Doe *v.* Vardill, 5 Barnew. & Cress. 428. See *infra*, 209. The Massachusetts Revised Statutes of 1836 have altered the law in this respect in that state, by declaring that if persons *resident in that state* contract marriage contrary to the provisions of the statute law, and, *in order to evade them*, go out of the state and marry, and return and reside there, such marriage is declared void within the state. By the French Civil Code, No. 63, publication of bans is to precede marriage; and by the article No. 170, if a Frenchman marries in a foreign country, the same regulation is still to be observed; and yet according to Toullier, Droit Civil Français, tom. i. No. 578, and note, Ibid., the omission to comply with the prescribed publication does not render the marriage void, whether celebrated at home or abroad. But if the marriage of a Frenchman abroad be within the age of consent fixed by the French code, though beyond the age of consent fixed by our law, it would seem that the marriage would not be regarded in France as valid, though valid by the law of the place where it was celebrated. The French code, No. 170, requires the observance, by Frenchmen, of the ordinances of that code, though the marriage be abroad, for personal laws follow Frenchmen wherever they go. Toullier, Droit Civil Français, tom. i. Nos. 118 and 576. Répertoire de Jurisprudence, tit. Loi, sec. 6. It was testified by the French consul at London, in Lacon *v.* Higgins, 2 Dowling & Ryland, N. P. Cases, 38, that a marriage in France, contrary to the prescribed solemnities in arts. 63, 64, 74, of the Code Napoleon, would be absolutely null and void. Mr. Justice Story, in his Com. on the Conflict of Laws, § 124, justly questions the wisdom of these stern and unrelenting rules of the French code.

The incidents to marriage respecting rights and property under the operation and collision of foreign and domestic law, have been a fruitful source of discussion among foreign jurists. Their refinements and speculations have been examined by Mr. Justice Story, (Com. on the Conflict of Laws, ch 6.) and he draws the following conclusions from a survey of the writings and cases, foreign and domestic, relating to the subject: (1.) That where there is marriage in a foreign country, and an express nuptial contract concerning personal property, it will be sustained everywhere, unless it contravenes some positive rule of law or policy. But as to real property, it will be made subservient to the *lex rei sitæ*. (2.) Where such a contract applies to personal property, and there is a change afterwards of the matrimonial domicil, the law of the actual domicil will govern as to future acquisitions. (3.) If there be no such contract, the matrimonial domicil governs all the personal property everywhere, but not the real property. (4.) The matrimonial domicil governs as to all acquisitions, present and future, if there be no change of domicil. (5.) If there be, then the law of the actual domicil will govern as to future acquisitions, and the law *rei sitæ* as to real property. Story's Com. on the Conflict of Laws, § 184–187. The English law, according to Lord Eldon, (Lashley *v.* Hogg, cited in Robertson's Appeal Cases, p. 4. Selkrig *v.* Davies, 2 Rose, Bank Cases, p. 99,) is, that if there be no special contract, the law of the actual domicil, at the dissolution of the marriage, governs as to all the property, whether acquired before or after the change of the matrimonial domicil. But if there was no change of the matrimonial domicil, the law of that domicil governed the personal property, wherever acquired and wherever situated. This is also the law in Louisiana. Saul *v.* His Creditors, 17 Martin's Rep. (5 N. S.) 569, 603–5; and it is a principle which best harmonizes with the analogies of the common law.

Story's Com. § 171, *et seq*. The foreign jurists do not generally agree to these conclusions, but they insist that the change of domicil after marriage does not change the law of the matrimonial domicil, as to past or future acquisitions. (Story's Com. § 160–170.) But it is agreed that nuptial contracts follow the parties into foreign countries, and bind them. Murphy *v.* Murphy, 5 Martin's Rep. 83. Decouche *v.* Savetier, 3 Johns. Ch. Rep. 190. Story's Com. § 189. If, however, the marriage takes place in a foreign country *in transitu*, and where the parties had no intention of fixing their domicil, the law of the actual or intended domicil of the parties governs the case as to the incidents of marriage; and it is the general rule, that if the husband and wife had different domicils when they married, the domicil of the husband became the true and only matrimonial domicil. Le Breton *v.* Nouchet, 3 Martin's Rep. 60. Ford's Curator *v.* Ford, 14 Ibid. 574. This is the opinion of all the foreign jurists. Story's Com. § 191–199.

LECTURE XXVII.

OF THE LAW CONCERNING DIVORCE.

WHEN a marriage is duly made, it becomes of perpetual obligation, and cannot be renounced at the pleasure of either or both of the parties. It continues, until dissolved by the death of one of the parties, or by divorce.

(1.) *Of Divorce a vinculo.*

By the ecclesiastical law, a marriage may be dissolved and declared void *ab initio*, for canonical causes of impediment, existing previous to the marriage. Divorces *a vinculo matrimonii*, said Lord Coke, (*a*) are *causa præcontractus*, *causa metus*, *causa impotentiæ seu frigiditatis*, *causa affinitatis*, *causa consanguinitatis*. We have seen how far a marriage may be adjudged void, as being procured by fear or fraud, or contracted within the forbidden degrees. The courts in Massachusetts, Delaware, Ohio, North Carolina, Alabama, Illinois, and probably in other states, are authorized by statute to grant divorces *causa impotentiæ;* and in Connecticut, imbecility has been declared sufficient to dissolve a marriage on the ground of fraud. (*b*) The canonical disabilities, such as consanguinity, and affinity, and corporeal infirmity, existing prior to the marriage, render it voidable only, and such marriages are valid for all civil purposes, unless sentence of nullity be declared in the lifetime of the parties; and it cannot be declared void for those causes after the death of either party. (*c*) *But the civil disabilities, such as a prior marriage, or idiocy, make the contract void, *ab initio*, and the union meretricious. (*d*) In New York it was adjudged, *96

(*a*) Co. Litt. 235, a.

(*b*) Benton *v.* Benton, 1 Day's Rep. 111. Dane's Abr. of American Law, ch. 46, art. 9, sec. 14. Revised Laws of Illinois, 1833.

(*c*) 1 Blacks. Com. 434, 435. Bury's case, 5 Co. 98, b. 2 Phill. Rep. 19.

(*d*) Elliott *v.* Gurr, 2 Phillimore's Rep. 16. Rex *v.* Inhabitants of Wroxton, 4 Bar.

in *Burtis* v. *Burtis*, (*a*) that corporeal impotence was not, under the existing laws, a cause of divorce, and that the English law of divorce on that point had never been adopted. The new French code will not allow such an allegation by the husband; (*b*) and Toullier (*c*) condemns a decree of divorce, *causa impotentiæ*, which was pronounced in France, in 1808, as contrary to the spirit of the code, and leading to scandalous inquiry.

Since the New York decision above mentioned, the jurisdiction of the Court of Chancery on this subject has been enlarged, and the New York Revised Statutes have authorized the chancellor, on a suit before him by bill, to declare void the marriage contract: 1. If either of the parties, at the time of the marriage, had not attained the age of legal consent. 2. If the former husband or wife of the party was living, and the marriage in force. 3. If one of the parties was an idiot or lunatic. 4. If the consent of one of the parties was obtained by force or fraud. 5. If one of the parties was physically incapable of entering into the marriage state. All issues upon the legality of a marriage,

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& Adolph. 640. By the Massachusetts Revised Statutes, 1836, p. 479, all marriages prohibited by law on account of consanguinity or affinity, or when the former wife or husband is living, or when either party was at the time insane, or an idiot, or between a white person and a negro, Indian, or mulatto, are declared to be absolutely void, without a decree of divorce, or other legal process; though, if the case be doubtful in point of fact, a libel for divorce may be filed and prosecuted. So, if persons marry under the age of consent, and separate during such nonage, and do not cohabit afterwards, the marriage is void without any decree of divorce. Divorce *a vinculo* may be decreed for adultery or impotency in either party, or when either is sentenced to confinement in the state prison. The issue of any marriage declared null by decree, on account of consanguinity or affinity, or of any marriage between a white person and a negro, Indian, or mulatto, are to be deemed illegitimate. It is otherwise upon the dissolution of a marriage on account of nonage, insanity, or idiocy. So the issue is also legitimate if the marriage be dissolved for bigamy, provided the second marriage was contracted in good faith, and with the full belief that the former husband or wife was dead. So, in Vermont, marriages prohibited by law, on account of consanguinity or affinity, or on account of a former wife or husband living, are absolutely void, without legal process or decree. A libel for the purpose may be filed in doubtful cases. If the marriage be declared void on account of consanguinity or affinity, the issue is to be deemed illegitimate. See Revised Statutes of Vermont, 1839, p. 322; and I take the occasion to observe, that this new revised code of Vermont does credit to the learning, judgment, and taste with which it was prepared, digested, and published.

(*a*) 1 Hopkins's Rep. 557.

(*b*) Code Civil, art. 313.

(*c*) Droit Civil Français, tom. i. No. 525.

except where it is sought to be annulled on the ground of the physical incapacity of one of the parties, are to be tried by a jury upon the award of a feigned issue. (*a*)

It is further provided, that a marriage shall not be annulled for the first cause above mentioned, on the application of a party who was of legal age at the time of the marriage, or if the parties, after they had attained the age of consent, had for any time freely cohabited as husband and wife. It may be annulled for the second cause on the application of either *party during the life of the other; but if it was contracted in good faith, and with the full belief of the parties that the former husband or wife was dead, the issue thereof shall be entitled to succeed to the estate of the parent equally as legitimate children. It may be annulled for the third cause, on the application of any relative of the idiot or lunatic interested to avoid the marriage, or by his next friend. But any free cohabitation of husband and wife after the lunacy has ceased, will be a bar to the divorce; and the children of a marriage annulled on the ground of lunacy or idiocy are entitled to succeed as legitimate children. A marriage may be annulled for the fourth cause above mentioned, during the life of the parties, on the application of the party whose consent was unduly obtained, provided there has been no subsequent voluntary cohabitation as husband and wife. The custody of the issue of such a marriage is to be given to the innocent parent, and a provision for their education and maintenance may be made out of the estate of the guilty party. A marriage is to be annulled for the fifth and last cause above mentioned, only on the application of the injured party, and the suit must be brought within two years from the solemnization of the marriage. (*b*) *97

These cases are all founded on the ground of the nullity of the marriage contract, for causes existing at the time it was formed; but there is one other case in which the marriage contract may be dissolved for a cause accruing subsequently. During the period of our colonial government, for more than

(*a*) N. Y. Revised Statutes, vol. ii. 142, sec. 20. Ibid. 145, sec. 45.

(*b*) N. Y. R. S. vol. ii. 142, 143, sec. 21-33. The Revised Statutes of Vermont, 1839, pp. 322, 323, contain the same provisions as the New York statute relative to the above causes of divorce, and the jurisdiction is vested in the Supreme Court.

one hundred years preceding the Revolution, no divorce took place in the colony of New York; and for many years after New York became an independent state, there was not any lawful mode of dissolving a marriage in the lifetime of the parties, but by a special Act of the legislature. This strictness was productive of public inconvenience, and often forced *98 the parties, in cases which rendered a separation fit *and necessary, to some other state, to avail themselves of a more easy and certain remedy. At last the legislature, in 1787, authorized the Court of Chancery to pronounce divorces *a vinculo*, in the single case of adultery, upon a bill filed by the party aggrieved. As the law in New York now stands, a bill for a divorce for adultery committed by either husband or wife, can be sustained in three cases only: (1.) If the married parties are inhabitants of the state at the time of the commission of the adultery; (2.) If the marriage took place in the state, and the party injured be an actual resident at the time of the adultery committed, and at the time of filing the bill; (3.) If the adultery was committed in the state, and the injured party, at the time of filing the bill, be an actual inhabitant of the state. (*a*) If the defendant answers the bill, and denies the charge, a feigned issue[1] is to be awarded, under the direction of the chancellor, to try the truth of the charge before a jury, in a court of law. Upon the trial of the issue, the fact must be sufficiently proved by testimony independent of the confession of the party; for, to guard against all kinds of improper influence, collusion, and fraud, it is the general policy of the law on this subject not to proceed solely upon the ground of the confession of the party to a dissolution of the marriage contract. The rule, that the confession of the party was not sufficient, unless supported by other proof, was derived from the canon law, and arose from

(*a*) New York Revised Statutes, vol. ii. p. 144, sec. 38, 39. It was adjudged, in New Jersey, in the case of The State *v.* Lash, 1 Harrison's Rep. 380, that a married man is not guilty of *adultery*, in having carnal connection with an unmarried woman. In Vermont, an act of that kind, between such parties, is punished by fine and imprisonment, as in cases of adultery. Revised Statutes of Vermont, 1839, p. 443. So in Tennessee, and in some of the other states, the living together by unmarried persons, in illicit connection, is an indictable offence.

[1] Feigned issues are now abolished in New York. Code of Procedure, sec. 72.

the jealousy that the confession might be extorted, or made collusively, in order to furnish means to effect a divorce. (a)

If the defendant suffers the bill to be taken *pro confesso*, * or admits the charge, it would be equally dangerous to act upon that admission of the bill, and the statute therefore directs, that the case be referred to a master in chancery, to take proof of the adultery, and to report the same with his opinion thereon.[1] If the report of the master, or the verdict of the jury, as the case may be, shall satisfy the chancellor of the truth of the charge of adultery, he may then decree a dissolution of the marriage; but this dissolution is not, under certain circumstances, to affect the legitimacy of the children. If the wife be the complainant, the legitimacy of any children of the marriage, born or begotten of her before the filing of the bill, are not to be affected by the decree; and if the husband be the complainant, the legitimacy of children born or begotten before the commission of the offence charged, are not affected by the decree, though the legitimacy of other children of the wife may be determined by the court upon the proofs in the cause. (b) The defendant, by way of punishment for the guilt, is disabled from remarrying during the life of the other party. (c)[2]

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The statute further provides, that if the wife be the complainant, the court is to make a suitable allowance, in sound discretion, out of the defendant's property, for the maintenance of

(a) Burn's Eccl. Law, tit. Mariage, sec. 11. *Traité de l'Adultere*, par Fournel, p. 160. Pothier, *Contrat de Mariage*, Nos. 517, 518. Baxter v. Baxter, 1 Mass. Rep. 346. Betts v. Betts, 1 Johns. Ch. Rep. 197. The New York Revised Statutes, vol. ii. p. 144, sec. 36, and the Vermont Revised Statutes of 1839, p. 323, sec. 15, provide that no sentence of nullity of marriage can be pronounced solely on the declarations or confessions of the parties; but other satisfactory evidence of the existence of the facts on which the decree is to be founded, must be required.

(b) N. Y. Revised Statutes, vol. ii. p. 145, sec. 40, 41, 43, 44.

(c) Ibid. sec. 49.

[1] But no order of reference will be made, on default of the defendant to answer, unless the bill specify, with reasonable certainty, the incidents of the alleged offence. Heyde v. Heyde, 4 Sandf. 692.

[2] Cropsey v. Ogden, 1 Kern. 228. A woman married elsewhere may contract a valid marriage in Massachusetts during the life of her former husband, if the divorce were decreed in another state for acts of hers, which would not be a cause of divorce in Massachusetts. Clark v. Clark, 8 Cush. 385.

her and her children, and to compel the defendant to abide the decree.[1] The chancellor is also to give to the wife, being the injured party, the absolute enjoyment of any real estate belonging to her, or of any personal property derived by title through her, or acquired by her industry. (a) If, on the other hand, the

(a) Ibid. sec. 45, 46. Pending a suit in chancery by the wife, or in the consistory court by the husband, for a divorce, it is a general rule of ecclesiastical law that the court may, under proper circumstances, and in its discretion, allow the wife, by an order on the husband, a sum of money for carrying on the suit, as well as for immediate alimony. 2 Dickens, 498, 582. Oughton, 306, tit. 206–209, sec. 7. Earl of Portsmouth *v.* Countess of Portsmouth, 3 Addams, 63. Fournel, *Traité de l'Adult.* 365. Burn, tit. Marriage, ch. 11, sec. 8. 2 Haggard, Consist. R. 199, 201. Mix *v.* Mix, 1 Johnson's Ch. Rep. 108. Denton *v.* Denton, Ibid, 364.[2] The New York Revised Statutes, vol. ii. p. 148, sec. 58, have expressly enforced this reasonable doctrine, by declaring, that in every suit for a divorce or separation, the court, in its discretion, may require the husband to pay any sum necessary to enable the wife to carry on the suit during its pendency. But if the bill for divorce be filed by the husband, the wife will not be allowed alimony, or an order for moneys to enable her to defend the suit until she has, by answer, disclosed the nature of her defence. Lewis *v.* Lewis, 3 Johnson's Ch. Rep. 519. In North Carolina, the courts have no power to assist the wife in the above cases, *pendente lite*, and Mr. Justice Gaston questions the policy of giving any such power. Wilson *v.* Wilson, 2 Dev. & Battle, 377. I am entirely convinced, however, from my own judicial experience, that such a discretion is properly confided to the courts. In New Hampshire, alimony is understood to be a provision made to the wife upon a divorce *a vinculo;* and it is not allowed in any other case. Parsons *v.* Parsons, 9 N. H. Rep. 309.[3]

[1] But a woman who has obtained a bill of divorce *a vinculo matrimonii* for the adultery of her husband, has been held not entitled to dower after his death. Wait *v.* Wait, 4 Barb. S. C. Rep. 192. In the Court of Appeals, to which this case was subsequently (1850) carried, it was held that the wife was entitled to dower. Wait *v.* Wait, 4 Comst. 95. And in Forrest *v.* Forrest, 6 Duer, (N. Y.) 102, it was held, that a decree of alimony, on condition that the wife release her claim of dower, is improper.

[2] Daiger *v.* Daiger, 2 Maryl. Ch. 335. Coles *v.* Coles, Id. 341. Tayman *v.* Tayman, Id. 393. Begbie *v.* Begbie, 3 Halst. Ch. 98. See, too, McGee *v.* McGee, 10 Georg. 477. Alimony, *pendente lite*, was granted to the wife on her sworn answer averring her innocence of the adultery charged by the bill; Bray *v.* Bray, 2 Halst. Ch. 27; but denied where there appeared to be no foundation for the suit. 4 Halst. Ch. 640. And see Taylor *v.* Taylor, 1 Jones (Law) 528. In Lynde *v.* Lynde, 4 Sandf. Ch. 373, while a suit for divorce was pending, the court ordered the husband to pay the expense of the wife's residence in a tropical climate.

[3] Sheafe *v.* Sheafe, 4 Fost. (N. H.) 564. In Rhode Island, the court has no power to order the husband to defray the wife's expenses during the pendency of the petition. Sanford *v.* Sanford, 2 R. I. 64. Nor could alimony be granted in such a case in Massachusetts before the statute of 1855. Shannon *v.* Shannon, 2 Gray, 285. See Mass Laws, 1851, c. 82; 1855, c. 65; and the "Act in relation to Libels for Divorce," 1855, c. 137. The Court of Chancery of New Jersey has no power to decree alimony, except as concomitant with divorce or under the 10th section of the statute. (R. L. 924.) Yule *v.* Yule,

husband be the complainant, then he is entitled to retain the same interest in his wife's real estate which he would have had if the marriage had continued; and he is also entitled to her personal estate and choses in action, which she possessed at the time of the divorce, equally as if *the marriage *100 had continued; and the wife loses her title to dower, and to a distributive share in the husband's personal estate. (*a*)

These are the statute provisions in New York on the subject of a divorce *a vinculo matrimonii;* and it is requisite, if the marriage was solemnized out of the state, distinctly and certainly to make it appear upon the bill, that both parties were inhabitants of the state at the time of the commission of the adultery; or that the offence was committed within the state, and the injured party an actual inhabitant at the time of exhibiting the bill. It must also appear, if the parties were married within the state, that the complainant was an actual resident at the time of the offence and of bringing the suit; and this means that the party's domicil was here, or that he had fixed his residence *animo manendi.* (*b*) Though the fact of adultery be made

(*a*) N. Y. Revised Statutes, vol. ii. p. 146, sec. 47, 48. The Revised Statutes of Massachusetts of 1836, part 2, tit. 7, ch. 76, sec. 27, 28, and of Vermont, 1839, pp. 325, 326, give the court similar discretion on divorce, touching the care and maintenance of the minor children, and the restoration to the wife of her estate, and of alimony, if necessary, if she be the innocent party. So, in New Jersey, the jurisdiction in all cases of divorce is in the Court of Chancery, proceeding regularly by bill, as in other cases. The bill may be filed if either party was an inhabitant of the state at the time of the injury complained of; or where the marriage was in the state, and the complainant a resident therein at the time of the injury and the filing of the bill; or where the adultery was committed in the state, and either party a resident when the bill was filed. Elmer's Digest, 139.[1] In the case of Charruaud *v.* Charruaud, in Chancery, before the assistant V. C., in 1847, (New York Legal Observer, vol. i. p. 134,) it was adjudged, that upon the principles of the common law, a divorce of the wife *a vinculo* for adultery, annuls every provision made for her in marriage articles or a marriage settlement, in the nature of jointure or otherwise, as well as any provision in articles executed upon separation.

(*b*) Mix *v.* Mix, 1 Johns. Ch. Rep. 204. Williamson *v.* Parisien, Ibid. 389. N. Y. Revised Statutes, vol. ii. p. 144, sec. 38. It was declared in Indiana, by law, in 1829–1830, that the laws concerning divorce applied only to citizens who had resided a year within the state.[1] In Ohio, no petition for a divorce is sustained, unless the

2 Stockt. (N. J.) 188. Alimony, *pendente lite*, may be granted in Arkansas. Bauman *v.* Bauman, 18 Ark. 320.

[1] Wilcox *v.* Wilcox, 10 Ind. 436.

out, it does not follow, as a matter of course, that a divorce is to be awarded; for the remedy by divorce is purely a civil and private prosecution, under the control and at the volition of the party aggrieved, and he may bar himself of the remedy, in sev-

husband or wife applying has been a *bonâ fide* resident in the state for two years, and an actual resident at the time, of the country where the application is made. In that case the application is to be sustained, whether the marriage or the cause of divorce occurred within the state or elsewhere. Statutes of Ohio, 1824, 1827. In Michigan, the petitioner in equity for a divorce must have been a resident of three years. Act of April 4th, 1833. So, in North Carolina, on application for a divorce, the party applying must have resided within the state for three years immediately preceding the filing of the petition or bill,[1] unless it be in the case of a divorce *a mensa* for cruel treatment. There is this further check, that the facts forming the ground of the complaint in every case must have existed to the knowledge of the party at least six months prior to the suit. 1 N. C. Revised Statutes, 1837, p. 240. In Missouri, the petitioner for a divorce must have had a permanent residence of one year, and the cause for it must have happened within the state. R. S. of Missouri, 1835, p. 225.[2] In Maine, it is held not to be necessary as a foundation of jurisdiction in a suit for divorce, unless made so by positive statute, that the fact of adultery should have been committed within the state, in whose tribunals a decree of divorce is sought for that cause. Harding *v.* Alden, 9 Greenleaf's R. 140. The Vermont statute has wisely guarded against imposition and abuse of jurisdiction on this subject, by declaring that no divorce shall be decreed for any cause, if the parties had never lived in the state as husband and wife; nor unless the libellant had resided in the state for one year next preceding the suit; nor if the cause accrued out of the state, unless the parties had, before it occurred, lived as husband and wife in the state, nor unless one of them was then living in the state. Revised Statutes of Vermont, 1839, p. 324. So, in New Hampshire, a divorce was refused, where the parties at the time of the divorce resided out of the state. Clark *v.* Clark, 8 N. Hamp. 21.[3]

[1] This provision is not complied with by considering the domicil of the husband to be the domicil of the wife. Schonwald *v.* Schonwald, 2 Jones, Eq. (N. C.) 367.

[2] Kruse *v.* Kruse, 25 Miss. (4 Jones,) 68.

[3] A libel for a divorce from a marriage, contracted in another state, must aver that the parties resided within the state when the alleged cause of divorce arose. Batchelder *v.* Batchelder, 14 N. H. 380. Hopkins *v.* Hopkins, 35 N. H. 474.

In Rhode Island, the court may now dispense with the former requirement of three years residence, and take cognizance of petitions for divorce, if the causes of divorce occurred in that state, or were causes of divorce in the state in which they occurred. Williams *v.* Williams, 3 R. I. 185. Ditson *v.* Ditson, 4 R. I. 87. See Hare *v.* Hare, 10 Tex. 355. Harrison *v.* Harrison, 19 Ala. 499.

In Wisconsin the law on this subject is very lax. For it was decided in Hubbell *v.* Hubbell, 3 Wis. 662, that the courts of that state have jurisdiction to grant a divorce, whenever the complainant is domiciled within the state, although the marriage and causes of divorce have occurred elsewhere, and although the defendant has never been in the state or been served with process. And see Gleason *v.* Gleason, 4 Wisc. 64. As to the jurisdiction in Pennsylvania, see Bishop *v.* Bishop, 30 Penn. State R. 412. And as to Alabama, Hanberry *v.* Hanberry, 29 Ala. 719.

eral ways, by his own act. (1.) Neither party can obtain a divorce for adultery, if the other party recriminates, and can prove a correspondent infidelity. The *delictum*, in that case, must be of the same kind, and not an offence of a different character. (a) The *compensatio criminis* is the standard canon law of England in questions of divorce, and it is founded on the principle that a man cannot be permitted to complain of the breach of a contract which he had first violated; and the same principle, it is to be presumed, prevails in the United States. (b) (2.) So, if the injured * party, sub- *101 sequently to the adultery, cohabits with the other, or is otherwise reconciled to the other, after just grounds of belief in the fact, it is, in judgment of law, a remission of the offence, and a bar to the divorce.[1] This is a general principle everywhere pervading this branch of jurisprudence. (c) (3.) By active

(a) Johnson v. Johnson, 4 Paige's Rep. 460. In Eldred v. Eldred, 2 Curteis, 376, and Dillon v. Dillon, 3 Ib. 86, it was held that the wife could not set up a charge of cruelty in bar of her husband's remedy of divorce for adultery, nor will malicious desertion be a bar, said Dr. Lushington, *ubi supra*.

(b) Oughton's Ordo Judiciorum, vol. i. tit. 214. Forster v. Forster, 1 Haggard's Consist. Rep. 144. Proctor v. Proctor, 2 Ibid. 292. Chambers v. Chambers, 1 Ibid. 439. Astley v. Astley, 1 Hagg. Eccl. Rep. 714. Beeby v. Beeby, Ibid. 789. Wood v. Wood, 2 Paige's Rep. 108. Whittington v. Whittington, 2 Dev. & Battle, 64.

(c) Oughton's Ordo, *ubi supra*, Burn's Eccl. Law, tit. Marriage, sec. 11. 1 Ersk. Inst. 113, 114. Anon. 6 Mass. R. 147. Williamson v. Williamson, 1 Johns. Ch. Rep. 492. Condonation is a conditional forgiveness, and founded on a full knowledge of all antecedent guilt. Bramwell v. Bramwell, 3 Hagg. Eccl. Rep. 629. Ibid. 351. Delliber v. Delliber, 9 Conn. Rep. 233. See, also, Code Napoleon, art. 272. Civil Code of Louisiana, art. 149. Van Leeuwen's Com. on the Roman-Dutch Law, p. 84, to the same point of condonation. Condonation, or the forgiveness of the offence, is of two kinds: 1. By an express forgiveness or reconciliation; 2. A tacit remission of the offence by a return to connubial intercourse. Snow v. Snow, Consist. Court, London, The Jurist, No. 6, 1842. Condonation is not presumed as a bar so readily against the wife as against the husband, for she has not the same control. Condonation is accompanied with an implied condition, that the injury shall not be repeated; and a breach of the condition, even though committed out of the jurisdiction of the court, revives the right to remedy for the former injury. Durant v. Durant, 1 Hagg. Eccl. Rep. 733, 752, 761, 786, 793. Johnson v. Johnson, 4 Paige's Rep. 460. Burr v. Burr, 10 Paige, 20. Condonation is accompanied with this further condition in the English law, that the wife shall be treated with conjugal kindness. Durant v. Durant, *sup.* Bramwell v. Bramwell, 3 Hagg. Eccl. Rep. 635.

[1] Morrell v. Morrell, 1 Barb. S. C. Rep. 818.

procurement or passive and conscious toleration of his wife's guilty conduct (a) It is also well established, that though mere time is no bar in the case of a woman, (b) yet that lapse of time, or a long tacit acquiescence of the husband in his wife's infidelity, even without cohabitation, but without any disability on his part to prosecute, will be deemed equivalent to a *condonatio injuriæ*, and bar a prosecution for a divorce, unless the delay be satisfactorily accounted for. The husband is not to be permitted, at any distance of time, to agitate such inquiries, and especially where his tacit acquiescence continued after his wife had formed another matrimonial connection, and he slumbered, in uncomplaining silence, until she became the mother of a new race of children. (c) The statute law of New York has declared, that the court may refuse to decree a divorce, though the fact of adultery be established. (1.) If the offence was committed by the procurement or with the connivance of the complainant. (2.) If it has been forgiven, and the forgiveness proved by express proof, or by the voluntary cohabitation of the parties with the knowledge of the fact. (3.) Where *102 the suit has not been brought within five *years after the knowledge of the adultery. (4.) Or where the complainant has been guilty of the same offence. (d) All these exceptions, except the positive limitation as to time, were, as we have already seen, settled and acknowledged principles of general jurisprudence applicable to the subject.

Johnson v. Johnson, 14 Wendell, 637. A guilty connivance on the part of the wife to her husband's adultery, is not to be established without grave and conclusive proof. 3 Hagg. Eccl. Rep. 351.

(a) To constitute a bar, by the ecclesiastical law, to the husband's complaint of the adultery of the wife, arising from his presumed consent, there must be corrupt connivance on his part. He must intentionally invite or encourage licentious conduct in the wife, or be knowingly accessory or privy to the adultery. Rogers v. Rogers, 3 Hagg. Eccl. Rep. 57. Rix v. Rix, Ibid. 74. Timmings v. Timmings, Ibid. 76. Lovering v. Lovering, Ibid. 85. Moorsom v. Moorsom, Ibid 87. Crewe v. Crewe, Ibid. 129, 131, 133. Hoar v. Hoar, Ibid. 137. Gilpin v. Gilpin, Ibid. 150.

(b) Popkin v. Popkin, 1 Hagg. Eccl. Rep. 765, note.

(c) Williamson v. Williamson, *ubi supra*. Best v. Best, 2 Phillimore's Rep. 161. Mortimer v. Mortimer, 2 Hagg. Consist. Rep. 313. Whittington v. Whittington, 2 Dev. & Batt. 64.

(d) N. Y. Revised Statutes, vol. ii. p. 145, sec. 42.

The policy of New York has been against divorces from the marriage contract, except for adultery. We meet with a great variety of practice and opinion on this subject, in this country and in Europe, and among ancient and modern nations; but the stronger authority and the better policy are in favor of the stability of the marriage union. The ancient Athenians allowed divorces with great latitude; but they were placed under one important check, for the party suing for a divorce was obliged to appeal to the magistrate, state the grounds of complaint, and submit to his judgment. It was a regular action, analogous in substance to a bill in chancery; and if the wife was the prosecutor, she was obliged to appear in person, and not by a proctor. (a) The Greeks were, comparatively, exemplary in their domestic relations; but the graver Romans permitted the liberty of divorce to a most injurious and shameful degree. (b) The maxim of the civil law was, that *matrimonia debent esse libera.* Either party might renounce the marriage union at pleasure. It was termed *divortium sine causa*, or *sine ulla querela;* and the principle is solemnly laid down in the Pandects, that *bona gratia matrimonium dissolvitur.* (c) We find the Roman lawyers discussing questions of property depending upon these voluntary divorces, or in which *Titia divortium a Seio fecit; Mævia Titio repudium misit.* (d) This facility of separation tended to destroy all mutual confidence, and to inflame every trifling dispute. The abuse of divorce prevailed *in the most polished ages of the Roman republic, and it was unknown in its early history. Though the twelve tables gave to the husband the freedom of divorce, yet the republic had existed 500 years when the first instance of a divorce occurred. (e) The Emperor Augustus

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(a) Plutarch's Life of Alcibiades. Potter's Greek Antiq. 296, 297. Taylor's Elements of the Civil Law, 352, 353.

(b) It is understood that Solon at Athens, as well as Augustus at Rome, made adultery a public crime, and triable by a public prosecution.

(c) Dig. 24, 57, 62, and 64.

(d) Dig. 24, 3, 34, and 38. See, also, Heinecc. Antiq. Rom. App. lib. 1, Nos. 44 to 49, where the learning on the subject is abundant.

(e) The institutions of Romulus, tending to render the marriage union indissoluble, were very much praised by Dionysius of Halicarnassus, Antiq. Rom. lib. 2. According to Plutarch, Romulus instituted, that if the husband abandoned his wife without

endeavored by law to put some restraint upon the facility of divorce; (a) but the check was overpowered by the influence and corruption of manners. Voluntary divorces were abolished by one of the novels of Justinian, and they were afterwards revived by another novel of the Emperor Justin. (b) In the novel restoring the unlimited freedom of divorce, the reasons for it are assigned; and while it was admitted that nothing ought to be held so sacred in civil society as marriage, it was declared that the hatred, misery, and crimes, which often flowed from indissoluble connections, required, as a necessary remedy, the restoration of the old law, by which marriage was dissolved by mutual will and consent. (c) This practice of divorce is understood to have continued in the Byzantine or Eastern empire, to the 9th or 10th century, and until it was finally subdued by the influence of Christianity.

In modern Europe, divorces are not allowed in the Roman Catholic countries, because marriage is considered a *104 *sacrament, and held indissoluble during the life of the parties. This was formerly the case in France; (d) and it was the general doctrine in the Latin, though not so either in the Greek or Protestant churches. (e) But the French revolu-

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due cause, he forfeited one half of his goods to the wife, and the other half to the goddess Ceres. How beautifully Horace recommended the value and continuance of the marriage union, must be familiar to every classical scholar:

> *Felices ter et amplius,*
> *Quos irrupta tenet copula; nec malis*
> *Divulsus Querimoniis,*
> *Suprema citius solvet amor die.* Lib. 13, car. 14.

On the other hand, the Roman philosophers, poets, and satirists held up to public scorn and indignation the wanton and extreme abuse of the liberty of divorce. Seneca, de Benef. iii. 16. Martial, vi. 7. Ibid. lib. 9. Epig. 16. Juvenal, Sat. 6. v. 228.

(a) Suet. ad Aug. 34.

(b) Dict. du Dig. tit. Divorce, Nos. 617, 618. Nov. 117, c. 8, 9.

(c) Nov. 140.

(d) 2 Domat, 651. Traité de l'Adult., par Fournel, 366, 370. Traité du Contrat de Mariage, par Pothier, sec. 462, 466, 467.

(e) The canon of the Council of Trent, *de sacramento matrimonii*, in 1563, recognized the indissolubility of the marriage tie. The facility of divorces in Protestant Germany is deemed by a late well-informed traveller (Russel's Tour in Germany) to be no less injurious than the absolute indissolubility of that relation in Catholic countries. In 1817, 3000 marriages were dissolved in Prussia! The Prussian code

tion, like a mighty inundation, swept away at once the laws and usages of ages; and, at one period, the French government seemed to have declared war against the marriage contract, and six thousand divorces are said to have taken place in the city of Paris in the space of two years and three months. (*a*) The Code Napoleon regards marriage only as a civil contract, and allows divorces not only for several reasonable causes, such as adultery, and grievous injuries, to be submitted to a judicial tribunal, but also without cause, and founded merely upon mutual consent, according to the usage of the ancient Romans. This consent is subjected to several restraints, which do in fact create very great and serious checks upon the abuse of the privilege. (*b*) By the Dutch law, there are but two just causes of divorce *a vinculo*, viz: adultery and malicious desertion; (*c*) and, by the English law, a marriage, valid in its commencement, cannot be dissolved for any cause, without an Act of Parliament.(*d*)[1] This was not the case in England anciently; (*e*) and, until the 44th

of 1794, prepared and published under Frederick Wm. III., gave great and dangerous facility to divorce, by allowing it for many causes fatal to the stability and sanctity of the contract. In Austria, divorces between Protestants may be had, not only for several substantial causes, but at the request of both parties, on the ground of *unconquerable aversion*. Turnbull's Austria, vol. ii. p. 509.

(*a*) Quarterly Review, No. 56, p. 509.

(*b*) Code Napoleon, Nos. 233, 275–297. Toullier, in his commentaries on the code, cannot withhold his astonishment at the perversion of moral sentiment which prevailed, even among the enlightened and exalted jurisconsults of ancient Rome, on the subject of the right of divorce. Droit Civil Français, tom. vi. Nos. 294–298. Since the restoration of the Bourbon dynasty, the law of divorce in France has been changed, and in 1816 it was confined to a judicial sentence of separation from bed and board.

(*c*) Voet de Divortiis et Repudiis, sec. 5, lib. 24, tit. 2. So, by the Scots' law, there are two admissible causes of divorce, adultery and wilful desertion by either party. Bell's Principles of the Law of Scotland, pp. 419, 420.

(*d*) 1 Blacks. Com. 441. I observe that in the session of Parliament in 1844, four different private Acts of Parliament were passed in favor of divorces *a vinculo* in individual cases, and allowing the husband to marry again.

(*e*) Bracton, fol. 92.

[1] In England, by Stat. 20 and 21 Vict. (1857,) a court was created, called "The Court for Divorce and Matrimonial Causes," with power to decree divorces *a vinculo matrimonii*, against the wife on the ground of adultery, and against the husband for adultery coupled with incest, bigamy, rape, sodomy, bestiality, wilful desertion for two years and upwards, and such cruelty as would have entitled the wife to a divorce *a mensa et thoro*. The adulterer may be made a co-respondent and compelled to pay damages and costs, and the action for *crim. con.* is abolished. (Parties may re-marry if permitted by decree.)

Eliz., divorces *a vinculo* were allowed for adultery. But *105 in *Foliamb's* *case*, 44 Eliz., it was held, in the Star Chamber, that adultery was only a cause of divorce *a mensa et thoro*, (a) and the Archbishop of Canterbury said in that case, it had been so settled before him, on appeal, by many divines and civilians.

In some of the United States, (b) divorces are restrained, even by constitutional provisions, which require to every valid divorce the assent of two thirds of each branch of the legislature, founded on a previous judicial investigation and decision. The policy of other states is exceedingly various on this subject. In several of them (c) no divorce is granted, but by a special act of the legislature, according to the English practice;

(a) Moore's Rep. 683, pl. 942. 3 Salk. 138.

(b) Georgia, Mississippi, and Alabama. In Georgia, two concurring verdicts of special juries are conclusive on the subject of divorce, whether absolute or only limited. There had been, from 1800 to 1837, 291 legislative divorces. Prince's Dig. 2d edit. p. 187.

(c) Virginia and South Carolina. In Virginia and Kentucky, the legislatures have always referred the judicial investigation of the facts constituting a ground for divorce *a vinculo* in any given case, to the courts of justice. 3 B. Monroe, 91. In some of the states, divorces by special acts of the legislature are very common. In 1836, divorces *a vinculo* were granted by the legislature of Illinois, without any cause assigned, and in 1837 by that of Missouri; but in the latter state the equity side of the circuit courts has regular jurisdiction, conferred by statute over cases of divorce. R. S. of Missouri, 1835, p. 225. In the states generally the legislatures may, in their discretion, grant divorces in extraordinary cases, and they occasionally exercise the power. In 1846, the governor of Pennsylvania, in his message, strongly condemned the practice of granting legislative divorces.

The Congress of the United States, by an Act of the 15th of May, 1826, ch. 46, annulled several Acts passed by the governor and legislative council of the territory of Florida, granting divorces. This is an instance of a strong national condemnation of the practice of granting legislative divorces.[1]

[1] Duke *v.* Fulmer, 5 Rich. Eq. 121. In Michigan and Missouri, legislative divorces are declared to be unconstitutional. Teft *v.* Teft, 3 Mich. 67. Bryson *v.* Bryson, 17 Miss. 590. In Maryland they are said to be a legitimate exercise of legislative power. Wright *v.* Wright, 2 Md. 429. See Jones *v.* Jones, 12 Penn. 350; Gaines *v.* Gaines, 9 B. Mon. 295. In Bingham *v.* Miller, 17 Ohio, 445, the Supreme Court of that state held that the legislature had *no* power to grant divorces: and yet in view of the incalculable evils of holding all the Acts of that body, granting divorce for a long series of years, absolutely null, the court refused to treat the divorce of the parties before them as void. The present constitution of Ohio expressly declares that the General Assembly shall grant no divorces. Const. 1851, art. 11, sec. 32.

and in others (*a*) the legislature itself is restrained from granting them, but it may confer the power on the courts of justice. So strict and scrupulous has been the policy of South Carolina, that there is no instance in that state, since the Revolution, of a divorce of any kind, either by the sentence of a court of justice, or by act of the legislature. (*b*) In all the other states, divorces *a vinculo* may be granted by the courts of justice for adultery. (*c*) In New York, the jurisdiction of the court as to absolute divorces, for causes subsequent to the marriage, is confined to the single case of adultery; but in most of the other states, (*d*) in addition to adultery, intolerable ill-usage, or wilful

(*a*) Tennessee, North Carolina, Arkansas, Michigan, New Jersey, Florida, and New York.

(*b*) Desauss. South Carolina Equity Reports, vol. i. Int. p. 54. Vol. ii. p. 646.

(*c*) In Louisiana, by statute, in 1827, a divorce *a vinculo* for adultery may be obtained by judicial decree. Adams *v.* Hurst, 9 Louis. Rep. 243. The Civil Code of Louisiana, art. 133, says that the marriage may be dissolved by *a divorce legally obtained*, but it does not define the causes that will authorize it. If the action for a divorce be founded on the abandonment of the wife by the husband, proof of the abandonment for five years is requisite, and also a decree of separation from bed and board rendered two years previously. Harman *v.* M'Leland, 16 Louis. Rep. by Curry, 26.

(*d*) Maine, New Hampshire, Massachusetts, Connecticut, Vermont, New Jersey, Pennsylvania, Delaware, Ohio, Indiana, Michigan, Kentucky, Illinois, Mississippi, Missouri, North Carolina, Georgia, Alabama, &c. In 1809, wilful desertion without cause, for five years, was made the ground for a decree of divorce in the state of Maine; but the divorce was not to bar the issue from inheriting; and if the wife was the libellant, she was to be entitled to her dower. In Massachusetts, by Act of 1838, and in New Jersey, by Act of 1820, the like wilful desertion for five years, without consent, was made a ground of divorce. In Kentucky, an abandonment by the wife for one year, is good cause of divorce to the husband. Act of March 2d, 1843. In North Carolina, by statute, in 1814, the superior courts were authorized to grant divorces in two cases only. (1.) For impotency at the time of the marriage, and continuing. (2.) For adultery. But the Act of 1827 gave the courts an unlimited discretion to grant divorces, either *a vinculo*, or *a mensa et thoro*, whenever the court should be satisfied that justice required it. North Carolina Revised Statutes, 1837, vol. i. 239. This vast power and discretion were found by the Supreme Court to be exceedingly embarrassing and painful in the exercise, and of which we have a striking instance in the case of Scroggins *v.* Scroggins, 3 Dev. Rep. 540. Adultery and fornication between parties living together in that condition, are indictable offences in North Carolina and Alabama. 1 Revised Statutes of North Carolina, 1837, p. 202. Laws of Alabama, p. 224. Griffith's Law Register, h. t. 1 New Hampshire Rep. 198. Reeves's Domestic Relations, 205. Breckenridge's Law Miscellanies, 421. Laws of Vermont, edit. 1825, p. 363. Revised Laws of Illinois, 1833. Reavis *v.* Reavis, 1 Scammon's Ill. Rep. 242. Walker's Mich. Ch. R. 53. By an Act of 4th December, 1833, in Illinois, the courts of chancery were authorized, in addition to

desertion, or unheard-of absence, or habitual drunkenness, or some of them, will authorize a decree for a divorce *a vinculo*, or from bed and board, under different modifications *106 *and restrictions.[1] The question of divorce involves in-

the already assigned causes for a divorce, upon pleadings and proofs, to decree divorces, *a vinculo*, "if they should be satisfied of the expediency of making such a decree."[2]

In Indiana and Missouri, divorces *a vinculo* are granted for impotency, former subsisting marriage, adultery, abandonment by either party for two years, condemnation for a felony, barbarous and inhuman treatment by the husband, or his habitual drunkenness for two years, and also "in any other case where the court, in their discretion, shall consider it reasonable and proper that a divorce should be granted." 2 Blackf. Ind. Rep. 408. Revised Statutes of Indiana, 1838, p. 242. R. S. of Missouri, 1835, p. 225. In Tennessee, under the Act of 1799, a divorce *a vinculo* was sustained for adultery and malicious absence, though the marriage was in another state; but the party entitled must be a citizen of the state, and resident for one year immediately preceding the bill. Fickle *v.* Fickle, 5 Yerger's Rep. 203. The constitution of Tennessee, of 1835, enables the legislature to authorize the courts, by laws of general and uniform operation, to grant divorces for causes to be specified; and by statute, in 1835, adultery, malicious desertion, or wilful absence for two years, or conviction of an infamous crime, were declared to be causes for judicial divorce. Statute Laws of Tennessee, 1836, p. 257.

In New Hampshire, desertion by the husband for three years, without provision for the wife's support, or joining the religious society of the Shakers, who hold cohabitation unlawful, and continuing in that society for three years, is a sufficient cause for a divorce. Dyer *v.* Dyer, 5 New Hampshire Rep. [illegible]. Clark *v.* Clark, 10 Ibid. 388. Union with any such sect is also ground for a divorce in Kentucky. In Connecticut, divorce *a vinculo* applies to cases of adultery and intolerable cruelty, and habitual intemperance, and fraudulent contract, and wilful desertion for three years, with total neglect of duty, or seven years' absence, and being unheard of during the time. Statute Code, 1702. Ibid. 1784. Ibid. 1821, p. 178. Statutes of Connecticut, 1838, p. 185. Statute of Connecticut, 1843. This last statute requires a residence of three years after removal from another state or nation before a petition for a divorce can be allowed, unless the cause of divorce arose since the removal of a party to a state. The statute of 1667 has remained the same in substance down to this day, though, during all that period, the legislature has occasionally passed special acts of divorce *a vinculo*. Daggett, J., in Starr *v.* Pease, 8 Conn. Rep. 541. The power of granting divorces in Connecticut is conferred upon the Superior Court, and it is declared that no petition or memorial shall be preferred to the General Assembly, but in cases where no judicial court is, by law, competent to grant relief. Statutes

[1] In Pennsylvania, the fact of the wife being insane at the time of committing adultery, is not a bar to a bill of divorce by the husband. Matchin *v.* Matchin, 6 Barr's R. 332. But see, *contra*, Wray *v.* Wray, 19 Ala. 522.

[2] For a construction of the Stat. of Ill. c. 33, sec. 8, see Birkby *v.* Birkby, 15 Ill. 120.

vestigations which are properly of a judicial nature, and the jurisdiction over divorces ought to be confined exclusively to

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of Connecticut, 1838, pp. 185, 324. Shaw *v.* Shaw, 17 Conn. Rep. 189, on the question of cruelty. Divorces in Maine are placed under similar regulations. 16 Maine Rep. 479, App. This legislative provision must now put an end to the former irregular practice. In Maryland, by Act of 10th of March, 1842, the chancellor and the county court, as courts of equity, have jurisdiction in cases of divorce; and if the defendant has *abandoned* the complainant, and has remained absent from the state for five years, a divorce *a vinculo* may be had. A subsequent statute of 10th of March, 1845, has shortened the period of abandonment to three years, provided the abandonment has continued uninterruptedly, and is deliberate and final, without any reasonable expectation of reconciliation. But by the statute of 9th March, 1844, no application for a divorce is to be sustained, when the cause of the divorce occurred *out of the state*, unless the complainant has resided in the state for two years next preceding the application.

In Ohio, the Supreme Court is authorized to grant a divorce, if either party had a former husband or wife living at the time of the second marriage, or where either party is wilfully absent from the other for three years; and in cases of adultery or impotency at the time of the marriage, or in case of extreme cruelty, or where either party is imprisoned in the penitentiary for a crime, and application is made for the divorce pending the imprisonment: Statute of Ohio, 1824; and also in all classes of fraudulent contracts, and of habitual drunkenness for three years; and for a total and gross neglect of duty. Act, 1834. For the Revised Statutes of Massachusetts, 1836, on the subject, *vide supra*, p. 96, note (*a*). In Vermont, imprisonment in the state prison for three years or more, and being actually confined, is ground for a divorce. Revised Statutes of Vermont, 1839. In Massachusetts, by the statute of 17th April, 1838, wilful and utter desertion by either party from the other for five years consecutively, and without consent, is a ground for divorce. This statute of 1838 introduced a great change in the law of divorce, and in addition to adultery, confined the divorce *a vinculo* to this case of wilful and utter desertion, leaving the cases of extreme cruelty, and gross and wilful neglect of a suitable maintenance, to be redressed by a divorce from bed and board. Pidge *v.* Pidge, 3 Metcalf, 257. In Maine, by statute, 1838, a confirmed and common drunkard for three years may be divorced. In Pennsylvania, impotency, adultery, wilful and malicious desertion for two years, barbarous treatment by husband, &c., are grounds for a divorce *a vinculo* or *a mensa et thoro* in the latter case. Purdon's Dig. 268, 270. The statute of New Hampshire, 1839, ch. 457, authorizes divorce for incest, bigamy, impotency, adultery, absence for three years unheard of, extreme cruelty in either party, or wilful absence of either party for three years.[1]

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[1] In Connecticut, in addition to those mentioned above, the following are causes of divorce: Imprisonment of the other party for life; bestiality, or other infamous crime, involving a violation of conjugal duty, and punishment by imprisonment in the state's prison; or any misconduct of the other party permanently destroying the happiness of the petitioner, and defeating the purposes of the marriage relation.

In Massachusetts, (Laws 1850, ch. 100,) if the husband or wife unites with a religious sect, which holds the marriage relation to be unlawful, and so continues united for three

the judicial tribunals, under the limitations to be prescribed by law. (a)

It is very questionable whether the facility with which divorces can be procured in some of the states, be not productive of more evil than good.[1] It is doubtful whether even divorces for adultery do not lead to much fraud and corruption. (b)

(a) The legislature of Maine, in 1838, by concurrent resolution, declared, that to dissolve the marriage contract was rightfully a judicial and not a legislative power. The law of Mississippi required every judicial decree of a divorce *a vinculo* to be sanctioned by a law or resolution of two thirds of both branches of the legislature. R. C. of Mississippi, 1824, p. 230. But by the constitution and statute law of Mississippi, as they existed in 1843, jurisdiction is conferred equally upon the chancery and circuit courts in cases of divorce and alimony. Shotwell *v.* Shotwell, 1 Smedes & Marshall's Ch. Rep. 51.

(b) I have had occasion to believe, in the exercise of a judicial cognizance over numerous cases of divorce, that the sin of adultery was sometimes committed on the part of the husband, for the very purpose of the divorce.

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years, refusing to cohabit with the other, who is not so united, such conduct is a cause of divorce *a vinculo.*

In Kentucky, the following are causes of divorce, *a vinculo*, viz: where a jury finds that either party has been guilty of, (1.) concealing any contagious or loathsome disease: (2.) that the contract has been entered into under duress by force or fraud: (3.) that either party has been guilty of such immoral conduct, or addicted to such obscene or degrading habits, as are destructive of the happiness of the parties, or of either of them: (4.) that the parties have separated and lived without communication for five years: (5.) that either party has unnecessarily exposed, in a public paper, the other to public notoriety and reproach for alleged abandonment: (6.) or by other unnecessary and cruel conduct, endeavored to disgrace the same. Laws, 1850, ch. 498.

In Louisiana, habitual intemperance was, in 1848, added to the preexisting causes of divorce. Act of 1848, No. 60.

The Rev. Stats. of 1843, of Indiana, are so amended that the abandonment of one party by the other, for the space of one whole year, or such circumstances as in the opinion of the court renders the reconciliation of the parties hopeless, are made sufficient causes of divorce. Acts of Indiana, 1849, ch. 52.

In Missouri, in addition to the usual causes of divorce, there are added the following: habitual drunkenness for two years; cruel or barbarous treatment, so as to endanger life; indignities, rendering the marriage state intolerable; the husband being guilty of such conduct as renders him a vagrant; pregnancy of the wife by another man at the time of marriage, unknown to the husband; and conviction of the husband before marriage, unknown to the wife, in any state, territory, or country, of felony or infamous crime. Laws of Missouri, 1849.

In Virginia, the causes of divorce *a vinculo* are adultery, incurable impotency at the time of marriage, and sentence of either party to the penitentiary for seven years or more. Rev. Stats. tit. 31, ch. 109, sec. 6.

[1] In South Carolina, no court has power to grant a divorce; and it was held, that there was no distinction between granting a divorce and declaring a marriage null. Mattison *v.* Mattison, 1 Strobh. Eq. R. 387.

Some of the jurists are of opinion that the adultery of the husband ought not to be noticed, or made subject to the same animadversion as that of the wife; because it is not evidence of such entire depravity, nor equally injurious in its effects upon the morals, and good order, and happiness of domestic life. Montesquieu, (a) Pothier, (b) and Dr. Taylor,(c.) all insist, that the case of husband and wife ought to be distinguished, and that the violation of the marriage vow, on the part of the wife, is the most mischievous, and the prosecution ought to be confined to the offence on her part. (d)

(2.) *Of foreign divorces.*

It may become a question of some difficulty with us, how far a divorce in one state is to be received as valid in another. The first inquiry is, how far has the legislature of a state the right, under the constitution of the United States, to interfere * with the marriage contract, and allow of divorces between its own citizens, and within its own jurisdiction. *107 The question has never been judicially raised and determined in the courts of the United States, and it has generally been considered that the state governments have complete control and discretion in the case. In the case of *Dartmouth College* v. *Woodward*, (e) the point was incidentally alluded to; and the chief justice observed, that the constitution of the United States had never been understood to restrict the general right of the legislatures of the states to legislate on the subject of divorces; and the object of state laws of divorce was to enable some tribunal, not to impair a marriage contract, but to liberate

(a) Esprit des Lois, tom. iii. p. 186.

(b) Traité du Contrat de Mariage, No. 516.

(c) Elem. of the Civil Law, p. 254. The early settlers in Massachusetts made the distinction, and male adultery was held not to be sufficient cause for a divorce. Hutchinson's Hist. vol. i. p. 445.

(d) In 1801 the question was discussed in the House of Lords, whether a parliamentary divorce ought to be granted on the application of the wife *against the husband* who had been guilty of incest with her sister. The divorce was granted by act of Parliament, and eloquently sustained by Lord Thurlow, and the precedent has been followed since in other cases of similar atrocity. Campbell's Lives of the Lord Chancellors, vol. v. p. 474.

(e) 4 Wheaton, 518.

one of the parties, because it had been broken by the other. It would be in time to inquire into the constitutionality of their acts, when the state legislatures should undertake to annul all marriage contracts, or allow either party to annul it at the pleasure of the other. Another of the judges of the Supreme Court (*a*) spoke to the same effect. He said that a *general* law, regulating divorces, was not necessarily a law impairing the obligation of such a contract. A law, punishing a breach of a contract by imposing a forfeiture of the rights acquired under it, or dissolving it, because the mutual obligations were no longer observed, was not a law impairing the obligation of contracts. But he was not prepared to admit a power in the state legislatures to dissolve a marriage contract without any cause or default, and against the wish of the parties, and without a judicial inquiry to ascertain the breach of the contract.

Assuming, therefore, that in ordinary cases the constitutionality of the laws of divorce in the respective states is not to be questioned, (*b*) the embarrassing point is, to determine how far a divorce in one state has a valid operation in another. There can be no doubt that a divorce of the parties *108 *who were married, and regularly domiciled at the time, in the state whose courts pronounced the divorce, would be valid everywhere. The difficulty is, when the husband and wife were married, and reside in a state where divorces are not permitted at all by the policy of its law, or not permitted to the extent and for the causes allowed to operate in other states; and they, or one of them, remove into another state for the sole and express purpose of procuring a divorce, and, having obtained it, return into their native state, and contract other matrimonial ties. How are the courts of the state where the parties had their home, to deal with such a divorce? When a divorce was sought in such a case, the courts in Massachusetts very properly refused to sustain a libel for a divorce, and sent the parties back to seek such relief as the laws of their own domicil afforded. (*c*) The Supreme Court of New York has

(*a*) Mr. Justice Story.

(*b*) In Starr *v.* Pease, 8 Conn. Rep. 541, it was adjudged that legislative divorces *a vinculo* for cause, were constitutional and valid.

(*c*) Hopkins *v.* Hopkins, 3 Mass. Rep. 158. Carter *v.* Carter, 6 Mass. Rep. 263.

refused to assist a party who had thus gone into another state, and obtained a divorce on grounds not admissible in New York, and procured in evasion of its laws. They would not sustain an action for alimony founded on such a divorce. (*a*) Afterwards, in *Borden* v. *Fitch*, (*b*) the same court held a divorce in another state, obtained by the husband when the wife resided out of the state, and had no notice of the proceeding, to be null and void; because the court pronouncing the divorce had no lawful jurisdiction of the case when they had none over the absent wife. They considered it to be a judgment obtained upon false and fraudulent suggestions. So, also, in *Hanover* v. *Turner*, (*c*) the Supreme Court in Massachusetts held a divorce in another state to be null and void, as having been fraudulently procured by one of their citizens without a change of domicil. * There is no doubt of the rule, that the allegation that a foreign judgment was obtained by fraud is admissible, and, if true, it will destroy its effect. All judgments rendered anywhere against a party who had no notice of the proceeding, are rendered in violation of the first principles of justice, and are null and void. (*d*) Sentences obtained by collusion *109

By the Massachusetts Revised Statutes, 1836, no divorce is to be granted for a cause occurring out of the state, unless the parties, before such cause occurred, lived together as husband and wife in the state; nor unless one of the parties at the time be living in the state. And if an inhabitant of the state goes out of it in order to obtain a divorce for a cause occurring within it, while the parties reside within it, or for any cause which would not authorize a divorce by the laws of Massachusetts, a divorce so obtained is of no force in the state.[1] But in all other cases, a divorce decreed in any other state or country, according to the law of the place, by a court having jurisdiction of the cause, and of the parties, would be valid in Massachusetts. This, as the revisers justly observed, is founded on the rule established by the comity of all civilized nations. In Barber *v.* Root, 10 Mass. Rep. 260, the decision was to that effect. A divorce in Vermont, of parties *bonâ fide* domiciled there, from a marriage contracted in Massachusetts, and for a cause which would not have dissolved the marriage in Massachusetts, was recognized as valid.

(*a*) Jackson *v.* Jackson, 1 Johns. Rep. 424.

(*b*) 15 Johns. Rep. 121. S. P. in Bradshaw *v.* Heath, 13 Wendell, 407.

(*c*) 14 Mass. Rep. 227.

(*d*) Fisher *v.* Lane, 3 Wilson, 297. Kilburn *v.* Woodworth, 5 Johns. Rep. 37. Thurber *v.* Blackbourne, 1 N. H. Rep. 242. Aldrich *v.* Kinney, 4 Conn. Rep. 380.

[1] Lyon *v.* Lyon, 2 Gray, 367.

are mere nullities, and all other courts may examine into facts upon which a judgment has been obtained by fraud. Every party is at liberty to show that another court was imposed on by collusion. (*a*) The question is, whether, if such a divorce be procured in another state, by parties submitting to the jurisdiction, and after a fair investigation of the merits of the allegations upon which the decree was founded, such a decree is entitled to be received as valid and binding upon the courts of the native state of the parties. A graver question cannot arise under this title in our law.[1]

The *locus delicti* may not be important in the jurisprudence of the states. It is not material in New York, provided the marriage was solemnized there. The effect that the constitution and laws of the United States have on the question, has not been judicially decided; but it is settled that a judgment of the state court is to have the same faith and credit in every other court in the United States, which it has in the courts of the state in which it was pronounced. (*b*) According to the doctrine of the decisions in the federal courts, it may be contended, that a divorce in one state, judicially conducted and declared, and procured under circumstances which gave *110 the court full jurisdiction of the cause *and of the parties, and sufficient to render the divorce valid and binding there, would be good and binding in every other state; and yet it is evident that the domestic policy of one state on this very interesting subject of divorce, may in this way be exposed to be greatly disturbed by a different policy in another state. It may be proper in this work to leave the question as I find it; but if

(*a*) Duchess of Kingston's case, Harg. St. Tri. vol. xi. p. 262. 1 Haggard's Consist. Rep. 290, *note*. How. St. Tri. vol. xx. p. 353.

(*b*) See vol. i. pp. 260, 261.

[1] In Vischer *v.* Vischer, 12 Barb. R. 640, it is *said*, if the parties appear in a suit for a divorce in another state, and it is litigated on the merits, and there is no collusion, the divorce will be conclusive, without reference to *lex loci contractus* in the domicil of the defendant, or the *locus delicti*. See Geils *v.* Dickenson, 20 E. L. & E. Rep. 1. In Ditson *v.* Ditson, 4 R. I. 87, it was held, that a divorce granted by the courts of a state having jurisdiction over the petitioning party, as a citizen of the state, is, by art. 4, sec. 1 of the constitution of the United States, valid in all the states. And see Thompson *v.* State, 28 Ala. 12.

such a decree will operate, and conclude the question in every state, we are at least relieved from that alarming and distressing collision which exists between the judicatures of England and Scotland on this subject; and the appeal must be made to the mutual comity, moderation, and forbearance of the legislatures of the several states, in their respective regulations on the subject of divorce. The twelve judges of England decided, in 1812, in *Lolley's case*, that as by the English law a marriage was indissoluble, a marriage contract in England could not be dissolved by the judicial tribunals of any other country, or in any way except by act of Parliament. (a) The party in that case was convicted of bigamy for marrying again after a Scotch divorce; and, consequently, all foreign divorces of English marriages were held to be null and void. I presume that such a decision will not be considered as law here, as between the several states. But supposing a marriage here is dissolved abroad, as in Scotland or France, for instance, for causes not admissible with us, how would such a divorce affect a marriage solemnized here? A short examination of some of the cases discussed in England and Scotland on this litigious question, may be useful and instructive. The *conflictus legum* is the most perplexing and difficult title of any in the jurisprudence of public law.

(a) 1 Dow, 124, 136. Russ. & Ryan's Cr. Cases, 236. See, also, Conway v. Beazley, 3 Hagg. Eccl. Rep. 642. But see *infra*, p. 117, n. a, where the case of Lolley is shaken. A similar decision to that in Lolley's case is stated to have been made by Lord Chancellor Brougham, in M'Carthy v. Decaix, where it was held that an English marriage could not be annulled by the Danish law. 3 Hagg. Eccl. Rep. 642, note. 2 Russell & M. 614. But in Harding v. Alden, 9 Greenleaf's Rep. 140, it was held, by the Supreme Judicial Court in Maine, that a decree of divorce did not fall within the rule that a judgment rendered against one not within the state, nor bound by its laws, nor amenable to its jurisdiction, was not entitled to credit against the defendant in another state; and that divorces pronounced according to the law of one jurisdiction, and the new relations thereupon formed, ought to be recognized, in the absence of all fraud, as operative and binding everywhere, *so far as related to the dissolution of the marriage*, though not as to other parts of the decree, such as an order for the payment of money by the husband. This is an important and valuable decision, and settles the question, so far as the judicial authority of a single state can do it, against the English rule, and places it upon the same principles of justice, good morals, and policy, which render a marriage valid by the law of the place where it was solemnized, valid everywhere.

In *Utterton* v. *Tewsh*, (a) the marriage was in England, and the husband afterwards committed adultery, and abandoned *111 his wife, and went to Scotland and resided there about forty days, living in adultery. The wife sued for a divorce *a vinculo*, in the consistorial court of Scotland, in 1811, and the court dismissed the bill on the ground that the husband had not formed a real and permanent domicil in Scotland, so as to give the court jurisdiction. Here was an English marriage by English parties, who had not changed their original English domicil; and if they had, the judges doubted whether, according to the *jus gentium*, the *lex loci contractus* ought not to be preferred. There was great danger of collusion of English parties to obtain a divorce *a vinculo* in Scotland, in opposition to the English law, which does not allow such divorces; and if decrees might be obtained in Scotland, which would be invalid in England, a distressing collision would arise, and dangerous questions touching the legitimacy of children by a second marriage, and the rights of succession, and the crime of bigamy. But the decree of the consistorial court was reversed on appeal, and the cause was remanded to that court, and they accordingly proceeded upon the bill for a divorce, and pronounced a divorce *a vinculo* for the adultery charged. Lord Meadowbank, in pronouncing the decree of reversal, in the supreme court of review, delivered a learned and powerful opinion. He observed that the relation of husband and wife was acknowledged *jure gentium*, and the right to redress wrongs incident to that relation attached on all persons living within the territory, though the marriage was celebrated elsewhere. It was not necessary that the foreigners should have acquired a domicil *animo remanendi;* and if the law refused to apply its rules to these domestic relations recognized by all civilized nations, Scotland could not be deemed a civilized country; as thereby it would permit a numerous description of persons to traverse it, and violate with impunity all the obligations of domestic life. If it assumed jurisdiction, and applied not its own rules, but the law of the foreign country where the relation had been created, the su-

(a) Fergusson's Reports of Decisions in the consistorial courts of Scotland in actions of divorce, p. 23.

premacy of the law of Scotland, *within its territory, *112 would be compromised, and powers of foreign courts, unknown to the law, usurped and exercised. A domicil was of no consequence, if the foreigner was to be personally cited, or his residence sufficiently ascertained. If the wife who prosecuted was innocent of any collusion, it was no bar to the remedy that the husband came to Scotland and committed adultery, with a calculation that it would be detected by the wife, or that he came to Scotland with the criminal intent of instigating his innocent wife to divorce him.

In the next case that came before the consistorial court, in 1816, (a) the parties married and lived in England, and the husband deserted his wife, committed adultery, and domiciled himself in Scotland. The judges did not concur in their views of the subject. Two of them held that the husband was sufficiently domiciled in Scotland to give jurisdiction, but that the law of England, which was the *locus contractus*, ought to govern upon principles of comity and international law, and not the *lex domicilii*. They were, therefore, of opinion, that the divorce for the adultery should be only *a mensa et thoro*. The other two judges thought that the domicil was not changed, and therefore a divorce *a vinculo* could not be pronounced. On appeal, the court of sessions remanded the cause for the purpose of inquiry into the fact of domicil. The consistorial court then held, that the real English domicil of the husband was not changed by being a weekly lodger in Scotland for eighteen months, and that a change of the real domicil, made *bonâ fide et animo remanendi*, at the date of the action, was necessary, for the purpose, not indeed of jurisdiction, but to determine whether the rule of the *lex loci*, upon principles of international law, did or did not apply. The rule of judgment must be the *lex loci*, as there was no change of the real English domicil, and, therefore, a divorce *a mensa et thoro*, and none other, was *pronounced. *113 But on appeal, this decree was also reversed by the court of sessions, and the court below ordered to render a decree of divorce *a vinculo*.

(a) Duntze v. Levett, Fergusson, p. 68.

A third case was decided in 1816. (a) The marriage was in England; but the parties lived and cohabited together in Scotland for eight years, and the adultery was committed there. The question was not one of domicil, for that was too clear to be questioned, but it was the general and broad question, whether the *lex loci contractus*, or the law of the domicil, was to govern in pronouncing the divorce. Two of the judges were for following the law of the domicil, and rendering a divorce *a vinculo*, and the other two were for the *lex loci*, and granting only a divorce *a mensa*. But the court of review reversed this decree also, and directed the cause to proceed upon the law of Scotland.

In *Butler* v. *Forbes*, decided in 1817, (b) the marriage was in Scotland; but the real domicil of the parties was in Ireland. The adultery was committed in Scotland, during a transient visit there. The consistory court held, that the law of the real domicil must prevail over the law of the contract. The *locus delicti* was immaterial, but the law of the real domicil was the governing principle, and they refused any other than a divorce *a mensa*. The court of review reversed this decree, also, and directed a divorce *a vinculo*.

In *Kibblewhite* v. *Rowland*, in 1816, (c) the parties were English, and married and domiciled in England; but the defendant had committed adultery on a visit to Scotland, and his wife sued him for a divorce. The consistorial court held, that both the law of the contract and the law of the domicil were against a divorce *a vinculo*, and they refused it. This *114 * decree was also reversed, and the usual divorce *a vinculo* directed.

I will cite but one more of these Scotch decisions, in which the subject was discussed in a masterly manner. The case of *Gordon* v. *Pye* was decided in the consistorial court, in 1815. (d) The parties were English, and married in England, and resided there during the whole period of cohabitation. The husband

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(a) Edmondstone v. Lockhart, Fergusson, p. 168.

(b) Fergusson, p. 209.

(c) Fergusson, p. 226.

(d) Fergusson, p. 276.

deserted his wife, and transiently transferred his domicil to Scotland, and committed adultery there. The court dismissed the bill, on the principle that the *lex loci contractus* must govern, as the permanent domicil was still in England, and a divorce *a vinculo* could not be obtained. The court insisted, that by the *jus gentium*, courts in one country cannot set aside contracts valid in another country where they were made. A temporary residence, raised for the purpose of jurisdiction, would be *in fraudem legis*. The *lex loci* is the sound rule of decision in respect to marriage contracts; and the courts of one country ought not to be converted into engines for either eluding the laws of another, or determining matters foreign to their territory. The *lex loci* ought to prevail over the *lex domicilii* on just principles of international policy, as the marriage contract is *jure gentium*. All Christian states favor the perpetuity of marriage, and suspicion and alarm watch every step to dissolve it; and the plaintiff was entitled *ex comitate*, and upon principles of international law, to the same measure of redress she would be entitled to in England, and especially when the *lex loci contractus*, and the *lex domicilii*, both concurred. To grant such divorces contrary to the *lex loci*, would be to invite foreigners to come to Scotland and commit adultery for the sake of the divorce; and this would hurt the public morals, and pollute a jurisdiction constituted to act in evident hostility to the laws and the policy of other states.

*115 * But the court of sessions reversed the decree, in opposition to all this reasoning and doctrine; and they insisted that the relation of husband and wife, wherever originally constituted, was entitled to the same protection and redress as to wrongs committed in Scotland, that belong of right to that relation by the law of Scotland. By marrying in England, the parties do not become bound to reside forever in England, or to treat one another in every other country according to the provisions of the law of England. To redress the violation of the duties and abuse of the powers of the marriage state, belongs to the law of the country where the parties reside, and to which they contract the duties of obedience, whenever they enter its territories. There is nothing in the will of the parties that gives the *lex loci* any particular force over the marriage contract, or

that impedes the course of the *jus publicum*, in relation to it; and it would be no objection to a divorce, at the instance of a Roman Catholic, that his marriage was, as to him, a sacrament, and by its own nature indissoluble. Other contracts are modified by the will of the parties, and the *lex loci* becomes essential; but not so with matrimonial rights and duties. Unlike other contracts, marriage cannot be dissolved by mutual consent; and it subsists in full force, though one of the parties should be forever rendered incapable, as in the case of incurable insanity, from performing his part of the mutual contract. Matrimonial obligations are *juris gentium*, and admit of no modification by the will of the parties; and foreign courts are not bound to inquire after that will, or after the municipal law to which it may correspond. They are bound to look to their own law, and to hold it paramount, especially in the administration of that department of internal jurisprudence, which operates directly on public morals and domestic manners. The consequences would be embarrassing, and probably inextricable, if the personal capacities of individuals, as of majors and minors, the competency to contract marriages, and infringe matrimonial obligations, and the rights of domestic *116 *authority and service, were to be regulated by foreign laws and customs, with which the mass of the population must be utterly unacquainted. The whole order of society would be disjointed, were the positive institutions of foreign nations concerning the domestic relations admitted to operate universally, and form privileged castes, leaving each under separate laws. Though marriage, contracted according to the *lex loci*, be valid all the world over, yet many of its rights and duties are regulated and enforced by public law, which is imperative on all who are domiciled within its jurisdiction. The laws of divorce are considered as of the utmost importance as public laws, affecting the dearest interests of society; and they are not to be relaxed as to a person domiciled in Scotland, because his marriage was contracted out of it. If two natives of Scotland were married in France or Prussia, the marriage would be valid in Scotland; but would the parties be entitled to come into court and insist on a divorce *a vinculo*, because their tempers were not suitable, or for any of the great variety of whimsical and absurd grounds

for a divorce allowed by the Prussian code of 1795? Certainly not; and the conclusion was, that the law of divorce must be governed by the law of Scotland, whenever the party was sufficiently domiciled there to enable the court to sustain jurisdiction of the cause.

I have thus given, for the benefit of the student, a pretty enlarged view of the discussions in Scotland, on this great question, touching the power of divorce in one country upon marriage in another. The same question was brought up on appeal from Scotland, to the House of Lords in England, in 1813, in the case of *Tovey* v. *Lindsay;* (a) and Lord Eldon there stated the decision of the twelve judges to have been, that no English marriage could be dissolved but by Parliament. The question in the case was, whether an English marriage could be dissolved by a Scotch court, even *if the parties were *117 sufficiently domiciled there to found a jurisdiction of the case. The lord chancellor admitted it to be a question of the highest importance; and Lord Redesdale intimated, that it could not be just, that one party should be able, at his option, to dissolve a contract, by a law different from that under which it was formed, and by which the other party understood it to be governed. The case was remitted back for review, without any final decision in the English House of Lords; but the opinion of Lord Eldon and Lord Redesdale evidently agreed with the decision of the twelve judges at Westminster, and went to deny the competency of any court to pronounce a decree of divorce *a vinculo* of English marriages, or to pronounce any other decree in the case than such as would be warranted by the *lex loci contractus.* (b)

(a) 1 Dow's Rep. 117.

(b) In Conway *v.* Beazley, 3 Hagg. Eccl. Rep. 639, in the consistory court of London, Dr. Lushington considered it to be still an unsettled question, whether a Scotch divorce of a marriage in England would be necessarily, and under all circumstances, invalid in England, if the parties were at the time actually and *bonâ fide* domiciled in Scotland. But he followed the decision in Lolley's case, (*supra*, p. 110,) and held that a Scotch divorce *a vinculo* from an English marriage, between parties domiciled in England at the time of such marriage, was null. Mr. Prater, in his Treatise on the "Cases illustrative of the Conflict between the Laws of England and Scotland, with regard to Marriage, Divorce, and Legitimacy," (London, 1835,) concludes that the laws of England and Scotland ought to be assimilated, by enabling the English eccle-

Upon the principles of the English law, a marriage contracted in New York cannot be dissolved, except for adultery, by any

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siastical courts to dissolve marriages for adultery, and to disallow the plea of recrimination as a bar to the suit, and not to permit desertion to be a cause of divorce in Scotland. He further proposes to abolish the law of legitimation in Scotland. The conclusion on this vexed subject to which Mr. Burge arrives, after an able consideration of the question in his Commentaries on Colonial and Foreign Laws, vol. i. 680-691, is, that the *lex loci contractus* ought to be invoked, when the question is whether a marriage was in the first instance valid in law, and that the appropriate law by which the dissolubility of the marriage is to be determined, ought to be that of the actual domicil.

This great question has at last been settled in the English House of Lords, in conformity with the principle of the Scotch decisions. In Warrender *v.* Warrender, (2 Shaw & Maclean, 189; 9 Bligh, 89,) decided in the Court of Session in Scotland, the husband was a native of Scotland, where he continued to retain his domicil. He married in England an English woman, and for adultery committed by the wife in France, he sued in the Scotch court for a divorce, and the court held that they had jurisdiction over the case. and dissolved the marriage, and the decision was affirmed, on appeal to the House of Lords, in 1837. Lord Chancellor Brougham, in his opinion delivered in the House of Lords in that case, observed that Lolley's case only settled that an English marriage could not be dissolved for *English purposes*, by any proceeding in a foreign jurisdiction, and that the divorced party would still be entitled to the rights and subject to the disabilities of a married person in England. But he held that Lolley's case was not founded on sound principles, and that there was an irreconcilable inconsistency in the proposition that the Scotch law was all-powerful to make a valid marriage, and utterly incompetent to dissolve it; and that if the court could recognize the foreign law as to the creation, they ought equally as to the rescission of the contract of marriage. The decision of the lords in this case essentially overruled Lolley's case, and settled that Scotch courts have jurisdiction in divorce, when the domicil has been acquired, without having regard to the native country of the parties, or of their marriage. The decision, and the order for re-argument, in the case of Birtwhistle *v.* Vardill, *infra*, p. 209, n. (*d*), have gone far to disembarrass the collision between English and foreign law from some of its most distressing results.

In Dorsey *v.* Dorsey, 7 Watts, 349, it was held by the Supreme Court of Pennsylvania, that the law of the actual domicil of the party at the time of committing the injury, was the rule in cases of divorce for everything but the original obligation of marriage; and that, although the original domicil and marriage of the parties were in Pennsylvania, the court had no jurisdiction of a cause of divorce alleged to have been committed in Ohio by the husband, while his domicil was in the state of Ohio. Ch. J. Gibson briefly but forcibly sustained the principle of the decision. So, in Kentucky, it is held that no state or nation has power to dissolve the marriage contract between citizens of any other state or nation, not resident or domiciled within its limits, for no nation could preserve its social order, if any other foreign state could, without its consent, dissolve or disturb that most important domestic institution of marriage. The principle that no foreign power can control the marriage contracts of foreigners, not domiciled within its jurisdictional limits, was clearly illustrated in the opinion of Ch. J. Robertson, and it rests upon the soundest basis of policy and sovereignty, and a

foreign tribunal out of the United States; because the *lex loci contractus* ought to govern; and if a divorce by a judicial proceeding in one of these United States be entitled to a different consideration in others, it is owing to the force which the national compact, and the laws made in pursuance of it, give to the records and judicial proceedings of other states. If, however, a marriage in New York should be dissolved, not by a regular judicial sentence, but by an Act of the legislature in another state, passed specially for the purpose, and for such a cause not admissible here, would *such* a divorce be received here as binding? A statute, though not in the nature of a judicial proceeding, is, however, a record of the highest nature; and in some of the states, all their divorces are by special statutes. But if a statute, though a matter of record, was to have the same effect in one state as in another, then one state would be dictating laws for another, and a fearful collision of jurisdiction would instantly follow. That construction is utterly inadmissible. While it is conceded to be a principle of public law, requisite for the safe intercourse and commerce of mankind, that acts valid *by the law of the place where they arise, are valid every- *118 where, it is, at the same time, to be understood that this principle relates only to civil acts founded on the volition of the parties, and not to such as proceed from the sovereign power. The force of the latter cannot be permitted to operate beyond the limits of the territory, without effecting the necessary independence of nations. And, in the present case, it is to be observed, that the Act of Congress of the 26th of May, 1790, ch. 11, prescribing the mode of authenticating records, only declares the faith and credit to be given to the records and judicial proceedings *of the courts* in the several states; and the supplementary Act of the 27th of March, 1804, ch. 56, relates only to office-books kept in the public offices, and has no bearing on this point. But if, instead of a divorce by statute *ex directo*, the Act should refer a special case to a court of justice, with directions to in-

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decree of divorce was held to be void against a husband who was never domiciled in the state. Maguire *v.* Maguire, 7 Dana's Rep. 181.[1]

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[1] Harrison *v.* Harrison, 19 Ala. 499.

quire into the fact, and to grant a divorce, or withhold it, as the case might require, would that be a judicial proceeding, to which full effect ought to be given? A number of embarrassing questions of this kind may be raised on this subject of interfering jurisdictions, and some of them may, probably, hereafter exercise the talents, and require the application of the utmost discretion and wisdom of the courts of justice. I have done as much as becomes the duty which I have assumed, in bringing into view the most material decisions which have taken place, and stating the principles which have been judicially recognized. (*a*)

(3.) *Effect of foreign judgments and suits.*

1. Foreign judgments.

In cases not governed by the constitution and laws of the United States, the doctrine of the English law generally, and with some few exceptions, is the law of this country, as to the force and effect to be given to foreign judgments. I shall probably take occasion, in subsequent parts of these lectures, to consider the effect to be given here to foreign contracts, foreign assignments, foreign official acts, and other various transactions in the course of business, as the subjects to which * 119 * they can be applied may render easy and pertinent the consideration of this branch of municipal and general jurisprudence. At present it will be sufficient to show, in connection with this inquiry, that the English law is exceedingly if not peculiarly liberal, in the respect which it pays to foreign judgments, in all other cases, except the case of a foreign divorce of an English marriage. As early as the reign of Charles II., Lord Chancellor Nottingham maintained, in the House of

(*a*) In Tolen *v.* Tolen, 2 Blackf. Ind. Rep. 407, a divorce *a vinculo* for adultery was sustained in Indiana, though the parties were married in another state, where they resided, and the cause of divorce arose there, and the defendant continued to reside there, and had constructive notice only of the suit of his wife for a divorce by publication; but she had for some years been a *bonâ fide* citizen of Indiana, and acquired a domicil *animo manendi.* The decision was founded upon the authority of the statute of 1831, which allowed suits for a divorce for just cause to all persons who had resided in the state one year, and as against non-residents, on giving constructive notice by publication.

Lords, in *Cottington's case*, (a) that a foreign decree of divorce, in the case of a foreign marriage, was conclusive, and could not be opened, or the merits reëxamined. It was against the law of nations, he observed, not to give credit to the judgments and sentences of foreign countries, till they be reversed by the law, and according to the forms of those countries wherein they were given. He referred to *Wier's case*, 5 Jas. I., (b) wherein a judgment in debt having been rendered in Holland against an Englishman, he fled from execution to England, and the judgment being certified, the defendant was imprisoned in the admiralty for the debt, and the K. B., upon *habeas corpus*, held the imprisonment to be lawful, and that "it was by the law of nations that the justice of one nation should be aiding to the justice of another nation, and the one to execute the judgments of the other." It has become a settled principle in the English courts, that where a debt has been recovered of a debtor, under the process of foreign attachment, fairly and not collusively, the recovery is a protection to the garnishee against his original creditor, and he may plead it in bar. (c)[1]

A distinction has been taken since the time of Lord Nottingham, between a suit *brought to enforce a *120 foreign judgment, and a plea of a foreign judgment in bar of a fresh suit for the same cause. No sovereign is obliged to execute, within his dominion, a sentence rendered

(a) Note to 2 Swanst. Rep. 242, from Lord Nottingham's MSS.

(b) 1 Rol. Abr. 530, pl. 12.

(c) Le Chevalier *v.* Lynch, Doug. Rep. 170. Cleve *v.* Mills, Cooke's B. L. 243. Allen *v.* Dundas, 3 Term Rep. 125. M'Daniel *v.* Hughes, 3 East, 367. Huxham *v.* Smith, 2 Campb. N. P. Rep. 19. Embree & Collins *v.* Hanna, 5 Johns. Rep. 101. Holmes *v.* Remsen, 4 Johns. Ch. Rep. 460. Where proceedings are *in rem*, all persons who could have asserted a right to the property become parties by the monition; and all judgments founded upon such proceedings, whether they regard real or personal property, being within the jurisdiction of the court, are held valid and binding, as being *res judicata* in every other country, in respect to all matters of right and title, transfer and disposition of the property. Rose *v.* Himely, 4 Cranch, 241. 7 Ibid. 429, S. P. Grant *v.* M'Lachlin, 4 Johns. Rep. 34. Curia Philipica, part 2, sec. 22, cited and proved on trial as containing the same and the true Spanish law on the point. 3 Binney's Rep. 230, note. Bauduc's Syndics *v.* Nicholson, 4 L'a Rep. 81.

[1] Cummings *v.* Banks, 2 Barb. S. C. Rep. 602.

out of it; and if execution be sought by a suit upon the judgment, or otherwise, he is at liberty, in his courts of justice, to examine into the merits of such judgment; for the effect to be given to foreign judgments is altogether a matter of comity, in cases where it is not regulated by treaty. In the former case of a suit to enforce a foreign judgment, the rule is, that the foreign judgment is to be received, in the first instance, as *primâ facie* evidence of the debt, and it lies on the defendant to impeach the justice of it, or to show that it was irregularly and unduly obtained.[1] This was the principle declared and settled by the House of Lords, in 1771, in the case of *Sinclair* v. *Fraser*, upon an appeal from the court of session in Scotland. (*a*) But if the foreign judgment has been pronounced by

(*a*) Cited in the case of The Duchess of Kingston, 11 State Tr. by Harg. 222; and also in Walker *v.* Witter, Doug. Rep 1; and in Galbraith *v.* Neville, Ibid. 6, note. See, also, Lord Kenyon's opinion in this latter case, 5 East, 475, note; and also Lord Mansfield's opinion in Walker *v.* Witter, and the opinion of Buller, J., in Galbraith *v.* Neville, and the opinion of Lord Ch. J. Eyre, in Philips *v.* Hunter, 2 H. Blacks. Rep. 410. Hall *v.* Odber, 11 East, 121. But in Martin *v.* Nicolls, 3 Simon's Rep 458, the vice-chancellor has undertaken to controvert the doctrine in Sinclair *v.* Fraser, and he held that a foreign judgment could not be questioned, not merely when it comes in collaterally or by way of defence, but in a suit brought directly upon it to enforce it. It is requisite, however, in order to recognize and give effect in any way to a foreign judgment, that the court which pronounced it was competent to the case, and had due and lawful jurisdiction over the cause and the parties, and that there had been regular judicial proceedings, and this is the case whether the proceedings which led to the judgment be *in rem* or *in personam*. Sawyer *v.* The Maine F. & M. Ins. Co 12 Mass. Rep. 291. Bradstreet *v.* Neptune Ins. Co. U. S. C. C., Boston, October, 1839, 3 Sumner, 600. Story's Com. on the Conflict of Laws, §§ 586–590. See, also, *supra*, vol. i. p. 251, n. *b*. The present inclination of the English courts is in conformity with the opinion of the vice-chancellor. Lord Ellenborough, in Tarleton *v.* Tarleton, 4 Maule & Selw. 21. Guinness *v.* Carwell, 1 B. & Aldolph. Rep. 429. Becquet *v.* MacCarthy, 2 Ibid. 951. See, also, Starkie on Evidence, vol. 1, p. 297. The arguments and authorities for and against the latter doctrine of the English courts, that a foreign judgment, regularly obtained, is conclusive *ex comitate gentium*, as well where it is sought to be enforced as when it is interposed by way of plea, are fully and ably stated and considered in Southgate *v.* Montgomerie, in the Scotch court at Edinburgh, in 1835. The lord ordinary (Jeffrey) decided that foreign judgments were only *primâ facie* evidence of the claim, and the discussions alluded to were on appeal from that decision. It would seem, from the case of Smith *v.* Nicolls, 5 Bingham, N. C. 208, that the English courts are returning to the old doctrine of

[1] Noyes *v.* Butler, 6 Barb. S. C. Rep. 613. Though the judgment is only *primâ facie* evidence of facts, which go to establish the jurisdiction of the court rendering the judgment, yet it is conclusive as to other facts.

a court possessed of competent jurisdiction over the cause and the parties, and carried into effect, and the losing parties institute a new suit upon the same matter, the plea of the former judgment constitutes an absolute bar, provided the subject, and the parties, and grounds of the judgment, be the same. It is a *res judicata*, which is received as evidence of truth; and the *exceptio rei judicatæ*, as the plea is termed in the civil law, is final and conclusive. (*a*) This is a principle of general juris-

Mansfield, Eyre, and Kenyon, that in assumpsit on a foreign judgment, the judgment is only *primâ facie* evidence of the debt. In Houlditch *v.* Donegal, (8 Bligh, 301,) the result of the judgment of the House of Lords was, that there were cases in which it was competent for the court to look into the ground and reasons of the foreign judgment, and satisfy itself as to the law of the country. And in Koster *v.* Sapte, (1 Curteis, 691,) in the prerogative court of Canterbury, Sir Herbert Jenner admitted, that under certain circumstances, as where there was a question as to jurisdiction, or whether the party was cited according to law, and for some other purpose, a foreign decree might be examined, but that it could not be opened, in order to examine by your own lights and knowledge whether a foreign judgment was pronounced on good ground or not. See, also, on this subject, Bradstreet *v.* Neptune Ins. Co. U. S. C. C., Boston, October, 1839, 3 Sumner, 600. The Law Reporter, No. 2, for January, 1840. Price *v.* Dewhurst, 8 Simons, 279. Mr. Justice Story reasons strongly in favor of the latter doctrine of the absolute conclusiveness of foreign judgments; (Com. on the Conflict of Laws, § 607,) and that is certainly the more convenient and the safest rule, and the most consistent with sound principle, except in cases in which the court which pronounced the judgment has not due jurisdiction of the case, or of the defendant, or the proceeding was in fraud or founded in palpable mistake or irregularity, or bad by the law of the *rei judicatæ;* and in all such cases the justice of the judgment ought to be impeached. Not only Vattel, but Huberus and other civilians cited by Henry on Foreign Law, maintain the entire validity of foreign judgments in every other country. Vattel, b. 2, ch. 7, sec. 84, 85. Huberus de Conflictu Legum, lib. 1, tit. 3, sec. 3, 6. Henry on Foreign Law, 74, 75, 76. In Boston India Rubber Factory *v.* Hoit, 14 Vermont R. 92, it was held that assumpsit was not the proper action on a judgment of another state; but it should be debt on the record of the judgment. See, *supra*, vol. i. p. [260.][1]

(*a*) Hughes *v.* Cornelius, Raym. 473. S. C. 2 Shower, 232. Burrows *v.* Jemino, Str. 733. Hamilton *v.* The Dutch East India Company, 8 Bro. C. P. by Tomlins,

[1] It is now held in England that the record of a foreign judgment is *primâ facie* evidence so far only as to admit the defendant to show either that the court which pronounced it had not jurisdiction, or that the judgment was obtained by fraud; but that upon the merits it is conclusive. Bank of Australasia *v.* Nias, 4 E. L. & Eq. 252.

The court inclined to the same opinion in Cummings *v.* Banks, 2 Barb. 602, though in that case it was sufficient to regard the foreign judgment as only *primâ facie* evidence. And see Wood *v.* Gamble, 11 Cush. 8. Monroe *v.* Douglas, 4 Sandf. Ch. 126. In the latter case, the whole subject of foreign judgments was discussed by the assistant vice-chancellor (Sandford) with perspicuity and learning. A foreign judgment does not merge the original cause of action. Lyman *v.* Brown, 2 Curtis, C. C. 559.

prudence, founded on public convenience, and sanctioned by the usage and courtesy of nations. (*a*) The rule of the English law has been *very generally recognized in the courts of justice in this country, in cases not affected by the constitution and law of the United States. (*b*) There is one exception in the jurisprudence of some of the states, as to the force and effect of foreign sentences in the prize courts of admiralty, bearing upon neutral rights. While those sentences are regarded in the courts of the United States as binding and conclusive upon the same questions, (*c*) there has been some difference of opinion, and some collisions on this point, in the decisions in the state courts. (*d*) The weight of judicial author-

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p. 264. Lothian *v.* Henderson, 3 Bos. & Pull. 499. Graham *v.* Maxwell, 2 Dow, 314. Lord Ch. J. Eyre, in Philips *v.* Hunter, 2 H. Blacks. Rep. 410. Tarleton *v.* Tarleton, 4 Maule & Selw. 20. Thompson *v.* Tolmie, 2 Peters's U. S. Rep. 157. Lalanne *v.* Moreau, 13 L'a Rep. 437.

(*a*) Vattel, b. 2, ch. 7, sec. 84, 85. Martens's Summary of the Law of Nations, b. 3, ch. 2, sec. 20. Ersks. Inst. of Scots's Law, vol. ii p. 735. Kaime's Pr. of Equity, vol. ii. p. 366, or, b. 3, ch. 8, sec. 6. Notes to vol. i. p. 6, of More's edit. of Lord Stair's Institutions. A judgment, while it stands, cannot be impeached by the parties or privies to the record, in a collateral action, or in another court. This is a general principle. De Medina *v.* Grove, 10 Ad. & El. R. N. S. 152. This case has been affirmed in the Exchequer Chamber, Id. 172.

(*b*) Hitchcock & Fitch *v.* Aickin, 1 Caines's Rep. 460. Goix *v.* Low, 1 Johns. Cas. 341. Taylor *v.* Bryden, 8 Johns. Rep. 178. Aldrich *v.* Kinney, 4 Conn. Rep. 380. Bissell *v.* Briggs, 9 Mass. Rep. 463. Washington, J., 4 Cranch, 442. Taylor *v* Phelps, 1 Harris & Gill, 492. Barney *v.* Patterson, 6 Harr. & Johns. 182. Story's Com. on the Conflict of Laws, § 586, *et seq*, and the numerous cases there collected. A judgment on a trustee process in one state, will protect the trustee in a suit in another state for the same debt. Ocean Ins. Co. *v.* Portsmouth R. R. Co. 3 Met. 420.

(*c*) Croudson *v.* Leonard, 4 Cranch, 434. Rose *v.* Himely, Ibid. 241. Hudson *v.* Guestier, Ibid. 293. Bradstreet *v.* The Neptune Ins. Co. 3 Sumner's Rep. 600.

(*d*) They were declared to be conclusive, according to the English rule, upon the question of neutral property, in a subsequent suit upon the policy of insurance, by the courts of law in New York. Ludlows *v.* Dale, 1 Johns. Cas. 16. Vandenheuvel *v.* United Insurance Company, 2 Ibid. 127. But the doctrine in those cases was reversed in the Court of Errors. 2 Ibid. 451. They were declared to be conclusive, by the Supreme Court of Pennsylvania, in 1 Binney's Rep. 299, note; but the legislature of that state, by an Act passed in March, 1809, declared that they should not be held conclusive. They were held to be binding in South Carolina, 2 Bay, 242; in Connecticut, 1 Day, 142; in Massachusetts, 6 Mass. Rep. 277; in Maryland, Gray *v.* Swan, 1 Harr. & Johns. 142; but an Act of the legislature of Maryland, in 1813, ch. 164, reduced the sentences of condemnation of foreign prize courts to the character of *primâ facie* proof. They were held conclusive in Cucullu *v.* Louisiana Ins. Co. 17 Martin, 464.

ity appears, however, to be decidedly in favor of the binding force and universal application of the doctrine of the English law. (*a*)

(*a*) Admiralty courts, being courts of the law of nations, their seal is judicially taken notice of in the courts of other countries, without positive proof of its authenticity; (Yeaton *v.* Fry, 5 Cranch, 335, 343. Thompson *v.* Stewart, 3 Conn. Rep. 171;) though the rule is different as to the seal of other foreign courts, and it must be proved, like any other fact. (Delafield *v.* Hand, 3 Johns. Rep. 310. De Sobry *v.* De Laistre, 2 Harr. & Johns. 192 Henry *v.* Adey, 3 East, 221.) The question touching the effect of foreign judgments has been frequently and very extensively and profoundly discussed, before the French tribunals; and it is surprising to observe the very little respect or comity which has hitherto been afforded to the judicial decisions of foreign nations, in so enlightened, so polished, and so commercial a country as France.

The French jurisprudence on this subject disclaimed any authority derived from the *jus gentium*, and it was placed entirely upon the basis of the royal ordinance of 1629. That ordinance declared, that foreign judgments, for whatever cause, should not be deemed to create any lien, or have any execution in France; and that notwithstanding the judgments, Frenchmen, against whom they might have been rendered, should not be affected by them, but be entitled to have their rights discussed *de novo*, equally as if no such judgment had been rendered. Opinions to that effect, given by several celebrated advocates of the parliament of Paris, as early as 1664, are published in the appendix to Henry's Treatise on Foreign Law, published at London, 1823.

Emerigon (Traité des Ass. ch. iv. sec. 8. ch. xii. sec. 20) said that the rule applied equally in favor of strangers domiciled in France, and it applied, whether the Frenchman be the plaintiff or defendant; but as to foreign judgments between strangers, they might be executed in France, without any examination of the merits. The principle in the civil and French law is, that a judgment is conclusive only between the parties.

It has, however, been a vexed question, whether foreign judgments, as between strangers, were entitled to any notice whatever, or were to receive a blind execution, without looking into their merits. There seems to have been much vibration of opinion, and doubt and uncertainty on this point.

In the elaborate argument which M. Merlin delivered before the court of cassation, in the case of Spohrer *v.* Moe, and which he has preserved entire in his Questions de Droit, tit. Jugement, sec. 14, he showed, by many judicial precedents, that the French law (*jurisprudence des arrets*) had been uniform from the date of the royal ordinance down to this day; that nothing which had been judicially decided under a foreign jurisdiction had any effect in France, and did not afford any ground or color even for the *exceptio rei judicatæ*. He maintained that the law did not distinguish between cases, for that all foreign judgments, whoever might be the parties, whether in favor or against a Frenchman with a stranger, or whether between strangers, and whether the judgment was by default, or upon confession or trial, were of no avail in France, and the *jurisprudence des arrets* rejected every such distinction. Whenever this rule had been suspended, it had been occasioned by the force of special treaties, such as that between France and the Swiss cantons, in 1777; or accorded by way of reciprocity to a particular power, such as in the case of the Duke of Lorraine, in 1738. The judgment of the court of cassation, on appeal, rendered in the year 12 of the French republic, was, that the foreign judgment, in that case, in which a Frenchman was one

2. *Of lis-pendens.*

A *lis pendens*, before the tribunals of another jurisdiction, has,

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of the parties and a Norwegian the other, was of no effect whatever. (*Vide* Répertoire de Jurisprudence, tit. Jugement, sec. 6. Questions de Droit, h. t. sec. 14.) Afterwards, in the case of Holker *v.* Parker, decided in the court of cassation in 1819, it was settled upon the authority of the new Code Civil, Nos. 2123 and 2128, and of the Code de Procedure, No. 546, that the Ordinance of 1629 no longer applied, and that the codes made no distinction among foreign judgments, and rendered them all *executory*, or capable of execution in France, after being subject to reëxamination; and whoever sought to enforce a foreign judgment, must show the reasons on which it is founded. (*Vide* Questions de Droit, par M. Merlin, tit. Jugement, sec. 14.) In that very case it had been previously decided, by the court of the first instance, at Paris, in 1815, that a foreign judgment was to be regarded as definitive between strangers, and to be executed in France, without their courts being permitted to take cognizance of the merits. The Royal Court of Paris, in 1816, on appeal, decided otherwise, and declared that foreign judgments had no effect in France, and that the principle was unqualified and absolute, and was founded on the sovereignty and independence of nations, and could be invoked by all persons, subjects and strangers, without distinction. The court of cassation, on a further appeal, decided that they were to be regarded *sub modo;* they were not to be of any force without a new investigation of the merits; for a blind submission to them would be repugnant to the nature of judicial tribunals, and strike at the right of sovereignty within every independent territory. I have said that the rule was *settled* in that case; but it seems to be difficult to know when or how the rule on this subject can be deemed settled in France, for the conflict of opinions between their various tribunals, and at different periods of time, is extraordinary. This very question, whether a foreign judgment between two strangers could receive execution in France without revision or discussion, was raised in January, 1824, before a tribunal at Paris, between Stackpoole *v.* Stackpoole and others, and it was decided in the negative, after a discussion on each side, distinguished for depth of learning and a lustre of eloquence not to be surpassed. M. Toullier ventures to consider the French jurisprudence, or the *droit public* of France, as being irrevocably established by the decree of the court of cassation, in 1819, and he considers it as resting on sound foundations. Foreign judgments are no longer absolute nullities, since they can be declared executory, after the French courts have taken cognizance of the merits of them, and have acted, in respect to them, in the nature of a court of appeals. The rule applies to all foreign judgments without distinction, and the French courts will admit the proofs taken in the foreign courts—*locus regit actum. Vide* Toullier's Droit Civil Français, suivant l'ordre du Code, tom. x. Nos. 76–86. The French and the English law have now, at last, approached very near to each other on this interesting head of national jurisprudence. They agree perfectly when the foreign judgment is sought to be enforced; but the French courts will not permit, as they certainly ought, a plea of a foreign judgment in bar of a new suit for the same cause, to be conclusive, if fairly pronounced by a foreign court, having a jurisdiction confessedly competent for the case. So far the French jurisprudence still wants the true spirit of international comity. See Merlin Répertoire, tit. Jugement, sec. 6. Pardessus, Droit Commercial, tom. v. p. 1488.[1]

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[1] It is stated in Wheaton's Elements of International Law, ed. 1855, p. 207, that the

in cases of proceedings *in rem*, been held to be a good plea in abatement of a suit.[1] Thus, where a creditor of A., a *bankrupt, had *bonâ fide* and by regular process, attached *123 in another state a debt due to A. and in the hands of B., it has been held, that the assignees of the bankrupt could not, by a subsequent suit, recover the debt of B. (*a*) The pendency of the foreign attachment is a good plea in abatement of the suit. (*b*) In such a case, the equity of the maxim, *Qui prior est tempore, potior est jure*, forcibly applies. Unless the plea in abatement was allowed in such a case, the defendant would be left without protection, and would be obliged to pay the debt twice; for the courts which had acquired jurisdiction of the cause by the priority of the attachment, would never permit the proceeding to be defeated by the act of the party going abroad, and subjecting himself to a suit and recovery against him in another state; or by instituting proceedings, in order to avoid or arrest the course of the suit first duly commenced against

(*a*) Le Chevalier *v.* Lynch, Doug. Rep. 170.

(*b*) Lord Holt, in Brook *v.* Smith, 1 Salk. Rep. 280. Embree & Collins *v.* Hanna, 5 Johns. Rep. 101. Carrol *v.* M'Donogh, 10 Martin's L'a Rep. 609. This is now the recognized doctrine in the Supreme Court of the United States. Wallace *v.* M'Connell, 13 Peters, 136. The priority of suit will determine the right. See Irvine *v.* Lumbermen's Bank, 2 Watts & Serg. 190. Lowry *v.* The Same, Ib. 210. But in West, Syndic, *v.* McConnell, 5 L'a Rep. 424, it was held, that the pendency of a suit by foreign attachment, for the same cause of action, in another state, could not be pleaded in abatement of the action instituted in Louisiana; though it might tend to modify the relief, so as to stay execution until the party credits and accounts for the proceeds of the property seized abroad, or else dismisses the foreign attachment.

The Court of Chancery of New York will not restrain, by injunction, a defendant from prosecuting a foreign suit previously commenced. Mead *v.* Merritt, 2 Paige's

execution of foreign judgments *in personam* is reciprocally allowed by the law and usage of the different states of the Germanic Confederation, and of the European Continent in general, except Spain, Portugal, Russia, Sweden, Norway, France, and the countries whose legislation is based on the French Civil Code.

1 The pendency of a replevin in a state court to settle a right of property in a vessel, is a bar to a libel in admiralty to settle the same right between the same parties — though not technically a *bar* as a *lis pendens*, yet effectively so to prevent a conflict of jurisdiction. Taylor *v.* The Royal Saxon, 1 Wallace, Jr. R. U. S. C. C. 311. The pendency of a prior suit cannot be pleaded in suspension of another suit, if the two are in their nature different; so that a plea of *lis alibi pendens* upon proceedings instituted *in personam* in a court of Scotland, was held to be no bar to a suit *in rem* in the Admiralty Court of England. Harmer *v.* Bell, 22 E. L. & Eq. 62.

*125 him. (a) But generally, a personal arrest *and holding to bail in a foreign country, cannot be pleaded in abatement; and it is no obstacle to a new arrest and holding to bail for the same cause in the English courts, and they will not take judicial notice of an arrest in a foreign country or in their own plantations; (b) and the same rule of law has been declared in this country. (c) [1]

4. *Of divorce a mensa et thoro.*

The statute of New York (d) authorized the Court of Chancery

Rep. 402; though this has been done in the English chancery under special circumstances. Bushby v. Munday, 5 Mad. Rep. 297. It has been done where the proceeding in a foreign court was instituted by the same party as to the same matter. 1 Sim. & Stuart, 16.

(a) Parker, Ch. J., in Tappan v. Poor, 15 Mass. Rep. 423. S. P. in Embree & Collins v. Hanna, 5 Johns. Rep. 103, 104.

(b) Maule v. Murray, 7 Term Rep. 470. Imlay v. Ellefsen, 2 East, 453. Bayley v. Edwards, 3 Swanston's Rep. 703. Salmon v. Wootton, 9 Dana's Rep. 123. The Court of Appeals in Lower Canada, in the case of Russell v. Field, (1833,) followed the English rule, and held that the plea of a suit pending in Vermont, between the same parties, for the same cause of action, was no bar to the new suit in the Canadian court.

(c) Bowne v. Joy, 9 Johns. Rep. 221. Mitchell v. Bunch, 2 Paige's Rep. 606. Godfrey v. Hall, 4 L'a Rep. 158. Peyroux v. Davis, 17 L'a Rep. 479. But where there are two tribunals under the same government, of concurrent and complete jurisdiction, the jurisdiction of that tribunal which first takes cognizance, by process, of the subject-matter of controversy, is conclusive. Smith v. M'Iver, 9 Wheaton, 532. The Ship Robert Fulton, 1 Paine, C. C. U. S. 620. Slyhoof v. Flitcraft, 1 Ashmead's Rep. 171. Whether a *lis pendens* in another state, between the same parties, for the same cause, was a good plea in abatement, was left as a doubtful question, in Casey v. Harrison, 2 Dev. N. C. Rep. 244. Ch. J. Gibson, in Ralph v. Brown, 3 Watts & Serg. 399, assumes that such a plea in such a case would be good. In the case of torts or joint contracts, a plea in abatement of another action pending for the same cause, against a co-trespasser or joint contractor, is bad. There may be several recoveries, but only one satisfaction. Henry v. Goldney, 15 M. & W. Rep. 494.[2]

(d) N. Y. Revised Statutes, vol. ii. p. 146.

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[1] The principle of *lis pendens* is, that the proceedings must be of such a character as to point out to all the world the property or rights affected by them. It can only affect rights acquired subsequently to such proceedings; and to defeat the claims of a *bonâ fide* purchaser, the suit must be prosecuted with reasonable diligence. Lewis v. Mew, 1 Strob. Eq. R. 180. Clarkson v. Morgan, 6 B. Mon. Rep. 441.

[2] The plea of *lis pendens*, in a state court or in a foreign court, is not a good plea in abatement of a suit *in personam* in the Circuit Court. White v. Whitman, 1 Curtis, C. C. 494. Lyman v. Brown, 2 Curtis, C. C. 559. But see Earl v. Raymond, 4 McLean, 233. Nor is a suit in a court of another state. McJilton v. Love, 13 Ill. 486. Drake v. Brander, 8 Texas, 351.

to allow qualified divorces *a mensa et thoro* founded on the complaint of the wife, of cruel and inhuman treatment, or such conduct as renders it unsafe and improper for her to cohabit with her husband; or for wilful desertion of her, and refusal and neglect to provide for her. The court may decree a separation from bed and board forever, or for a limited time, in its discretion; and the decree may be revoked at any time by the same court by which it was pronounced, under such regulations and restrictions as the court may impose, upon the joint application of the parties, and upon their producing satisfactory evidence of their reconcilation. (*a*)

To entitle the court to sustain such a suit, (1.) the parties must be inhabitants of the state; (2.) or the marriage must have taken place in the state, and the wife must be an actual resident at the time of exhibiting the complaint; (3.) or the parties must have been inhabitants of the state at least one year, and the wife an actual resident at the time of filing the bill. (*b*)

These qualified divorces are allowed by the laws of almost all countries, and it is assumed that they prevail generally in the United States, in cases of extreme cruelty, though they are unknown in some of them, as, for instance, in New Hampshire, Connecticut, Ohio, Indiana, and South Carolina. (*c*) In Eng-

(*a*) N. Y. Revised Statutes, vol. ii. pp. 146, 147, sec. 50, 51, 56.

(*b*) Ibid. 146, sec. 50.

(*c*) In Louisiana, the divorce *a mensa* leads to the divorce *a vinculo*, if the parties be not reconciled in two years. Savoie *v.* Ignogoso, 7 L'a Rep. 281; and in Virginia in seven years; Act of 1841. In Massachusetts, divorces from bed and board are allowed for causes of extreme cruelty in either party, and in favor of the wife when the husband shall utterly desert her, or grossly or wantonly and cruelly refuse or neglect to provide (if able) suitable maintenance for her. Mass. Revised Statutes, 1836.[1] In Vermont, New Jersey, Kentucky, Mississippi, Tennessee, Alabama, and

[1] By ch. 228 of the Laws of 1857, it is enacted in Massachusetts, that when parties have lived apart for five consecutive years after a divorce *a mensa*, a divorce *a vinculo* may be granted upon the petition of the party at whose instance the former divorce was decreed; and after a separation of ten years, such a divorce may be granted, under certain conditions, on the petition of either party.

In Connecticut, divorces *a vinculo* may be decreed for wilful, continued, and obstinate desertion for three years; (Laws, Conn., 1856, ch. 143,) and in Massachusetts after five years. (Laws, Mass., 1857, ch. 228.)

land, they are allowed only *propter sævitiam aut adulterium;* and where there is a separation *for such a cause, if the parties come together again, the same cause cannot be revived. (a)

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In determining what is *sævitia*, by the ecclesiastical law, we find it stated in *Evans* v. *Evans*, (b) that it is necessary there should be a reasonable apprehension of bodily hurt. The court keeps the rule very strict. The causes must be grave and weighty, and show such a state of personal danger as that the duties of the married life cannot be discharged. Mere austerity of temper, petulance of manners, rudeness of language, a want of civil attention, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to that cruelty against which the law can relieve.[1] The wife must disarm such a disposition in the husband by the weapons of kindness. (c)

Michigan, divorce *a mensa et thoro*, may be granted for extreme cruelty, and in some of those states for wilful desertion for two years. Act of Michigan, April 4th, 1833. Lockridge *v.* Lockridge, 3 Dana's Ken. Rep. 28. Holmes *v.* Holmes, Walker's Miss. Rep. 474. Elmer's Digest, 140. Laws of Vermont, p. 364. 4 Aiken's Ala. Dig. 2d edit. 131. Statute Laws of Tennessee, 1836, p. 261. In the Dutch law, and in Scotland, wilful abandonment of either party without due causes for a long time, is ground for a decree of divorce. Van Leeuwen's Roman-Dutch Law, 85. Ersk. Inst. b. 1, tit. 6, sec. 20. Divorces from bed and board were unknown to the ancient church, and were first established by the decrees of the Council of Trent.

(a) Lord Eldon, 11 Vesey, 532. Cohabitation is not always a condonation for cruelty on the part of the husband under gross circumstances. Snow *v.* Snow, Consistory Court, London, Jul. 1842. Jurist, No. 6.[2]

(b) 1 Haggard's Consist. Rep. 35.

(c) 1 Ibid. 364, 409. 2 Ibid. p. 148. Neeld *v.* Neeld, 4 Haggard's Eccl. Rep. 363. Pothier, Traité du Contrat de Mariage, sec. 509. 2 Mass. Rep. 150. 3 Ibid. 321, note. 4 Ibid. 587. Finley *v.* Finley, 9 Dana's Rep. 52. But it is cruelty, in judgment of law, if the wilful conduct of the husband exposes the wife to bodily hazard and intolerable hardship. D'Aguilar *v.* D'Aguilar, 1 Haggard's Eccl. Rep. 773.

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[1] Shaw *v.* Shaw, 17 Conn. R. 189. In this case the subject of cruelty is extensively examined. See a case in the House of Lords, Paterson *v.* Paterson, 12 E. L. & Eq. R. 19. David *v.* David, 27 Ala. 222. Sheffield *v.* Sheffield, 3 Tex. 79. Wright *v.* Wright, 6 Tex. 3. Shell *v.* Shell, 2 Sneed, 716. C—— *v.* C——, 28 E. L. & Eq. 603.

[2] Condonation of cruelty will be construed favorably to the wife. Bowie *v.* Bowie, 8 Maryl. Ch. 51. Reese *v.* Reese, 23 Ala. 785. Gardner *v.* Gardner, 2 Gray, 434. And to support her right to cancel her condonation, it is not necessary that the *same* injuries be repeated. Langdon *v.* Langdon, 25 Verm. 678.

This being the rule of the English courts, it would appear that divorces *a mensa* are placed, by the statute of New York, on rather broader ground. They are not only for cruelty, but generally for such conduct on the part of the husband towards his wife as renders it unsafe and improper for her to cohabit with him, and be under his dominion and control. Probably the word unsafe, in our statute, may mean the same thing as the reasonable apprehension of bodily hurt in the English cases. (*a*) It was considered, in the case of *Barrere* v. *Barrere*, (*b*) that the danger or injury must be serious, and the slightest assault or touch in anger was not, in ordinary cases, sufficient. It was likewise held, in that case, that the separation need not be declared to be for any specific time, but may be left general and indefinite, with *liberty to the *127 parties to be reconciled when they please, and to apply to be discharged from the decree. The decree of divorce is always, by the canon law, *sub spe reconciliationis*. (*c*)

The statute above referred to seems to have considered the wife as the only infirm party who stands in need of such protection, for it confines the divorce *a mensa* for cruelty, desertion, or other improper conduct, to such conduct in the husband; (*d*) but the English ecclesiastical law makes no such distinction, and divorces are granted on a bill by the husband, for cruel usage by the wife. (*e*) Upon these separations from bed and board, the children that the wife has during the separation, are

(*a*) It has been so understood in Mason *v.* Mason, 1 Edw. Ch. Rep. 292.

(*b*) 4 Johns. Ch. Rep. 187.

(*c*) Burn's Eccl. Law, tit. Marriage, ch. 11, sec. 4. Oughton's Ordo Jud. tit. 215, sec. 3. Bynk. Q. Jur. Priv. b. 2, ch. 8.

(*d*) Van Veghten *v.* Van Veghten, 4 Johns. Ch. Rep. 501. By a statute of New York, of April 10th, 1824, ch. 205, sec. 12, the Court of Chancery was authorized to decree a divorce *a mensa*, on the complaint of the *husband*, and that provision is deemed to be in force, notwithstanding the subsequent general provision in the *revised laws*, confining that remedy to the wife.[1] Perry *v.* Perry, 2 Paige's Rep. 501.

(*e*) Kirkman *v.* Kirkman, 1 Haggard's Consist. Rep. 409.

[1] A single act of violence is not sufficient. It must appear that the husband will not be able to protect himself and family. Perry *v.* Perry, 1 Barb. Ch. R. 516. In Pennsylvania, a divorce may be granted, on the petition of the husband, "when the wife shall have, by cruel and barbarous treatment, rendered the condition of her husband intolerable, or life burdensome." (Penn. Laws, 1854, May 8.)

bastards, for due obedience to the decree is to be presumed, unless the contrary be shown. (*a*) If, however, cohabitation between the husband and wife existed, the presumption of illegitimacy is destroyed. This is the general law; and when the New York Revised Statutes (*b*) declared that a child begotten and born during the separation of its mother from her husband, pursuant to a divorce *a mensa et thoro*, shall be deemed a bastard, it is to be taken, as I apprehend, subject to the same qualifications which accompanied the general rule.

These qualified divorces are regarded as rather hazardous to the morals of the parties. In the language of English courts, it is throwing the parties back upon society, in *128 * the undefined and dangerous characters of a wife without a husband, and a husband without a wife. The ecclesiastical law has manifested great solicitude on this subject, by requiring, in every degree of separation, an express monition to the parties "to live chastely and continently, and not during each other's life contract matrimony with any other person;" and security was formerly required from the party suing for the divorce, to obey the mandate. (*c*) The statute allows the husband, on such a bill by the wife, for ill-conduct, to show, in his defence, and in bar of the suit, a just provocation in the ill-behavior of the wife, and this would have been a good defence even without the aid of the statute. (*d*) [1] And on these separations from bed and board, the courts intrusted with the jurisdiction of the subject will make suitable provision for the support of the wife and children, out of the husband's estate, and enforce the decree by sequestration; and the chancellor in New York may exercise his discretion in the disposi-

(*a*) St. George *v.* St. Margaret, 1 Salk. 123.

(*b*) Vol. i. p. 641.

(*c*) Burn's Eccl. Law, tit. Marriage, ch. 11, sec. 4. Barrere *v.* Barrere, 4 Johns. Ch. Rep. 196, 198. Van Veghten *v.* Van Veghten, Ibid. 501.

(*d*) New York Revised Statutes, vol. ii. p. 147, sec. 53. Waring *v.* Waring, 2 Haggard's Consist. Rep. 154.

[1] He may also show a condonation. But a subsequent repetition of the personal abuse revives all those causes of separation which existed prior to the condonation. And slight acts of abuse, which of themselves would not sustain a bill, revive all antecedent acts of cruelty and misconduct. Calkins *v.* Long, 22 Barb. (N. Y.) 97.

tion of the infant children, and vary or annul the same from time to time, as circumstances may require. (*a*) [1] I apprehend there is not, in the United States, any essential difference in principle, or departure from the doctrines of the English law on the subject of divorces *a mensa et thoro*. (*b*)

(*a*) New York Revised Statutes, vol. ii. p. 147, sec. 54, 55. Ibid. 148, sec. 59, 60. Barrere *v*. Barrere, 4 Johns. Ch. Rep. 197. In Shelford on Marriage and Divorce, pp. 592–607, the cases are collected on the exercise of the equitable and discretionary jurisdiction of the ecclesiastical courts, in awarding permanent alimony to the wife, on decrees of divorce *a mensa et thoro*. In an aggravated case a moiety of the husband's property has been given.

(*b*) Reeve's Domestic Relations, ch. 16. Thompson *v*. Thompson, 2 Dallas, 128. Warren *v*. Warren, 3 Mass. Rep. 321. Statutes of Delaware, 1832, ch. 144.

[1] Ahrenfeldt *v*. Ahrenfeldt, 4 Sandf. Ch. 493. Battey *v*. Battey, 1 R. I. 212.

LECTURE XXVIII.

OF HUSBAND AND WIFE.

The legal effects of marriage are generally deducible from the principle of the common law, by which the husband and wife are regarded as one person, and her legal existence and authority in a degree lost or suspended, during the continuance of the matrimonial union. (*a*) From this principle it follows, that at law no contracts can be made between the husband and wife, without the intervention of trustees; for she is considered as being *sub potestate viri*, and incapable of contracting with him; and except in special cases, within the cognizance of equity, the contracts which subsisted between them prior to the marriage, are dissolved. (*b*) The wife cannot convey lands to her husband, though she may release her dower to his grantee; nor can the husband convey lands by deed directly to the wife without the intervention of a trustee. (*c*) [1] The husband may

(*a*) Co. Litt. 112 a, 187 b. Litt. sec. 168, 291. 1 Blacks. Com. 441. The *jus mariti*, where it is not restrained by special contract, exists with equal force and extent in the Scotch law. The husband acquires the same power over the person and property of the wife, and she is subjected to similar disabilities. Erskine's Inst. b. 1, tit. 6, sec. 19, 22. Stair's Inst. b. 1, tit. 4, sec. 13, 16

(*b*) The disability of husband and wife to contract with each other is founded in the wisest policy, and is an essential muniment to the inviolability of the nuptial contract, and to the maintenance of the institution of marriage. The consequent dependence of the wife upon the husband, and the continued liability of the husband to support the wife, and the other incapacity of the parties, by their own mere will, to absolve each other from the reciprocal rights and duties which the law of their contract imposes upon them, furnishes powerful motives to the promotion of harmony and peaceful cohabitation in married life. Marshall, J., in Simpson *v.* Simpson, 4 Dana's Ken. Rep. 142.

(*c*) Co. Litt. 3 a. Litt. § 677. Martin *v.* Martin, 1 Greenleaf's Rep. 394. Rowe

[1] Where the husband executed an attested instrument, *giving* and granting a freehold house to his wife: held, that the gift was incomplete, and the relationship of trustee and *cestui que trust* was not created. Price *v.* Price, 8 Eng. L. & Eq. R. 271.

To constitute a gift between husband and wife, there must be either a gift to a trustee

devise lands, or grant a legacy to his wife, for the instrument is to take effect after his death; and by a conveyance to uses, he may create a trust in favor of his wife, (a) and equity will decree performance of a contract by the husband with his wife, for her benefit. (b) The general rule is, that the husband becomes entitled, upon the marriage, to all the goods and chattels of the wife, and to the rents and profits * of her lands, and he becomes liable to pay her debts and perform her contracts. *130

According to the plan of these general disquisitions, I cannot undertake to enter minutely into the numerous distinctions and complex regulations which appertain to the relation of husband and wife. My purpose will be answered if I shall be able to collect and illustrate the leading principles only; and that I may be able to do this clearly, and to the satisfaction of the student, I shall consider the subject in the following order:—

1. The right which the husband acquires by marriage in the property of the wife:

2. The duties which he assumes in the character of husband:

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v. Hamilton, 6 Greenleaf's Rep. 63. Stickney v. Borman, 2 Barr's Penn. R. 67. Shepard v. Shepard, 7 Johns. Ch. 60. But though such a conveyance would be void at law, equity will uphold it in a clear and satisfactory case. Wallingsford v. Allen, 10 Peters's Sup. Court Rep. 583. See *infra*, p. 162. But a court of equity has no jurisdiction, even with the consent of the wife to transfer to her husband personal property settled in trust for her, and to be hers absolutely on surviving her husband. Richards v. Chambers, 10 Vesey, 580.

(a) Co. Litt. 112, a.

(b) Moore v. Ellis, Bunb. Rep. 205. Livingston v. Livingston, 2 Johns. Ch. Rep. 537. Shepard v. Shepard, 7 Johns. Ch. Rep. 57.

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for the wife, or the husband must devest himself of the property, and engage to hold it as trustee for the separate use of the wife. Mews v. Mews, 21 Eng. L. & Eq. R. 556. See Visk v. Cushman, 6 Cushing, R. 20, *post*, 146, [163]. It is held in Alabama, that the husband may at any time during his life revoke the gift of property which he has purchased, and holds as trustee for his wife. Gannard v. Eslava, 20 Ala. 732.

When the husband and wife are each next of kin to an intestate, each is entitled to a distributive share of the estate. The doctrine that husband and wife are one person in law, does not apply to such a case. Knapp v. Windsor, 6 Cushing, R. 156. Under recent statutes in Maine, a husband may convey directly to his wife; and the property in a note passes to her by the husband's indorsement. Johnson v. Stillings, 35 Maine, 427. Motley v. Sawyer, 34 Maine, 540. And see Davis v. Herrick, 37 Id. 397.

3. How far the wife is enabled by law to act during coverture, as a *feme sole*:

4. Her competency, in the view of a court of equity, to deal with her property:

5. Other rights and disabilities incident to the marriage union.[1]

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[1] The recent legislation of several of the states has essentially changed the relations of husband and wife, in respect to the property of the latter.

In Vermont, by law passed in 1847, it has been enacted, that the rents, issues, and profits of the real estate of any married woman, and the interest of the husband in her right to the same, whether acquired before or after marriage, shall be exempt from attachment or execution for the sole debt of the husband; and no conveyance of the husband, during coverture, of such right or interest, shall be valid, unless the same be by deed, executed jointly by the husband and wife. Married women may devise their real estate, or any interest therein, descendible to their heirs.

In Connecticut, (ch. 20, Acts of 1849,) it is provided, that personal property accruing to a married man in right of his wife, by bequest or representation, shall be held in trust for the wife, the husband taking the income during his life, the same being exempt from his debts, except for those contracted for the wife and her children. The wife must join with her husband to give validity to a transfer of this property.

By the Rev. Stat. of Conn. tit. 7, ch. 1, § 7, 1849, the husband's interest in the wife's real estate cannot be seized by execution during the lives of the wife and children. A married woman may herself receive the wages of her own labor.

In Alabama, the change of the law is still more remarkable. By an Act, passed in 1850, it is provided: —

1. That all property, owned by a woman on her marriage, or afterwards acquired, shall be her separate property.

2. Such property is vested in the husband in trust, to manage according to the general law of trusts, and he may take the rents, &c., without liability to account to the wife; but both the property and its rents and profits are not liable for his debts.

3. If the husband is guilty of certain enumerated abuses of his wife, or of his trust, and becomes incompetent, the courts may declare the wife to be a "free dealer," having the rights and liability of a *feme sole*.

4. The wife's property can be conveyed only by the joint conveyance of the husband and the wife.

5. For articles of supply for the family, for which the husband would be liable at common law, the husband is severally liable, and the husband and wife jointly liable.

6. On the death of the wife, intestate, the husband succeeds to one half of her personal property absolutely, and to the use for life of one half of her real estate. It would appear that by a subsequent statute he is given the use for life of all her real estate. See Marshall *v.* Crow's Administrator, 29 Ala. 278. On the husband's death, if the wife's separate estate be equal to her dower, she has no dower; if it be less, she is entitled to so much of her husband's estate, as with her separate estate shall be equal to full dower.

In Massachusetts, by an Act passed in 1855, (Laws, ch. 304,) and amended in 1857, (Laws, ch. 249,) a married woman may hold real or personal property, belonging to her, or which may come to her by descent, devise, or bequest, or the gift of any person except her husband, in the same manner as if she were a *feme sole*. She may sell and convey away any of her real or personal property, with the written consent of her husband, or, if that cannot be obtained, with the consent of one of the judges of the supreme judicial court, or court of common pleas, or judge of probate. She may make a will, but cannot

I. *The right which the husband acquires by marriage in the property of the wife.*

(1.) *To her lands in fee.*

If the wife, at the time of marriage, be seised of an estate of

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bequeath away from her husband more than one half of her personal property, without his written consent, and cannot, by her will, deprive him of his rights as tenant by the curtesy. She may carry on any trade or business, and perform any labor or services, and her earnings for the same are her sole and separate property. No bargain or contract, made by her in carrying on any trade or business, is binding on her husband. She may sue and be sued as a *feme sole.*

In Mississippi, by an Act passed in 1839, (Laws, ch. 46,) it was enacted that a married woman may become seised and possessed of any property, real or personal, by direct bequest, devise, gift, purchase, or distribution, in her own name, and as of her own property, provided the same does not come from her husband before coverture.

By the laws of Texas, it is provided that all the property of the husband on marriage, and all his future acquisitions, shall be his separate property; and that the property of the wife, owned at the time of marriage, or thereafter acquired, shall be her separate property. The husband has the management of the whole property. There are other provisions similar to those of the law of Alabama. Laws of Texas, ch. 79, 1848. And it was held in Fitts *v.* Fitts, 14 Texas, 443, that a wife, with respect to her property, is not one with her husband; she has like capacity with him to acquire, receive, and hold property; and she can hold fully and perfectly in her own right, without the intervention of a trustee.

In California, by a law passed April 17, 1850, at the first session of the legislature of that state, all property, both real and personal, of the husband or wife, owned by him or her before marriage, and acquired afterwards by gift, bequest, devise, or descent, is his or her separate property. All property, acquired after the marriage by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, is common property. The rents and profits of the separate property of either husband or wife are deemed common property. No estate is allowed to the husband as tenant by curtesy, and the wife has no right of dower. Upon the dissolution of the community by the death of either husband or wife, one half of the common property goes to the survivor, and the other half to the descendants of the deceased husband or wife, subject to the payment of the debts of the deceased. If there be no descendants of the deceased husband or wife, all the property goes to the survivor.

In New York, a law equally bold in its innovations, but less minute and comprehensive in its provisions, has been enacted. By "An Act for the more effectual protection of the property of married women," passed April 7, 1848, and amended April 11, 1849, it was enacted:

1. That the property of a woman thereafter marrying, should continue her sole and separate property as if she were a single female, not liable to her husband's debts, nor subject to his disposal.

2. A similar provision was made as to the property of a woman married at the time of the Act, except so far as the same might be liable for the debts of the husband previously contracted.

3. It was declared that any married woman might inherit or take property by gift, &c., from any person other than her husband, and hold the same to her separate use, in the same manner as if she were unmarried.

4. Married women, then entitled to trust estates, were authorized to receive conveyances from their trustees of the trust property, for their separate use.

inheritance in land, the husband, upon the marriage, becomes seised of the freehold *jure uxoris*, and he takes the rents and

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5. Marriage contracts were declared to be in full force after the marriage takes place.

There has been, as yet, but a slight examination of this important statute in the courts of New York. In Snyder *v.* Snyder, 3 Barb. S. C. Rep. 621, it was decided that the Act did not apply retrospectively to the property which women then married had at the time of their marriage, or had acquired during coverture. See, also, Holmes *v.* Holmes, 4 Id. 296. Watson *v.* Bonney, 2 Sandf. (Law,) 405.

It would be premature to pronounce upon all the bearings of this startling innovation on the law of husband and wife. According to the plainest construction of the statute, an immense alteration of the law, as declared in this lecture, has been effected. Nor is it easy to assign its limits. Does the estate by the curtesy remain even after the death of the wife? Does the husband succeed to the wife's personal estate in any character whatever? Is the husband bound for the debts of the wife, no longer receiving property by her? Innumerable questions suggest themselves to be decided by the courts, as well as the more important one, to be determined by time, whether true wisdom has dictated this entire destruction of a rule of law which had stamped itself upon national manners, and become connected with the happiness of domestic life.

Since the preceding part of this note was written, it has been decided, that, although under the statute of New York the husband has no interest in the wife's land, during coverture, yet, on her death after issue born, he is entitled to his tenancy by the curtesy. Hurd *v.* Cass, 9 Barb. R. 366. Smith *v.* Colvin, 17 Barb. 157. A similar statute has been passed in Maine. Laws, 1852, ch. 291, p. 280.

In further construction of this statute, it has been held, that the wife cannot convey to *her husband* her dower-right in his lands. Graham *v.* Van Wyck, 14 Barbour, R. 531.

The statute shall not be construed to affect the husband's vested interest in a legacy bequeathed to the wife prior to its enactment, though not then reduced by him to possession. Westervelt *v.* Gregg, 2 Kern. 202.

It has been held further that these Acts do not confer upon a married woman any new capacity to make personal contracts, which have no relation to her separate estate. Switzer *v.* Valentine, 4 Duer, 96; and see Blood *v.* Humphrey, 17 Barb. 660; Sleight *v.* Read, 18 Barb. 159.

By an Act passed March 20, 1860, the rights of married women are still further enlarged. By this statute, a married woman may bargain, sell, assign, and transfer her separate personal property, and carry on any trade or business, and perform any labor or services on her sole and separate account; and her earnings from her trade, business, labor, or services are her sole and separate property, and may be used or invested by her in her own name. So a married woman may sell and convey her real estate with the written consent of her husband; or, if that cannot be obtained, by an order of the county court, to be granted on proof of certain facts. She may sue and be sued alone, and may even bring an action, in her own name, for damages, against any person or body corporate, for injury to her person or character; and the money received on settlement or recovered by judgment is her sole and separate property. Upon the decease of husband or wife, leaving no minor child or children, the survivor has a life-estate in one third of all the real estate of which the husband or wife died seised. Upon the decease of a husband or wife intestate, leaving a minor child or children, the survivor has a right to hold, possess, and enjoy all the real estate of which the husband or wife died seised, and all the rents and profits during the minority of the youngest child, and one third during his or her natural life.

By Statutes of Maine, Laws of 1852, ch. 227, a married woman, seised and possessed of property, real or personal, may sell and convey the same in her own name.

In New Jersey, (Laws of 1852, ch. 41,) the property of a woman at the time of her marriage continues her separate property, and she is authorized to receive and hold property

profits during their joint lives. (*a*) It is a freehold estate in the husband, since it must continue during their joint lives, and it may, by possibility, last during his life. It will be an estate in him for the life of the wife only, unless he be a tenant by the curtesy. It will be an estate in him for his own life if he dies before his wife, and in that event, she takes the estate again in her own right.[1] If the wife dies before the husband, without having had issue, her heirs immediately * succeed to *131 the estate. If there has been a child of the marriage born alive, the husband takes the estate absolutely for life, as tenant by the curtesy, and on his death the estate goes to the wife, or her heirs; and in all these cases, the emblements growing upon the land, at the termination of the husband's estate, go to him or his representative.

During the continuance of the life-estate of the husband, he sues in his own name for an injury to the profits of the land; but for an injury to the inheritance, the wife must join in the suit, and if the husband dies before recovery, the right of action survives to the wife. (*b*) If the husband himself commits waste,

(*a*) Co. Litt. 351, a. In Georgia, the rights of the husband upon marriage in the real estate of the wife are vastly enlarged. That estate passes to the husband absolutely, the same as personal property; and if the wife dies intestate, the husband is entitled to administer upon her estate, real and personal, and recover and enjoy the same without being subject to distribution. On the other hand, if the husband dies intestate without issue, the wife inherits his whole estate, real and personal, subject to his debts. Hotchkiss's Codification of the Statute Law of Georgia, 1845, p. 426.

(*b*) Weller and others *v.* Baker, 2 Wils. Rep. 423, 424. It is there said to be difficult to reconcile the cases, as to the joinder of husband and wife, in actions relating to the land.

as if she was unmarried. And a husband cannot recover, to his own use, a bequest made to his wife, unless he have reduced such bequest to possession previous to the Act of 1852. Henry *v.* Dilley, 1 Dutch. (N. J.) 302.

In Maryland, (Laws of 1853, p. 324,) the property, real and personal, belonging to a woman at the time of her marriage, or which she may acquire thereafter by gift, devise, descent, or bequest, is not liable for the debts of her husband; provided the same shall not have been conveyed to her by her husband in prejudice of the rights of his creditors.

In Kentucky, (Laws of 1855–6, p. 42,) the slaves and real estate, belonging to married women, are not liable for the debts of the husband.

[1] If the real estate of the wife be converted into personalty during the life of the wife, by act of law, it will be treated as though the wife had herself made the conversion. Graham *v.* Dickinson, 3 Barb. Ch. R. 170. The rule appears to be otherwise in Maryland. Taggart *v.* Boldin, 10 Md. 104.

Where the husband and wife united in a conveyance of the real estate of the wife to

the coverture is a suspension of the common-law remedy of the wife against him. The husband has an interest in the freehold estate of his life, which may be seized and sold on execution; and if the assignee or creditor of the husband, who takes possession of the estate on a sale on execution of his freehold interest, commits waste, the wife has her action against him, in which the husband must join; for though such assignee succeeds to the husband's right to the rents and profits, he cannot commit waste with impunity. (*a*) So, also, the heir of the wife may sue the husband for the waste, and no doubt the Court of Chancery would stay by injunction the husband's waste, on behalf of the wife herself. But it seems, that from want of privity, the heir of the wife cannot bring an action of waste against the assignee of the husband, though it may be brought against the husband himself, for waste done by his assignee, and he shall recover the land of the assignee. (*b*) The subtle distinction in *Walker's case*, (*c*) and which we have followed, was, that if the tenant by the curtesy assigns over his estate, the heir of the wife can sue him for waste done after the assignment; *132 but if the heir *grants over the reversion, the grantee cannot sue the husband, for the privity of the action is destroyed. He can only sue the assignee of the husband, for as between them there is a privity of estate.

If an estate in land be given to the husband and wife, or a joint purchase be made by them during coverture, they are not properly joint tenants, nor tenants in common, for they are but one person in law, and cannot take by moieties.[1] They are both seised of the entirety, and neither can sell without the consent of the other, and the survivor takes the whole. (*d*) This species

(*a*) Babb and Wife *v.* Perley, 1 Greenleaf's Rep. 6. Mattocks *v.* Stearns, 9 Vermont Rep. 326.

(*b*) Bates *v.* Shraeder, 13 Johns. Rep. 260.

(*c*) 3 Co. 22.

(*d*) Preston on Estates, vol. i. 131.

trustees *for the use of the grantors*, it was held, that the transaction gave the husband absolute control of the proceeds. Siter *v.* M'Clanachan, 2 Gratt. R. 280. The husband, after the death of the wife, may sue for the use and occupation of her real estate, by the permission of the husband and wife during coverture. Jones *v.* Patterson, 11 Barb. 572.

[1] In lands conveyed to the wife, the husband becomes seised of an estate for their joint lives. R. R. Co. *v.* Harris, 9 Ind. 184.

of tenancy arises from the unity of husband and wife, and it applies to an estate in fee, for life, or for years. If the grant be made to the husband and wife and B., or to the husband and wife and B. and C., the grantees are all joint tenants as between themselves, but the husband and wife are tenants by entireties, as between each other; and as for all the purposes of ownership, the husband and wife are but one person in law, they take only a moiety of the land in the one case, and only a third of it in the other.(a) If they are tenants by entireties of a term of years, the husband may alien the entirety so as to bind the wife. (b) The same words of conveyance, which would make two other persons joint tenants, will make the husband and wife tenants of the entirety. This is a nice distinction laid down in the old books, and it continues to this day to be the law. (c) *The husband alone may grant or charge *133 the wife's land during their joint lives,[1] and if he be

(a) Litt. sec. 291. Barber v. Harris, 15 Wendell, 617. Johnson v. Hart, 6 Watts & Serg. 319.

(b) Grute v. Locroft, Cro. Eliz. 287. When husband and wife hold the entirety, with the right of survivorship, he cannot alien the *entire estate;* but the husband may execute a mortgage of his interest, or he may make a lease in his own name, or join with his wife. Jackson v. McConnell, 19 Wendell, 175. In the state of Ohio, no joint tenancy exists, and the doctrine of survivorship is unknown, even as to a devise to husband and wife, and they take as tenants in common, and not as tenants of the entirety. Sergeant v. Steinberger, 2 Ohio Rep. 305, (Hammond, 423); Wilson v. Fleming, 13 Id. 68.

(c) Litt. sec. 291. Co. Litt. 187 b, 188 a, 351. Bro. Abr. tit. Cui in vita, 8. 2 Blacks. Rep. 1214. Doe v. Parratt, 5 Term Rep. 652. 16 Johns. Rep. 115. 5 Johns. Ch. Rep. 437. Barber v. Harris, 15 Wendell, 615. Den v. Hardenbergh, 5 Halsted's Rep. 42. 3 Randolph's Rep. 179. 5 Mass. Rep. 523. 1 Dana's Kentucky Rep. 37, 243. Taul v. Campbell, 7 Yerger, 319. Den v. Whitemore, 2 Dev. & Bat. 537. Greenlaw v. Greenlaw, 13 Maine Rep. 186, Weston, Ch. J. Dickinson v. Codwise, 1 Sandford's Ch. R. 214, 222. See *infra,* vol. iv. p. 362. Mr. Preston (Abstracts of Title, vol. ii. p. 41) says, that as the law is now understood, husband and wife may, by *express words,* be made tenants in common, by a gift to them during coverture. The assistant vice-chancellor, in Dias & Burn v. Glover, 1 Hoffman's Ch. Rep. 71, questions the solidity of Mr. Preston's opinion. The law in the text does not exist in Connecticut; but the husband and wife are joint tenants in such case, and the husband may alone convey his interest. Whittlesey v. Fuller, 11 Conn. Rep. 337.[2]

[1] Butterfield v. Beall, 3 Ind. 203.

[2] Both, it is held in Pennsylvania, are seised of the entirety though the conveyance be to them in fee "as tenants in common and not as joint tenants." Stuckey v. Keefe's Executors, 26 Penn. 397.

tenant by the curtesy during his own life. He cannot alien or incumber it, if it be a freehold estate, so as to prevent the wife, or her heirs, after his death, from enjoying it, discharged from his debts and engagements. But from the authorities, when closely examined, says Mr. Preston, (*a*) it seems that the husband has the power to transfer the *whole* estate of his wife, and the estate will be in the alienee of the husband, subject to the right of *entry* of the wife, or her heirs, and which entry is necessary to revest the estate after the husband discontinues it. She was driven at common law to her writ of right, as her only remedy; but Lord Coke says, (*b*) he found that in the times of Bracton and Fleta, the writ of entry *cui in vita* was given to the wife, upon the alienation of her husband, and this was her only remedy in the age of Littleton. (*c*) That writ became obsolete after the remedial statute of 32 Hen. VIII. c. 28, which reserved to the wife her right of entry, notwithstanding her husband's alienation; and the writ of entry lay even if she had joined with her husband in a conveyance by feoffment, or bargain and sale, for such conveyances were deemed the sole act of the husband, as the wife was not separately examined. (*d*)

(*a*) Essay on Abstracts of Title, vol. i. pp. 334, 435, 436. Sergeant Williams, in his note to Wotton *v.* Hele, 2 Saund. 180, n. 9, concludes, that as estates for life, being freehold estates, and commencing by livery of seisin, could only be avoided by entry, leases for life by the husband were voidable only, but that leases for a term of years were absolutely void on the husband's death; and this, Chancellor Johnson considers the better doctrine; and this, I think, is the correct conclusion. Brown *v.* Lindsay, 2 Hill's S. C. Ch. Rep. 544.

(*b*) 2 Inst. 343.

(*c*) Litt. sec. 594. The extent of the remedy under this ancient writ may be seen in Bro. Abr. tit. Cui in vita, and F. N. B. 193, h. t.

(*d*) Co. Litt. 326, a. The statute of 32 Hen. VIII. was reënacted in New York, in 1787, by act, 10th sess. ch. 48. But it does not appear in the revision of 1830, and the action of ejectment was doubtless deemed commensurate with every right to the recovery of land. New York Revised Statutes, vol. ii. p. 303. In Massachusetts, it is held, that the statute of 32 Hen. VIII. protecting the wife's inheritance or freehold from the husband's act, is still in force in that state, "as a modification and amendment to the common law." Bruce *v.* Wood, 1 Metcalf, 542. In New Jersey, by statute, it is declared that the husband can do no act or make any default to affect or work any prejudice to the wife's inheritance or freehold, and after his death she may lawfully enter and hold the same, notwithstanding. Elmer's Dig. 77. This is the universal law on the subject. In Maryland, under the statute of 1786, the husband may elect, in right of his wife, to take her ancestor's lands at the valuation of commissioners, and pay or give bonds to the co-heirs of the wife for their just proportion

(2.) *To her life-estate.*

*If the wife, at the time of the marriage, hath an estate for her life, or for the life of another person, the husband becomes seised of such an estate in right of his wife, and is entitled to the profits during the marriage. On the death of the wife, the estate for her own life is gone, and the husband has no further interest in it. But if she have an estate for the life of another person, who survives her, the husband becomes a special occupant of the land during the life of such other person. After the estate for life has ended, the land goes to the person entitled in reversion or remainder, and the husband, *quasi* husband, has no more concern with it. This estate the husband can only sell or charge to the extent of his interest in it, and his representatives take as emblements the crops growing at his death. *134

(3.) *To her chattels real.*

The husband, upon marriage, becomes possessed, also, of the chattels real of the wife, as leases for years, and the law gives him power, without her, to sell, assign, mortgage, or otherwise dispose of the same as he pleases, by any act in his lifetime; (*a*) except it be such an interest as the wife hath, by the provision or consent of her husband, by way of settlement. (*b*) Such chattels real are also liable to be sold on execution for his debts. If he makes no disposition of the same in his lifetime, he cannot devise the chattels real by will; (*c*) and the wife, after his death, will take the same in her own right, without being executrix or administratrix to her husband. If he grants a rent-charge out of the same, without altering the estate, the rent-charge becomes void at his death. If he survives his wife, the law gives him her chattels real, absolutely, by survivorship; for he was in possession of the chattel *real during the coverture, by a kind of joint tenancy with the wife. (*d*) *135

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of the estate, and that election vests in him the fee as a purchaser, to the exclusion of the wife. Stevens *v.* Richardson, 6 Harr. & Johns. Rep. 156. In Miller *v.* Shackleford, 4 Dana, 728, it was held that a woman, whose estate had been wrongfully aliened by her husband, might recover it in ejectment after his death, without notice to the tenant to quit, and no acquiescence in the tenant's holding, short of 20 years, would bar her.

(*a*) Co. Litt. 46, b.

(*b*) Sir Edward Turner's case, 1 Vern. 7.

(*c*) Co. Litt. 351, a.

(*d*) Co. Litt. 351, b, Butler's note, 304, to Co. Litt. lib. 3, 351, a. 1 Rol. Abr. 345, pl. 40.

(4.) *To her choses in action.*

As to debts due to the wife, at the time of her marriage, or afterwards, by bond, note, or otherwise, and which are termed *choses in action*, they are not vested absolutely in the husband, but the husband has power to sue for and recover, or release or assign the same;[1] and when recovered and reduced to possession, and not otherwise, it is evidence of a conversion of the same to his own use, and the money becomes, in most cases, absolutely his own. (*a*) The rule is the same if a legacy or distributive share accrues to the wife during coverture. (*b*)[2] Sq.

(*a*) Little *v.* Marsh, 2 Iredell's N. C. Eq. Rep. 18. 2 Leigh's N. P. 1109. The reduction of the wife's choses in action into possession by the husband is not in all cases conclusive, though it is *primâ facie* evidence of the conversion of it, for there may be satisfactory proof that he took and held the money as her trustee, and for which he would be accountable. Estate of Hinds, 5 Wharton, 138.[3]

(*b*) Garforth *v.* Bradley, 2 Vesey, Sen. 675. Schuyler *v.* Hoyle, 5 Johns. Ch. Rep.

[1] It has been held that a husband cannot deprive his creditors of the choses in action which come to the wife during coverture, by settling them upon the wife without reducing them to possession. Dold *v.* Geiger, 2 Gratt. R. 98. But see Andrews *v.* Jones, 10 Ala. R. 400. Where the consideration of a note proceeds from the rights or property of the wife, and it is made payable to her, with the husband's assent, he may refuse to reduce it to possession, and his creditors cannot take it. Poor *v.* Hazleton, 15 N. H. R. 564. See Peacock *v.* Pembroke, 4 Maryl. 280. A wife may claim by the right of survivorship against her husband's executor, a promissory note taken during coverture, payable to husband and wife, with the husband's assent. Wilder *v.* Aldrich, 2 R. I. 518.

A note given to a wife during coverture is a *chose in action*, which the husband must reduce to possession, and not a personal chattel which vests absolutely in him. Gaters *v.* Madeley, 6 Mees. & W. 423. Hart *v.* Stephens, 6 Q. B. (Adol. & Ell. N. S.) Rep. 937. Scarpellini *v.* Atcheson, 7 Ad. & El. N. S. 875.

[2] Chose *v.* Palmer, 25 Maine R. 341. Woelper's Appeal, 2 Barr's R. 71. Wells *v.* Tyler, 5 Fost. 340. If the husband neglects to assert any claim to the distributive share of his wife, it is an unsettled question whether the husband's creditors may subject it to the payment of his debts. In Wheeler *v.* Moore, 13 N. Hamp. R. 478, such power was denied. And also in Harris *v.* Taylor, 3 Sneed, (Tenn.) 536. So in Coffin *v.* Morrill, 2 Fost. (N. H.) 352, it was held that lands purchased by the wife with a legacy, which the husband has declined to reduce to possession, is not chargeable with his debts. Gallego *v.* Gallego, 2 Brock. R. 287. *Contra*, Wheeler *v.* Bowen, 20 Pick. R. 563. Hayward *v.* Hayward, Id. 528. Strong *v.* Smith, 1 Met. R. 476. An attachment by the husband's creditors of the wife's interest, as legatee, in the hands of an executor, creates only a lien, which will be defeated by the death of the husband pending the suit. Vance *v.* McLaughlin, 8 Gratt. 289. Hairston *v.* Hairston, 2 Jones's Eq. (N. C.) 123. Denson *v.* Patton, 19 Geo. 577. Sloper *v.* Cottrell, 37 Eng. Law & Eq. 89.

In Pennsylvania, it has been held, that an outstanding legacy to a wife does not pass by an assignment by her husband of all his property. Skinner's Appeal, 5 Barr's R. 262. But see Swoyer's Appeal, Id. 377.

[3] S. P. Gochenaur's Estate, 23 Penn. 460. Resor *v.* Resor, 9 Ind. 347. The property

he has power to release and discharge the debts, and to change the securities, with the consent of the debtor. (a) But if he dies before he recovers the money or alters the security, or by some act reduces the chose in action into possession, the wife will be entitled to the debts in her own right, without administering on his estate, or holding the same as assets for his debts. (b) [1] If his wife dies, and he survives her before he has reduced the *chose in action* to possession, it does not strictly survive to him; but he is entitled to recover the same to his own use, by acting as her administrator. (c) [2] By the statute

196. Haviland v. Bloom, 6 Ibid. 178. Carr v. Taylor, 10 Vesey, 578. Wildman v. Wildman, 9 Vesey, Jr. 174. Parsons v. Parsons, 9 N. H. Rep. 309.

(a) The husband may release his wife's choses in action, even those in remainder or expectancy, which may possibly fall in during the marriage. 1 Roper on Husband and Wife, 227, 237.

(b) Kintzinger's Estate, 2 Ashmead, 455. Poindexter v. Blackburn, 1 Iredell's N. C. Eq. Rep. 286. Snowhill v. Executor of S., 1 Green's N. J. Ch. Rep. 30. Richards v. Richards, 2 B. & Adol. 447 Gaters v. Madeley, 6 Meeson & W. 423. Scarpellini v. Atcheson, 7 Ad. & El. N. S. 864. It seems to be now a settled principle in the late English equity jurisprudence, under the sanction of the highest judicial authority, as that of Eldon, Grant, Plumer, Leach, Lyndhurst, Cottenham, and Sugden, that nothing short of *actual* and *positive* reduction into possession by the husband will bar the wife's right by survivorship to the full enjoyment of her choses in action, and reversionary and contingent interests. See *post*, p. 138, n. b. It has been suggested by Mr. Sugden, that it would be a good amendment of the law to confer upon the husband the absolute power to dispose of all his wife's chattel interests or personal estate, whether present or reversionary. But the same lord chancellor decided, with the assistance of the master of the rolls, in Box v. Jackson, 1 Drury, 42, in the chancery of Ireland, that the court had no power to take and hold the wife's consent as binding to an assignment of her reversionary interest or chose in action.

(c) Garforth v. Bradley, 2 Vesey, 675. Lord Tenterden, in Richards v. Richards, 2 B. & Adol. 447.

must have been received by the husband solely in the exercise of his marital right. Barron v. Barron, 24 Verm. 375. Savage v. Benham, 17 Ala. 119. The recovery of a judgment in a joint suit is not of itself a sufficient conversion. Pike v. Collins, 33 Maine, 43. Mason v. McNeill, 23 Ala. 201. But when the reduction is once complete, no subsequent expressions of regret on the part of the husband will revive the wife's right, or render him her debtor or trustee for the amount converted. Nolen's Appeal, 23 Penn. 37.

[1] The right of a widow to the personal estate of which her husband died seised, is a mere chose in action, the title to which does not vest in her second husband, until he has reduced the property into possession and the right survives to the widow, on the death of her second husband. Harper v. Archer, 28 Miss. (6 Cush.) 212. Bond v. Conway, 11 Md. 512. Hair v. Avery, 28 Ala. 267.

[2] See Drew v. Long, 21 Eng. L. & Eq. R. 339. Jones v. Brown, 34 N. H. 439. But this right of the husband was held to be incompatible with the legislation of Vermont. Holme

of distributions of 22 and 23 Charles II., and the 25th section of the statute of 29 Charles II. c. 3, in explanation thereof, and which have in substance been reënacted in New York (*a*) and the other states of the Union, the husbands of *femes covert*, who die intestate, have a right to administer upon their personal estate, and to recover and enjoy the same. Under the statute, it is held, that the husband is entitled, for his own benefit, *jure mariti*, to administer, and to take all her chattels real, things in action, and every other species of personal property, whether reduced to possession, or contingent, or recoverable only by suit. (*b*) [1] But if the wife leaves *choses in action* not reduced to possession in the wife's life, the husband will be liable for her debts *dum sola*, to that extent; for those *choses in action* will be assets in his hands. (*c*) * It is also settled, that if the husband, who has survived his wife, dies before he has recovered the *choses in action*, his representatives are entitled to that species of property; and in New York, it would seem, (though it would be contrary to the English rule,) that the right of administration follows the right of the estate, and is to be granted to the next of kin of the husband; and the representatives of the husband, who administer upon the assets

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(*a*) N. Y. Revised Statutes, vol. ii. p. 75, sec. 29. Ibid. 98, sec. 79.

(*b*) Whitaker *v.* Whitaker, 6 Johns. Rep. 112. The statute of 29 Charles II. ch. 3, sec. 25, left the effects of *femes covert* as at common law; and the right of the husband, at common law, was not only to administer, but to enjoy exclusively the effects of his deceased wife. 2 Blacks. Com. 515, 516. Hoskins *v.* Miller, 2 Dev. N. C. Rep. 360. It seems to be the settled rule, that if the husband is reduced to the necessity of suing either at law or in equity in order to recover his deceased wife's choses in action, he must first administer on her estate, and sue in the capacity of administrator.

(*c*) Heard *v.* Stamford, 3 P. Wms. 409, 411. Cases Temp. Talb. 173. Donnington *v.* Mitchell, 1 Green's N. J. Ch. Rep. 243. He is only liable as administrator on the estate of the wife for her debts, to the extent of the assets received by him. N. Y. Revised Statutes, vol. ii. p. 75.

v. Holmes, 2 Wms. (28 Vt.) 765. And in Cox *v.* Morrow, 14 Ark. 617, and Carter *v.* Cantrell, 16 Ark. 155, it was held that the personal property of the wife not reduced to possession by the husband during her lifetime, descends upon her death to her heirs or representatives, and not to her husband.

[1] If a wife, entitled to a fund as *cestui que trust*, die, her husband surviving, he, as survivor, administrator, or distributee, is entitled to it. Rice *v.* Thompson, 14 B. Mon. (Ky.) 377.

of the wife remaining unadministered, are liable for her debts to her creditors, in preference to the creditors of the husband. (*a*) [1] So, if, after the husband has administered in part on his wife's estate, and dies, and administration *de bonis non* of the wife should be obtained by a third person, or by the next of kin of the wife, he would be deemed a mere trustee for the representatives of the husband. (*b*)

It has been considerably discussed in the books, by what title the husband, surviving his wife, takes her *choses in action.* It has often been said that he takes by the statute of distribution as her next of kin. But, from the language of the English courts, it would seem to be more proper to say, that he takes under the statute of distribution *as husband*, with a right in that capacity to administer for his own benefit; for, in the ordinary sense, neither the husband nor wife can be said to be *next of kin* to the other. (*c*)

What will amount to a change of property in action belonging to the wife, so as to prevent it from going back to the wife in case she survives her husband, was discussed in the case of *Schuyler* v. *Hoyle.* (*d*) [2] It was there shown, that the husband

(*a*) N. Y. Revised Statutes, vol. ii. p. 75, sec. 29.

(*b*) Butler's note, 304, to lib. 3, Co. Litt. Elliot *v.* Collier, 3 Atk. Rep. 526. Spencer, J., 6 Johns. Rep. 118. 1 Hagg. Eccl. Rep. 341. Betts *v.* Kimpton, 2 B. & Adolphus, 273. See, also, Hunter *v.* Hallett, 1 Edw. Ch. Rep. 388, and *infra*, pp. 411, 412. In Ohio the law is different. The husband is not next of kin to his wife for inheritance. He may administer on the estate of his deceased wife, but he must account not only to the creditors of the wife, but to the heirs; and therefore the husband cannot, as survivor, *in his own right* pursue her choses in action either in law or equity. Curry *v.* Fulkinson, 14 Ohio Rep. 100. So in Connecticut, the husband, on the death of his wife, does not become entitled as heir or survivor to her personal property. He does not take as administrator, but the property goes to her administrator for distribution. Baldwin *v.* Carter, 17 Conn. Rep. 201.

(*c*) 3 Vesey, 246, 247. 14 Ibid. 381, 382. 15 Ibid. 537. 18 Ibid. 49, 55, 56.

(*d*) 5 Johns. Ch. Rep. 196.

[1] Lockwood *v.* Stockholm, 11 Paige's R. 87.

[2] Bartlett *v.* Van Zandt, 4 Sandf. Ch. R. 396. Latourette *v.* Williams, 1 Barb. S. C. Rep. 9. In this last case it was held, that the pledge of a note of the wife by the husband, which he afterwards redeemed, was not such a reduction into possession as destroyed the interest of the wife. Harper *v.* Archer, 28 Miss. (6 Cush.) 212. And as to what constitutes a reduction to possession, see Holmes *v.* Holmes, 2 Wms. (28 Vt.) 765; Burr *v.* Sherwood, 3 Bradf. (N. Y.) 85; Corley *v.* Corley, 22 Geo. 178; Machem *v.* Machem, 28 Ala. 374; Gillespie *v.* Burleson, 28 Ala. 551; Lockhart *v.* Cameron, 29 Ala. 355; Lowery *v.*

may assign, for a valuable consideration, his wife's *choses in action* to a creditor, free from the wife's contingent *137 *right of survivorship. The doctrine that the husband may assign the wife's *choses in action* for a valuable consideration, and thereby bar her of her right of survivorship in the debt, but subject, nevertheless, to the wife's equity, has been frequently declared, and is understood to be the rule best sustained by authority. Such an appropriation of the property is the exercise of an act of ownership for a valuable purpose, and an actual appropriation of the chattel which the husband had a right to make. (*a*) [1] But a voluntary assignment by the husband of the wife's *choses in action*, without consideration, will not bind her, if she survives him. (*b*) [2] The rule is, that if the husband appoints an attorney to receive the money, and he receives it, or if he mortgages the wife's *choses in action*, or assigns them without reservation, for a valuable consideration, or if he recovers her debt by a suit in his own name, or if he releases the debt, or novates the debt, by taking a new security

(*a*) Carteret *v.* Paschal, 3 P. Wms. 197. Bates *v* Dandy, 2 Atk. Rep. 206. S. C. 1 Russell's Rep. 33, note. Jewson *v.* Moulson, 2 Atk. 417. Earl of Salisbury *v.* Newton, 1 Eden's Rep. 370. Sir William Grant, in Mitford *v.* Mitford, 9 Vesey, 87. Johnson *v.* Johnson, 1 Jac. & Walk. 472. Schuyler *v.* Hoyle, above cited. Kenney *v.* Udal, 5 Johns. Ch. Rep. 464. S. C. 5 Cowen's Rep. 590. Lowry *v.* Houston, 3 How. U. S. 394. Siter and another, Guardians *v.* Jordan, 4 Rawle's Rep. 468. In this last case the assignment was sustained, not strictly as an assignment for a valuable consideration enuring to the husband, but on the very meritorious ground that the assignment of the wife's chose in action to trustees was for the benefit of her and her child. It was a reasonable anticipation by settlement, of a provision for the wife's equity, and valid in equity, though the fund was not reduced to possession before the execution of the assignment. But see the note *a*, *infra*, p. 138, where the power of the husband over the wife's rights in action is more limited.

(*b*) Burnett *v.* Kinnaston, 2 Vern. Rep. 401. Sir William Grant, in Mitford *v.* Mitford, 9 Vesey, 87. Sir Thomas Plumer, in Johnson *v.* Johnson, 1 Jac. & Walk. 472. Jewson *v.* Moulson, 2 Atk. Rep. 420. Saddington *v.* Kinsman, 1 Bro. 44. Hartman *v.* Dowdel, 1 Rawle's Rep 279.

Craig, 30 Miss. (1 George) 19; McNeil *v.* Arnold, 17 Ark. 154; Walden *v.* Chambers, 7 Ohio, (N. S.) 30; Needles *v.* Needles, 7 Ohio, (N. S.) 432.

The receipt of a wife's distributive share, by agents appointed under a power of attorney, executed to the husband by the wife, is a reduction by the husband. Turton *v.* Turton, 6 Maryl. 375.

[1] Tuttle *v.* Fowler, 22 Conn. 58.

[2] See *ante*, p. 118, (135,) note (1.)

in his own name; in all these cases, upon his death, the right of survivorship in the wife to the property ceases. And if the husband obtains a judgment or decree, as to money to which he was entitled in right of his wife, and the suit was in his own name alone, the property vests in him by the recovery, and is so changed as to take away the right of survivorship in the wife. If the suit was in their joint names, and he died *before he had reduced the property to possession, *138 the wife, as survivor, would take the benefit of recovery. (a) It is settled, that in a suit in chancery by the husband to recover a legacy or distributive share due to the wife, she must be made a party with him, and then the court will require the husband to make a suitable provision for the wife out of the property. The Court of Chancery has always discovered an anxiety to provide for the wife out of her property in action which the husband may seek to recover. If he takes possession in the character of trustee, and not of husband, it is not such a possession as will bar the right of the wife to the property if she survives him. The property must come under the actual control and possession of the husband, *quasi* husband, or the wife will take, as survivor, instead of the personal representatives of the husband.

A general assignment in bankruptcy, or under insolvent laws, passes the wife's property and her *choses in action*, but subject to her right of survivorship; and if the husband dies before the assignees have reduced the property to possession, it will survive to the wife, for the assignees possess the same rights as the husband before the bankruptcy, and none other. (b)[1] It has

(a) Hilliard v. Hambridge, Aleyn's Rep. 36. Lord Hardwicke, in Garforth v. Bradley, 2 Vesey, 675. M'Dowl v. Charles, 6 Johns. Ch. Rep. 132. Searing v. Searing, 9 Paige's Rep. 283.

(b) Mitford v. Mitford, 9 Vesey, 87. Jewson v. Moulson, 2 Atk. Rep. 420. Gayner v. Wilkinson, Dickens's Rep. 491. Saddington v. Kinsman, 1 Bro. Ch. 44. Van Epps v. Van Deusen, 4 Paige's Rep. 64. Pierce v. Thornely, 2 Simon's Rep. 167. Outcalt v. Van Winkle, 1 Green's N. J. Ch. Rep. 516. It is well settled that, at law, an assignment in bankruptcy will, of itself, bar the wife's contingent right of survivorship in a chose in action, and will bar a suit at law on a bond entered into by the wife

[1] Moore v. Moore, 14 B. Mon. (Ky.) 259.

been accordingly held, that a legacy in stock was not reduced to possession by such an assignment, so as to bar the wife's right of survivorship, and the wife took it by survivorship as against the assignees. (a)

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dum sola. Miles *v.* Williams, 1 P. Wms. 249, in K. B. Bosvil *v.* Brander, 1 P. Wms. 458, in K. B. Michell *v* Hughes, 6 Bing. Rep. 689. But in the late case of Mallory *v.* Vanderheyden, before Vice-Chancellor Parker, of the 3d circuit, New York Legal Observer for January, 1846, (No. 4, p. 4,) it was held, that though a discharge of the husband in bankruptcy would bar a suit at law against husband and wife for the debt of the wife *dum sola,* yet in equity, satisfaction could be had for the debt out of her separate estate, where there had been an appointment by her charging her separate estate with the debt. *Vide infra,* p. 146.

(*a*) Pierce *v.* Thornely, 2 Simon's Rep. 167, 180. It is difficult to reconcile the more ancient with the recent English equity cases, on the subject of the effect to be given to the husband's assignment of the wife's choses in action. Thus, in the cases of Chandos *v.* Talbot, 2 P. Wms. 601; Bates *v.* Dandy, 2 Atk. Rep. 207, and Hawkyns *v.* Obyn, Ibid. 549, the language is, that a contingent interest, or the possibility of a term, or a specific possibility of the wife, may be assigned by the husband for a valuable consideration, so as to bind his wife. But in Hornsby *v.* Lee, 2 Madd. Ch. Rep. 16, Purdew *v.* Jackson, 1 Russell's Rep. 70, and Honner *v.* Morton, 3 Ibid. 65, it is held, that the husband's assignment of the wife's reversionary interest will not bar her right as his survivor, provided the interest continues reversionary to his death. So, Sir William Grant, in Mitford *v.* Mitford, 9 Vesey, 87, doubted the soundness of the rule, that the husband's assignment for a valuable consideration passed the wife's chose in action, freed from her contingent right of survivorship, because, in that case, the purchaser would take a greater right than the husband had. He admitted, however, that a distinction was constantly taken between assignments in bankruptcy, or by operation of law, and a particular assignee for a specific consideration. And in Hornsby *v.* Lee, Sir Th. Plumer considered that a particular assignee was not better off in this respect than a general assignee in bankruptcy. Afterwards, in Purdew *v.* Jackson, 1 Russell's Rep. 70, the subject was discussed and reargued with great ability; and Sir Th. Plumer, in an elaborate opinion, declared his adherence to his former opinion, and carried his doctrine out broadly to the whole extent of it, by holding, that all assignments made by the husband of the wife's outstanding personal chattels, not then reduced to possession, whether the assignment be in bankruptcy, or under an insolvent act, or to trustees for payment of debts, or to a purchaser for a valuable consideration, pass only the interest which the husband had, subject to the wife's legal right of survivorship; and the husband could not possibly make an assignment of the reversionary interest of his wife, so as to bar her as survivor, provided the interest remained reversionary.[1] Sir William Grant, in Wright *v.* Morley, 11 Vesey, 12, thought there was great weight in the proposition of Lord Alvanley, that no assignment by the husband, even for a valuable consideration, could convey more than the right he had to reduce the wife's outstanding interest into possession, subject to "the wife's equity;" and that if the husband died before that fact had occurred, the wife's right

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[1] To the same effect is Bugg *v.* Franklin, 4 Sneed, (Tenn.) 129.

The wife's equity to a reasonable provision out of her property for the support of herself and her children, makes a distinguished figure in the modern chancery cases, which relate to the claims of the husband upon the property of his wife in action. If the husband wants the aid of chancery to enable him to get possession of his wife's property, or if her fortune be within the reach

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as survivor would bar the assignee. In Ellison v. Elwin, 13 Sim. 309, the doctrine in the case of Purdew v. Jackson was reaffirmed by the vice-chancellor. Again, in Honner v. Morton, 3 Russell's Rep. 65, Lord Chancellor Lyndhurst gave a decided support to the doctrines of the successive masters of the rolls, Lord Alvanley, Sir William Grant, and Sir Th. Plumer, so far as the reversionary interest of the wife was in question; but he took a distinction between the case in which the husband had an immediate power at the time of the assignment, of reducing the chose in action into possession, and where he had not. In the first case, the assignment ought, in equity, to be regarded as the actual reduction of the property into possession, and a consequent transfer of it, for he had the power to do it, and the assignment amounted to an agreement to do it.[1]

These latter cases were reviewed in Siter and another, guardians of Jordan, 4 Rawle's Rep. 468, by Ch. J. Gibson, with learning and ability, and the reasoning of Sir Thomas Plumer, and of Lord Lyndhurst, powerfully combated. Afterwards, in Shuman v. Reigart, 7 Watts & Serg. 169, the court declared their adherence to the doctrine in Siter's case. The doctrine of the English cases, that the efficiency of the assignment depends on the previous reduction of the chose in action to possession, is declared not to be sound, inasmuch as the husband *jure mariti* has dominion over the property, as well as the power to reduce it to possession, and his fair *bonâ fide* transfer of it for a valuable consideration, passes that whole dominion, capacity, and title. The husband, by marriage, succeeds to the wife's power of disposal; and the distinction between vested and contingent or reversionary interests of the wife, in respect to the marital dominion and power of the transfer of it, is held to be without foundation. The critical review in this last case of the English cases, was intended only to show the weak grounds on which the new theory rested; and the point really decided in Pennsylvania, and the authority of the case, extend only to prove that the assignment of a wife's chose in action to trustees, for the benefit of the wife and children, and to place it beyond the power of waste by the husband, was meritorious and valid in equity.[2]

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[1] In Elliott v. Cordell, 5 Madd. 149, the decision was against the right of the wife: and this decision was approved by Lord Brougham, in Stanton v. Hall, 2 Russ. & My. 175; and by the vice-chancellor, in Tidd v. Lister, (1853,) 17 Eng. L. & Eq. R. 567.

It is held, in Alabama, that the husband's assignee for valuable consideration, is not entitled as against the wife to her choses in action, unless he reduce them to possession during the coverture. George v. Goldsby, 23 Ala. 326. Arrington v. Yarborough, 1 Jones, Eq. 72; but see Tuttle v. Fowler, 22 Conn. 58, and Manion v. Titsworth, 18 B. Mon. (Ky.) 582.

[2] It is held in Pennsylvania, that a husband may assign for a valuable consideration the wife's choses in action, whether they be presently reducible or be reversionary interests or possibilities. Webb's Appeal, 21 Penn. 248. Smilie's Estate, 22 Penn. 130.

of the court, he must do what is equitable, by making a reasonable provision out of it for the maintenance of her and her children. Whether the suit for the wife's debt, legacy, or portion, be by the husband or by his assignees, the result is the same, and a proper settlement on the wife must first be made of a proportion of the property. (*a*) The provision is to be proportioned, not merely to that part of the equitable portion of the wife's estate which the husband seeks, but to the whole of her personal fortune, including what the husband had previously received. And perhaps chancery ought, on just principles, to restrain the husband from availing himself of any means, *either at law or equity*, of possessing himself of the wife's personal property in action, unless he would make a competent provision for her. The English rule in equity is, that where there is a suit in the ecclesiastical courts for subtraction of a legacy, and there is a married woman to be protected, or a trust to be executed, the Court of Chancery will restrain the suit by injunction. (*b*)

Chancery will restrain the husband from proceeding in the ecclesiastical courts, for the recovery of the wife's legacy, *140 until *a provision is made for her; (*c*) and, upon that doctrine, a suit at law for a *legacy or distributive share*

(*a*) Howard *v.* Moffatt, 2 Johns. Ch. Rep. 206. 1 Eden's Rep. 67, 370, 371. 2 Atk. Rep. 420, 421, 422. Sleech *v.* Thorington, 2 Vesey, Sen. 562 4 Bro. Rep. 139. 2 Cox's Cases, 422. 11 Vesey, 17, 20, 21. 1 Madd. Ch. Rep 362. Clancy's Treatise, *passim*. Duvall *v.* Farmers' Bank of Maryland, 4 Gill & Johns. Rep. 282. Whitesides *v.* Dorris, 7 Dana's Rep. 106. Perryclear *v.* Jacobs, Hill's S. C. Ch. Rep. 509. Like *v.* Beresford, 3 Vesey, 506. In this last case the assignment of the wife's interest in bank stock to creditors, in trust to pay debts, was held to be subject to the wife's equity, on a bill to enforce the assignment.

(*b*) Anon. 1 Atk. Rep. 491 Grignion *v.* Grignion, 1 Hagg. Eccl. R. 535.

(*c*) 2 Atk. Rep. 419. Chancery will interpose on a bill filed by or on behalf of the wife, and restrain the husband, or his assignees, from possessing themselves of the property at law, until a suitable provision be allowed for her support. Van Epps *v.* Van Deusen, 4 Paige's Rep 64. It has, at last in New York, become a settled rule of the courts of equity, that they will interfere and restrain a husband from recovering at law his wife's property, until he makes a provision for her. But this will not be the case if the wife lives apart from her husband without cause, or has sufficient provision from other sources. Fry *v.* Fry, 7 Paige, 462. Martin *v.* Martin, 1 Hoffman's Ch. Rep 462. But equity will not, at the suit of the wife, compel a settlement out of a *chose in action* bequeathed to her for life, but not expressed to be for her sole and separate use, *against a particular assignee, for a valuable consideration.* The con-

ought equally to be restrained, for such rights in action are of an equitable nature, and, properly, of equitable cognizance. The principle is, that chancery will lay hold of the property of the wife, as far as it may be in its power, for the purpose of providing a maintenance for her when she is abandoned by her husband; and in *Dumond* v. *Magee*, (a) where the husband had abandoned his wife for many years, and married another woman, he was held to have forfeited all just claim to his wife's distributive share of personal estate inherited by her, and the same was appropriated, by decree, to her separate use.

This subject was considered, and the principal authorities reviewed, in the case of *Kenney* v. *Udall.* (b) It was there held, that the wife's equity attached upon her personal property whenever it was subject to the jurisdiction of the court, and was the object of a suit, in any hands to which it might come, or in whatever manner it might have been transferred. It makes no difference whether the application to the court for the property be by the husband, or his representatives, or assignees, or by the wife, or her trustee, seeking a provision out of the property. This equity is equally binding, whether the transfer of the property be by operation of law, under a commission of bankruptcy, or by act of the party to general assignees, or to an individual, or whether the particular transfer was voluntary, or made upon a good and valuable consideration, or in payment of a just debt. (c) The court may also, in its discretion, give the whole, or part only, of the property to the wife, according to the circumstances of the case. So, again, in *Haviland* v. *Bloom*, (d) the same subject *came under consideration; *141 and the rule in equity was considered as settled, that

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tract of the husband is excluded only by words, showing clearly that the gift was intended to be for her separate use, or in the existence of a case in which he omits duly to provide for her. Elliott *v.* Cordell, 5 Madd. Ch Rep. 149. Stanton *v.* Hall, 2 Russ. & Mylne's Rep. 175. Tyler *v.* Lake, Ibid. 183.

(a) 4 Johns. Ch. Rep. 318.

(b) 5 Johns. Ch. Rep. 464. 3 Cowen, 590, S. C. Durr *v.* Bowyer, 2 M'Cord's S. C. Ch. 368. Duvall *v.* Farmers' Bank of Maryland, 4 Gill & Johns. Rep. 282, S. P.

(c) Earl of Salisbury *v.* Newton, 1 Eden's Rep. 370. Bosvil *v.* Brander, 1 P. Wms. 458. *Ex parte* Thompson, 1 Deacon, 90. *Ex parte* King, Ibid. 143.

(d) 6 Johns. Ch. Rep. 178.

the wife's equity to a suitable provision for the maintenance of herself and her children, out of her separate estate, lying in action, was a valid right, and extended not only to property which she owned *dum sola*, but to property descended or devised to her during coverture. A new equity arises to the wife upon property newly acquired, and attaches upon it equally as upon that which she brought with her upon marriage. (*a*)

The wife's equity does not, according to the adjudged cases, attach, except upon that part of her personal property in action which the husband cannot acquire without the assistance of a court of equity.[1] The rule in equity does not controvert the legal title of the husband to his wife's personal fortune; and if he once acquired possession of that property *jure mariti*, though it should have been of an equitable nature, chancery will leave him in undisturbed possession of it. The claim attaches on that part of the wife's personal fortune for which the husband seeks the aid of a court of equity, or where he makes an assignment of her equitable interests; or the wife seeks relief in chancery against her husband and his assignees, in regard to her legal or equitable rights which they are pursuing. (*b*) If the husband can acquire possession without a suit at law, or in equity, or by a suit at law, without the aid of chancery, (except, perhaps, as to legacies, and portions by will or inheritance, as has been already suggested,) the husband will not be disturbed in the exercise of that right. (*c*)[2] But it is unnecessary to pur-

(*a*) In the case *Ex parte* Beresford, 1 Dessau. S. C. Rep. 263, the court, after a full discussion, ordered a new settlement in favor of the wife on a new accession of fortune.

(*b*) Walworth, Ch., in Van Epps *v.* Van Deusen, 4 Paige, 64 Fry *v.* Fry, 7 Id. 462. Martin *v.* Martin, 1 Hoffman's Ch. Rep. 462. 2 Atk. 419. 2 Story's Eq. 632. Clancy's Treatise, 468.

(*c*) Howard *v.* Moffatt, 2 Johns. Ch. Rep. 206. Thomas *v.* Sheppard, 2 M'Cord's S. C. Ch. Rep. 36. In the matter of Anne Walker, 1 Lloyd & Goold, 159, Cases temp. Plunket.

[1] A wife's equity does not extend to a reversionary interest in stock. The settlement of that fund cannot be asked for until it falls into possession, *i. e.* until the husband has a right to receive it. Osborn *v.* Morgan, 8 Eng. L. & Eq. R. 192.

The husband cannot charge or assign a reversionary interest of the wife, which cannot by any possibility vest in him. Duberley *v.* Day, 12 E. L. & Eq. 268. Rogers *v.* Acaster, 11 Id. 300, and see Sale *v.* Saunders, 24 Miss. 24.

[2] Wiles *v.* Wiles, 3 Maryl. 1.

sue this subject more minutely; and it is a vain attempt, says Mr. Justice Story, (a) to ascertain, by general reasoning, the nature or extent of the doctrine, for it stands upon the practice of the court. The cases in chancery to which I have referred, have incorporated into the equity jurisprudence of New York all the leading provisions and principles of the English courts of equity on this head; and though such protection to the wife cannot be afforded in Pennsylvania, where there is no court of *chancery, (b) nor in New Hampshire, where *142 equity powers, to a specific extent only, are conferred by statute upon the superior court of common-law jurisdiction, (c) yet I presume it exists in most of the other states where courts are established with distinct equity powers, according to the English system, or with legal and equitable powers united, according to the more generally prevailing practice in the United States. It exists in Maryland and Tennessee; and in the latter state protection is even afforded in their courts of law. (d) [1] In North Carolina, if the aid of a court of equity be required by the husband to enable him to take possession of his wife's property, he must make reasonable provision for her; and the rule is the same when his legal representatives or assignees claim it. But their decisions go no further, and the wife cannot, by

(a) Story's Eq. vol. ii. 635, 636.

(b) Yohe v. Barnet, 1 Binney, 358. The want of such a power in the Pennsylvania courts is deeply regretted by a very intelligent judge. In the matter of Miller, 1 Ashmead's Rep. 323. But the Orphans' Court has, by statute, a limited jurisdiction over the wife's equity.

(c) Parsons v. Parsons, 9 N. H. Rep. 309.

(d) M'Elhatten v. Howell, 4 Haywood, 19. Duvall v. Farmers' Bank of Maryland, 4 Gill & Johns. Rep 282. In Tennessee, it has been adjudged that the wife's equity will be enforced: (1.) When the husband or his assignee is asking the aid of a court of equity to reduce her property into possession: (2) At the suit of the wife or of her trustee, praying for the provision: (3.) When the trustee designs or is willing to pay or deliver over the property to the husband or his assignee without suit. In that case, all of them will be enjoined, at the suit of the wife, from changing the possession until provision be made. But if the husband or his assignee has already reduced the property into possession, a court of equity does not interfere. Dearin v. Fitzpatrick, Meigs, 551. These are the settled principles on the subject in the English equity system.

[1] It exists in Georgia. Corley v. Corley, 22 Geo. 178.

a suit in equity, stop him, though he be insolvent, from taking possession, unless her claim be founded upon a marriage settlement. (a)[1] The Superior Court of New Hampshire intimates that it may, perhaps, be authorized to apply the principle of sustaining the wife's equity, when the husband or his assignee asks the aid of the court to obtain possession of the distributive share of his wife. (b)

There is a difference as to *choses in action* belonging to the wife, whether the husband sues in his own name exclusively, or jointly with his wife. The principle of the distinction is, that if he brings the action in his own name alone, (as it is said he may for a debt due to the wife upon bond,) (c) it is a disagreement to the wife's interest, and implies it to be his intention that it should not survive her. But if he brings the action in their joint names, the judgment is, that they shall both recover, and the debt survives to the wife. The judgment does not alter the property, or show it to be his intention that it should be altered. It is also the rule of equity, that if before marriage the husband makes a settlement on the wife, in consideration of her fortune, he is considered in the light of a purchaser of her fortune, and his representatives will be entitled, on *143 his dying in his wife's lifetime, *to the whole of her

(a) Bryan v. Bryan, 1 Dev. Eq. Rep. 47.

(b) See Parsons v. Parsons, 9 N. H. Rep. 309–336, where Ch. J. Parker has examined the history and doctrine of the wife's equity with accurate and elaborate learning.

(c) Lord Chancellor, in Oglander v. Baston, 1 Vern. 396. Howell v. Maine, 3 Lev. 403. But Mr. Preston, in his Essay on Abstracts of Title, vol. i. p. 348, condemns the doctrine in this case in Levinz, and denies that the husband can sue alone on a bond given to the wife alone.

[1] See Allen v. Allen, 6 Ired. Eq. 293. Barron v. Barron, 24 Verm. 375, 391. The wife's equity extends as well to real as to personal property. In Moore v. Moore, 14 B. Mon. 259, it was allowed to the wife out of the proceeds of lands which descended to her during the coverture; and in such case the wife may assert her right by original bill. So, where the wife joined with the husband in the conveyance of lands, and the husband became insolvent before the price was paid, a suitable settlement was decreed to her out of the price. Lay v. Brown, 13 B. Mon. 295. The wife may waive her right by permitting the conveyance; Wright v. Arnold, 14 B. Mon. 638; or by joining in the receipt for the proceeds: *Ex parte* Geddes, 4 Rich. Eq. 301; or explicitly, on a separate examination; Ward v. Amory, 1 Curtis, C. C. 419. And see McVey v. Boggs, 3 Maryl. Ch. 94. Barrow v. Barrow, 31 E. L. & Eq. 241.

things in action, though not reduced to possession in his lifetime, and though there be no special agreement for that purpose. If the settlement be in consideration of a particular part only of her fortune, the right of survivorship in the wife will exist only as to the part of her property not comprised in the settlement, and not reduced to possession by the husband. (*a*) The settlement must state, or import, that it was in consideration of the wife's fortune, and it must appear to be adequate to the purchase of her fortune, before it will bar her right of survivorship. (*b*)

(5.) As to personal property of the wife, which she had in possession at the time of the marriage in her own right, and not *en autre droit*, such as money, goods, and chattels, and movables, they vest immediately and absolutely in the husband, (*c*) [1] and he can dispose of them as he pleases, and on his death they go to his representatives, as being entirely his property. (*d*)

(*a*) Butler's note, 304, to lib. 3 Co. Litt. 1 Vern. 396, note 5. Garforth *v.* Bradley, 2 Vesey, 677. Middleton *v.* Wynn, 1 Eq. Cas. Abr. 70, pl. 15. Packer *v.* Wyndham, Prec. in Ch. 412. Druce *v.* Dennison, 6 Vesey, 395.

(*b*) Cleland *v.* Cleland, Prec. in Ch. 63. Salway *v.* Salway, Amb. Rep. 692. Lord Eldon, in Druce *v.* Dennison, 6 Vesey, 395. The Master of the Rolls, in Carr *v.* Taylor, 10 Ibid. 579. The cases admit that the settlement will not bar the wife's equity to a further settlement out of property accruing during coverture, unless it be made in consideration of her fortune which she then has, or may thereafter be entitled to.

(*c*) Co. Litt. 351, b.

(*d*) By the statute law Georgia of 1789, the real estate belonging to the wife at the marriage, becomes vested in and passes to the husband in the same manner as personal property. See *infra*, vol. iv. p. 29. There is a prevalent disposition in many of the states to enlarge the powers of the wife, and abridge those of the husband, over her separate property, belonging to her at marriage, or subsequently acquired by her, and to substitute the policy of the civil law for that of the common law on the subject. Thus, by the constitution of Wisconsin, adopted in 1846, all the real and personal property of the wife, at the time of her marriage, or acquired by her afterwards, are to be her separate property.[2] So the legislature of Arkansas have exempted all such property from liability for her husband's debts.

[1] This is so in regard to slaves in Kentucky. Potts *v.* Merritt, 14 B. Mon. (Ky.) 406. In Kentucky the property of the husband is not liable for debts of the wife contracted before marriage, but the property of the wife, acquired by devise, descent, bequest, or gift, is liable therefor. Laws of 1855-6, p. 42.

[2] In Wisconsin, in the absence of any agreement between husband and wife, moneys earned by the wife during coverture belong to the husband. Connors *v.* Connors, 4 Wis. 112.

II. *The duties which the husband assumes.*

(1.) *To pay her debts.*

The husband is answerable for the wife's debts before coverture; but if they are not recovered during the coverture, he is discharged. (*a*)[1] He is answerable for her debts only in virtue of the duty imposed on him to discharge all the obligations of the wife; and that his responsibility should cease after coverture ceases, is, in some cases, rather against conscience; *144 but then, as a compensation for the rule, it is to *be considered that the charging the husband in all cases with the debts, would be against conscience also. It is a strict rule of law, which throws upon the husband, during coverture, all the obligations of the wife; and by the same rule of law, he is discharged after the coverture ceases, by the death of the wife. Courts of equity have held, that they could not vary the rule of law according to the fact, whether the husband had, or had not, received a portion with his wife, or charge his conscience in one case more than in the other. This is the meaning of the case of *Heard* v. *Stamford*, (*b*) according to Lord Redesdale's explanation of the rule on this point. (*c*)

(*a*) He is liable for a breach of trust committed by the wife before marriage. Palmer *v.* Wakefield, 3 Beavan, 227.

(*b*) 3 P. Wms. 409. Cases temp. Talb. 173.

(*c*) 1 Sch. & Lef. 263. Witherspoon *v.* Dubose, in Court of Appeals, in S. C. Law Journal, No. 3, p. 366, S. P.

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1 Where the wife, before marriage, held shares in a joint-stock company, which remained in her name after marriage, the husband refusing to have anything to do with them: *held*, that he was not liable as a member of the company. The company's deed of settlement provided that the husband of a shareholder should not be a member. Dodgson *v.* Bell, 3 Eng. L. & Eq. R. 542.

In New York, by statute passed July 18, 1853, (Laws of 1853, ch. 576, p. 1057,) suits to recover debts contracted by the wife before marriage, may be brought against husband and wife; but the judgment and execution affect the separate estate of the wife only. A husband, however, who acquires the separate property of his wife, is liable to the extent of such property for her debts contracted before marriage. (§ 2, Ib.) But it was held in Berley *v.* Rampacher, 5 Duer, (N. Y.) 183, that this Act does not extend to debts existing at the time of its passage.

In Massachusetts, by statute passed May 5, 1855, the husband of a woman thereafter married in that state, cannot be sued for any cause of action which originated against her before marriage; but the wife can be sued, and her property attached and taken in execution, the same as if she were *sole*. In California, by statute passed April 17, 1850, the separate property of the husband is not liable for the debts of the wife contracted before marriage, but the separate property of the wife is liable.

The rule of law on this subject may operate very injuriously to creditors; for if the wife be largely indebted before marriage, and the husband takes and appropriates all her personal property to himself, and the wife dies before the creditors have collected their debts, the husband is no longer liable, and the creditors of the wife are left without remedy. If the husband himself dies before the debts are collected, his representatives are not liable; and though the wife remains liable after her husband's death, for her former debts remaining unpaid, she may have no property to pay them. The answer to this objection is attempted by Lord Macclesfield, in *The Earl of Thomond* v. *Earl of Suffolk*.(a) It may be hard, he observes, that the husband should be answerable for the wife's debts, when he receives nothing from her; but we are to set off against that hardship the rule, that if the husband has received a personal estate with the wife, and happens not to be sued during the coverture, he is not liable. He runs a hazard in being liable to the debts, much beyond the personal estate of the wife; and in recompense for that *hazard, he is entitled to the whole of her *145 personal estate, though far exceeding the debts, and is discharged from the debts as soon as the coverture ceases. In *Heard* v. *Stamford*, there was a strong effort made before Lord Ch. J. Talbot, to charge the husband, after the wife's death, with a debt of hers, *dum sola*, to the extent of what he had received from her, for she happened to bring a large personal estate to her husband. The injustice of the case was pressed upon the court, for upon the rule as it stood, a *feme sole* might be worth 10,000*l*. and owe 1,000*l*., and marry and die, and the husband might appropriate the 10,000*l*. to his own use, and not pay one farthing of the debt. Lord Nottingham was so provoked at the hardship of the rule, in a case in which the wife brought a large portion to her husband, and died, and when the husband continued in possession of the goods, and refused to pay the very debt contracted by the wife for the goods, that he declared he would alter the law. But Lord Talbot said, that nothing less than an Act of Parliament could alter the law; and the rule was fixed, that the husband was liable for the wife's debts only

(a) 1 P. Wms. 469.

during the coverture, unless the creditor recovered judgment against him in the wife's lifetime,[1] and that only the wife's *choses in action* not reduced to possession in her lifetime, would be assets in her husband's hands, when they come to him, as her administrator. If relief ought to be given against the husband, because he received sufficient property with the wife, then by the same reason, if the wife had brought no fortune to her husband, and judgment was recovered against him during coverture, relief ought to be afforded to the husband against this judgment after his wife's death. He declared that the rule could not be disturbed by a court of equity; and it has continued unaltered to this day. The husband is liable, not as the debtor, but as the husband. It is still the debt of the wife, and if she survives her husband, she continues personally liable. (*a*) * It has also been held by the K. B., in *Miles* v. *Williams*, (*b*) that the debts of the wife *dum sola*, as well as the husband's debts, are discharged by the bankruptcy of the husband. It is clear that a certificate of bankruptcy discharges him; and Lord Ch. J. Parker thought that the wife was also discharged forever, and not merely during the husband's life, though on that point, he said, it was not necessary to give a decided opinion.[2]

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(2.) *To maintain her.*

The husband is bound to provide his wife with necessaries suitable to her situation and his condition in life; and if she contracts debts due for them, during cohabitation, he is obliged

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(*a*) Woodman *v.* Chapman, 1 Campb. N. P. 189.

(*b*) 1 P. Wms. 249. It was decided, in Lockwood *v.* Salter and wife, 2 Nevill & Manning's Rep. 255, that the wife's debts, *dum sola*, were extinguished by the husband's discharge as a bankrupt or insolvent. But see *contra, infra*, p. 138, Mallory *v.* Vanderheyden, the rule in equity, and which is the correct rule, though the rule at law is otherwise.

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[1] This was held to be the law in Arkansas. Lamb *v.* Belden, 16 Ark. 539. And the estate of a deceased husband is not liable for the debts of his wife contracted before marriage. Cureton *v.* Moore, 2 Jones, Eq. (N. C.) 204.

[2] It is now settled in New York, that a discharge of the husband under the bankrupt laws, is no discharge of the wife. Mallory *v.* Vanderheyden, 3 Barb. Ch. 9. S. C. 1 Const. R. 453.

to pay those debts; but for anything beyond necessaries he is not chargeable. He is bound by her contracts for ordinary purchases, from a presumed assent on his part;[1] but if his dissent be previously made known, the presumption of his assent is rebutted. He may still be liable, though the seller would be obliged to show, at least, the absolute necessity of the purchase for her comfort. (*a*) If the tradesman furnishes goods to the wife, and gives the credit to her, the husband is not liable, though she was at the time living with her husband. (*b*)[2] Nor is he liable for money lent to the wife, unless his request be

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(*a*) Etherington *v.* Parrott, 1 Salk. 118. 2 Lord Raym. 1006, S. C. Montague *v.* Benedict, 3 Barnew. & Cressw. 631.

(*b*) Bentley *v.* Griffin, 5 Taunton's Rep. 356. Metcalfe *v.* Shaw, 3 Campb. 22.

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1 Gilman *v.* Andrus, 2 Wms. (Vt.) 241.

2 Simmons *v.* McElwain, 26 Barb. (N. Y.) 420. If the goods supplied be necessaries, the husband is not the less liable, because they are charged upon the tradesman's books to the wife. Furlong *v.* Hysom, 35 Maine, 332. Jewsbury *v.* Newbold, 40 Eng. Law and Eq. 518. Where the wife employed counsel to prosecute a petition for divorce, and a divorce was obtained, it was held that the counsel fees could not be considered as *necessaries* for the wife, but that she only was liable to her counsel. Shelton *v.* Pendleton, 18 Conn. R. 417. Johnson *v.* Williams, 3 Greene, (Iowa,) 97. But it was held, in Brown *v.* Ackroyd, 34 E. L. & Eq. 214, that a proctor's fees might be recovered as necessaries, if there were reasonable grounds for instituting the suit. In Coffin *v.* Dunham, 8 Cush. 404, the husband was held to be not liable for the fees of a counsellor, who had successfully defended the wife against his libel for divorce. In Johnson *v.* Williams, 3 Iowa, 97, the husband was held not liable for the fees of an attorney employed by the wife to prosecute a divorce. Such fees are not necessaries for which the husband is liable. And see Williams *v.* Monroe, 18 B. Mon (Ky.) 514. He is chargeable with the expense of necessary medical attendance upon his wife. Cothran *v.* Lee, 24 Ala. 380. But not for the fees of one who neither has, nor professes to have, any medical skill or knowledge of diseases or their remedies. Wood *v.* O'Kelley, 8 Cush. 406. The husband is not liable for goods furnished to his wife which were fitting for her station in life, if, in fact, she was supplied by him with necessaries at the time of the purchase. Renaux *v.* Teakle, 20 Eng. L. & Eq. R. 345. In an action for goods supplied to the wife on her order alone, the question is, in the absence of such evidence of necessity as may show an agency in law, not whether the goods were necessaries, but whether there was an agency or authority in fact. Read *v.* Teakle, 24 E. L. & Eq. 332; and see Sawyer *v.* Cutting, 23 Verm. 486. This is a well considered case as to what inferences of agency (in the absence of positive proof) may be inferred from the marital relation. See Burk *v.* Howard, 13 Mis. R. 241. Ruddock *v.* Marsh, 38 E. L. & Eq. 515.

But for necessaries, the wife of a lunatic, confined in an asylum, may pledge his credit, and the husband may be sued for debt. Reed *v.* Legard, 4 Eng. L. & Eq. R. 523. Where a married woman, in prison for the non-payment of fines, imposed for the violation of the statute prohibiting the sale of intoxicating drinks, gave certain promissory notes required to procure her release, it was held her husband was not liable therefor. Bates *v.* Enright, 42 Maine, 105.

averred and shown. (*a*) So, if the husband makes a reasonable allowance to the wife for necessaries during his temporary absence, and a tradesman, with notice of this, supplies her with goods, the husband is not liable, unless the tradesman can show that the allowance was not supplied. (*b*) If the husband abandons his wife, or they separate by consent, without any provision for her maintenance, or if he sends her away, he is liable for her necessaries, * and he sends credit with her to that extent. (*c*)[1] But if the wife elopes, though it be not with an adulterer, he is not chargeable even for necessaries. The very fact of the elopement and separation is sufficient to put persons on inquiry, and whoever gives the wife credit afterwards, gives it at his peril. The husband is not liable unless he receives his wife back again. (*d*) The duties of the wife, while cohabiting with her husband, form the consideration of his liability. He is accordingly bound to provide for her in his family; and while he is not guilty of any cruelty, and is willing to provide her a home, and all reasonable necessaries there, he is not bound to furnish them elsewhere. All persons supplying the food, lodging, and raiment, of a married woman living separate from her husband, are bound to make inquiries, and they give credit at their peril. (*e*)[2]

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(*a*) Stone *v.* Macnair, 7 Taunton, 432.

(*b*) Holt *v.* Brien, 4 Barnew. & Ald. 252. If there be an amicable separation of husband and wife, and he furnishes her with necessaries according to the agreement, he is not liable for articles furnished to her by a tradesman, though he had no notice, for the moral obligation on his part ceases. Caney *v.* Patton, 2 Ashmead, 140. Mr. Wallace, one of the learned editors to the American edition of Smith's Leading Cases, in Law Library, N. S. vol. xxv., says that this case in Pennsylvania is the ablest case on the subject to be found in the American books.

(*c*) Walker *v.* Simpson, 7 Watts & Serg. 83.

(*d*) Robinson *v.* Greinold, 1 Salk. Rep. 119. Morris *v.* Martyn, Str. Rep. 647. Child *v.* Hardyman, Str. Rep. 875. Manby *v.* Scott, 1 Mod. Rep. 124. 1 Sid. Rep. 109. 1 Lev. Rep. 4, S. C. 12 Johns. Rep. 293. 3 Pick. Rep. 289. Kirkpatrick, Ch. J., 2 Halsted's Rep. 146.

(*e*) M'Cutchen *v.* M'Gahay, 11 Johns. Rep. 281. Mainwaring *v.* Leslie, 2 Carr. & Payne's N. P. Rep. 507. Hindley *v.* Marquis of Westmeath, 6 Barnew. & Cress. 200.

[1] Walker *v.* Laighton, 11 Foster, (N. H.) 111. Calkins *v.* Long, 22 Barb. (N. Y.) 97. The husband is liable for the funeral expenses of the wife, though they were, by agreement, living separate at the time of the death. Ambrose *v.* Kerrison, 4 Eng. L. & Eq. R. 631.

[2] The husband, having a right to the wife's services, may maintain an action for

It has been a question, whether, if the wife elopes, and repents and returns again, and her husband refuses to receive her, he is then bound for her necessaries. The opinion of Lord Ch. J. Raymond, in *Child* v. *Hardyman*, (a) seems to be, that he would be liable; for he says that if the husband should refuse to receive the wife, "from that time it may be an answer to the elopement."[1] Lord Eldon subscribed to that case, and the same doctrine has been declared in New York; (b) but it does not apply where the wife had committed adultery. (c) It has also been a debatable point, whether, if the husband should refuse to provide necessaries for his wife, and * prohibit a particular person, or any person from trusting her, and she should, notwithstanding the prohibition, be trusted with necessaries suitable to her age, and degree, and rank in life, the law would then, notwithstanding such prohibition, raise an assumpsit against the husband. In the case of *Manby* v. *Scott*, in the reign of Charles II.,(d) which was argued many times at the bar, and then in the Exchequer, by all the judges of England, it appeared to be the opinion of a large majority of the judges that the husband could not be charged even with the necessaries for the wife, against his express previous prohibition to trust her, and that her remedy would be in the spiritual court for alimony. But the minority of the court held, that the husband would be chargeable from the necessity of the case; and that the husband cannot deprive the wife of the liberty which the law gives her of providing necessaries at his expense for her preservation. This opinion of the minority seems to be

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(a) 2 Str. Rep. 875.

(b) M'Cutchen v. M'Gahay, 11 Johns. Rep. 281. M'Gahay v. Williams, 12 Ibid. 293. Ewers v. Hutton, 3 Esp. 256.

(c) Govier v. Hancock, 6 Term Rep. 603.

(d) 1 Mod. Rep. 124. 1 Sid. Rep. 109. 1 Lev. Rep. 4, S. C.; and the case is reported at large, with learned notes, in Smith's Leading Cases, in Law Library, N. S. vol. xxviii., in a new translation from the original French in Sidefin, by J. G. Phillimore, Esq. It is one of the most interesting cases, and in ability and learning the discussion is equal to any in the English law.

slanderous words affecting her health and spirits. Olmsted v. Brown, 12 Barb. R. 657.

[1] Clement v. Mattison, 3 Rich. R. 93.

the received law at this day, and the extreme rigor of the old rule is relaxed.[1] The husband is bound to provide his wife with necessaries when she is not in fault, from a principle of duty and justice; and the duty will raise an assumpsit independent of his consent, and when no consent can be inferred, as in the case of a refusal on his part to provide her with necessaries. If he turns her out of doors, and forbids all mankind from supplying her with necessaries, or if she receive such treatment as affords a reasonable cause for her to depart from his house, and refuse to cohabit with him, yet he will be bound to fulfil her contracts for necessaries, suitable to her circumstances and those of her husband. (*a*)[2] The case of *Bolton* v. *Prentice*, (*b*) which * arose in the K. B. as late as 18 Geo. II., goes the length of establishing this reasonable doctrine. The wife took up necessaries on credit after the husband had used her ill, and abandoned her, and forbidden the plaintiff from trusting her. But the K. B. held that the husband had no right to make such a prohibition in such a case; and they distinguished the case from that of *Manby* v. *Scott*, because, in that case the wife was guilty of the first wrong; and they sustained the action of the assumpsit for the goods sold to the wife.

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(*a*) Houliston *v.* Smyth, 3 Bingham's Rep. 127. In this case the court considered the law to be, that if a man rendered his house unfit for a modest woman to continue in it, or if the wife had reasonable ground to apprehend personal violence, she was justified in quitting it, and the husband would be liable for necessaries furnished for her support.

(*b*) Str. Rep. 1214.

[1] Clement *v.* Mattison, 3 Rich. R. 93.

[2] The party furnishing necessaries must prove that the wife left for a sufficient cause. Blowers *v.* Sturtevant, 4 Denio's R. 46. Adultery by the husband is a sufficient cause. Sykes *v.* Halstead, 1 Sandf. (Law) R. 483. Hancock *v.* Merrick, 10 Cush. (Mass.) 41. Snover *v.* Blair, 1 Dutch. (N. J.) 94. Reese *v.* Chilton, 26 Mis. (5 Jones) 598. Williams *v.* Monroe, 18 B. Mon. (Ky.) 514.

If a husband, who is able to support his wife, drive her away from his house, he cannot be charged with her support as a pauper at the suit of the superintendents of the poor. Norton *v.* Rhodes, 18 Barb. 100. See Commissioners *v.* Hildebrand, 1 Carter, (Ind.) 555; but it seems to be held, in Massachusetts, that a town may in such a case recover of the husband the amount expended in the necessary support of the wife as a pauper, but not for supplies suitable to her condition in life. Monson *v.* Williams, 19 Law Rep. 412, (Nov. 1856.)

In a modern decision, in the K. B., (*a*) it was held, that if a man turned away his wife without justifiable cause, he was bound by her contracts for necessaries suitable to her degree and estate. If they lived together, he is only bound by her contracts made with his assent, which may be presumed. If the wife goes beyond what is reasonable and prudent, the tradesman trusts the wife at his peril, and the husband is not bound but by his assent, either express or reasonably implied. The doctrine of the Supreme Court of New York is to the same effect. (*b*)

(3.) *Liable for her torts.*

The husband is liable for the torts and frauds of the wife committed during coverture.[1] If committed in his company, or by his order, he alone is liable. If not, they are jointly liable, and the wife must be joined in the suit with her husband. Where the remedy for the tort is only damages by suit, or a fine, the husband is liable with the wife; but if the remedy be sought by imprisonment, on execution, the husband is alone liable to imprisonment. (*c*) The wife, during coverture, cannot be taken on a *ca. sa.* for her debt *dum sola*, or a tort *dum sola*, without her husband; and if he escapes, or is not taken, the court will not let her lie in prison alone. (*d*) If the tort or offence be punished criminally by imprisonment, *or other corporal punishment, the wife alone is to be punished, unless there be evidence of coercion, from the fact that the offence was committed in the presence or by command of the husband. This indulgence is carried so far as to excuse

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(*a*) Montague *v.* Benedict, 3 Barnew. & Cress. 631.

(*b*) M'Cutchen *v.* M'Gahay, 11 Johns. Rep. 281. The husband is not liable on a negotiable note given by the wife, even in a suit by the *bonâ fide* indorsee, though given for goods purchased by her to carry on her trade, unless it was given with his authority or approbation. Reakert *v.* Sanford, 5 Watts & Serg. 164.

(*c*) 3 Blacks. Com. 414.

(*d*) Jackson *v.* Gabree, 1 Vent. Rep. 51.

[1] A wife, having no power at law to enter into the contract of agency with her husband, *it would seem* to follow that she cannot be made liable for his fraud, while assuming to act for her in that capacity. Birdseye *v.* Flint, 3 Barb. S. C. Rep. 500. In an action against husband and wife for a libel published by the latter, no less damages shall be recovered, than if the woman were unmarried. Austin *v.* Wilson, 4 Cush. 273.

the wife from punishment for theft committed in the presence or by the command of her husband. (*a*) But the coercion which is supposed to exist in that case is only a presumption of law, and, like other presumptions, may be repelled.[1]

III. *Wife's capacity at law to act as a feme sole.*

(1.) *To purchase and sell land.*

The disability of the wife to contract so as to bind herself, arises not from want of discretion, but because she has entered into an indissoluble connection, by which she is placed under the power and protection of her husband, and because she has not the administration of property, and has given up to him all personal property in possession, and the right to receive all such as may be reduced into possession. (*b*) But this general rule is subject to certain exceptions, when the principle of the rule could not be applied, and when reason and justice dictate a departure from it.[2]

In the first place, a wife may purchase an estate in fee without her husband's consent, and the conveyance will be good, if the husband does not avoid it by some act declaring his dissent, and the wife, after her husband's death, may waive or disagree to the purchase. (*c*) But the conveyance of a *feme covert*, except by some matter of record, was absolutely void at law,[3] and in

(*a*) 1 Hawk. P C. b. 1, ch. 1, sec. 9.
(*b*) 1 Vesey, 305. 1 H. Blacks. Rep. 346.
(*c*) Litt. sec. 677. Co. Litt. 3, a; 356, b. 2 Blacks. Com. 292.

[1] Uhl *v.* Commonwealth, 6 Gratt. 706 Commonwealth *v.* Murphy, 2 Gray, 510. A wife cannot be convicted of feloniously receiving stolen goods from her husband. Regina *v.* Brooks, 14 E. L. & Eq. 580. Regina *v.* Mathews, 1 E. L. & Eq. 549. It is held in Roadcap *v.* Sipe, that a joint action of trespass will lie against husband and wife for an assault committed by both. 6 Gratt. 213. And where a party brought an action against husband and wife jointly for an assault by the latter, it was held error to nonsuit him as to both, on the ground of the presumed exemption of the wife. Wagener *v.* Bill, 19 Barb. 321. It may be well to remark, that this immunity of the wife does not extend to the crimes of treason, murder, or robbery, nor, in general to those crimes (except theft) which are *mala in se*; even in respect to theft, if the wife was not drawn to the offence by the husband, she is guilty as well as the husband. 1 Russell on Crimes, p. 16.

[2] In New York, if any female, being or afterwards becoming a married woman, deposits funds in a savings-bank in her own name, the officers of such bank are authorized to pay the same to her, and her receipt will be a sufficient discharge. Laws of New York, 1850, ch. 91.

[3] Where lands were conveyed to a married woman who had been deserted by her hus-

England the wife used to pass her freehold estate by a fine, and this and a common recovery were the only ways in which she could, at common law, convey her real estate. She might, by a fine and a declaration of the uses thereof, declare a use for her husband's benefit.[1] So if the husband and wife levied a fine, a declaration of the uses by the husband alone would bind the wife and her heirs, unless she disagreed to the uses during the coverture. (*a*) As a general rule, the husband must be a *party with the wife to her conveyance;[2] but if she *151 levied a fine as a *feme sole*, without her husband, though it would be good as against her and her heirs, (*b*) the husband may avoid it during coverture, for the benefit of the wife as well as for himself. (*c*) Now the English law is changed as to the mode of conveyance of the wife, by the abolition of fines and recoveries, and the wife conveys by deed, with the hus-

(*a*) Beckwith's case, 2 Co. 57. Swanton *v.* Raven, 3 Atk. Rep. 105. In Durant *v.* Ritchie, 4 Mason's Rep. 45, the husband and wife conveyed to A. in fee, to the use of the grantors for their joint lives, and to the survivor in fee, and the uses were held to be well raised out of the seisin of A.

(*b*) Bro. Abr. tit. Fines, pl. 75. Perkins, sec. 20. Shep. Touch. by Preston, p. 7.

(*c*) Preston on Abstracts of Title, vol. i. p. 336. By the Fine and Recovery Act of 3 & 4 Wm. IV. c. 74, the court of C. B. may, whenever the husband's concurrence cannot be procured from any cause whatever, authorize the wife to convey her lands by deed without his concurrence.[3] This is analogous to the provision in the Civil Code of Louisiana, art. 127, taken from the Code Napoleon, art. 218, by which, in case the husband refuses to authorize his wife to sell her paraphernal property, she may apply to the judge of the place of her domicil for authority, and which he may grant after hearing the parties.

band, a mortgage deed, given back by her at the same time to secure a part of the purchase-money, was held void. Concord Bank *v.* Bellis, 10 Cush. 276. Nor is a married woman estopped from setting up title to lands, as against one claiming as grantee under her warranty deed, which falsely purported to have been executed before her marriage. Lowell *v.* Daniels, 2 Gray, 161.

[1] The wife, even at common law, may make a conveyance to her husband through a third person, to whom the wife first conveys, and who then conveys to the husband. Jackson *v.* Stevens, 16 Johns. R. 110. Meriam *v.* Harsen, 2 Barb. Ch. R. 232. But it seems that a married woman may not, by uniting with her husband in a conveyance of her lands to a trustee, reserve a valid power to appoint it to the husband's use, or convey it to him by devise. Dempsey *v.* Tylee, 3 Duer, 73.

[2] Scott *v.* Purcell, 7 Blackf. R. 66. But see, as to the law in New York, the F. Ins. Co. *v.* Bay, 4 Barb. S. C. Rep. 407. Affirmed in the Court of Appeals, 4 Comstock R. 1. The mortgage of the wife, without the concurrence of the husband, was held to be good.

[3] See 30 E. L. & Eq. 493; Id. 519; 30 Id. 348; 33 Id. 227, 282.

band's concurrence. (*a*) The wife may, as an attorney to another, convey an estate in the same manner as her principal could, and she may execute a power, simply collateral, and, in some cases, a power coupled with an interest, without the concurrence of her husband. (*b*) She may also transfer a trust estate, by lease and release, as a *feme sole*. (*c*)

The conveyance of land by *femes covert*, under the government of the colony of New York, was, in point of fact, by deed and not by fine, and upon the simple acknowledgment of the wife before a competent officer, without private examination. Such loose modes of conveyance were mentioned in the Act of the 16th of February, 1771, and were confirmed; but it was declared, that in future no estate of a *feme covert* should pass by deed, without her previous private acknowledgment before the officer, apart from her husband, that she executed the deed freely, without any fear or compulsion of her husband. (*d*) [1] The

(*a*) By the English statute of 3 & 4 Wm. IV. c. 74, abolishing fines and recoveries, married women are enabled, with the concurrence of their husbands, and in special cases without it, to dispose by deed, or relinquish any estate they may have, as effectually as they could do if sold, provided the deed of a married woman be acknowledged by her before a competent officer, on a previous examination, apart from her husband.

(*b*) Sugden on Powers, c. 3, sec. 1. Co. Litt. 52 a, 112 a.

(*c*) Burnaby *v.* Griffin, 3 Vesey 266.

(*d*) It is worthy of notice, however, that in the Act of the first legislature of New York, in 1683, under the Duke of York, and which was termed "the charter of liberties," it was provided, that no estate of a *feme covert* should be conveyed but by deed acknowledged by her in some court of record, and she being secretly examined, whether she did it freely, without threats or compulsion of her husband. In the old colony of Plymouth, it was enacted by law, in 1646, that the acknowledgment of a sale of lands by the wife before a magistrate was sufficient. Plymouth Colony Laws, by Brigham, 1836, p. 86. In Massachusetts, under the Province Act of 9 William III., a wife, in conjunction with her husband, might convey her real estate by deed of war-

[1] The certificate of the officer must be complete according to the requisition of the statute to make a married woman's deed operative. It cannot be amended by parol testimony of the officer, after his term of office has expired. Elwood *v.* Klock, 13 Barb. R. 50. Dennis *v.* Tarpenny, 20 Barb. 371.

By a recent statute of Vermont, the separate acknowledgment of married women to deeds is no longer required. They execute deeds in the same manner as their husbands. Laws of 1851, p. 29.

The wife may be estopped from impeaching the validity of a conveyance made without her separate acknowledgment, if by her own free act she receive the consideration. Fulton *v.* Moore, 25 Penn. 468. See Curtiss *v.* Follett, 15 Barb. 337.

deeds of *femes covert*, in the form used in other cases, accompanied by such an examination, and which is still required by statute, (*a*) have ever since been held sufficient to convey their estates, or any future contingent interest in real property, and fines and recoveries are now abolished by statute in New York. (*b*) If the wife resides out of the state, she may unite with her husband and convey all her right and interest, present and contingent, equally *as if she were a *feme* *152 *sole*, and without any such special acknowledgment. (*c*) Nor does a deed by the wife, in execution of a power or trust, require a private examination. (*d*)

This substitute of a deed for a conveyance by fine has prevailed throughout the United States, as the more simple, cheap, and convenient mode of conveyance. (*e*) The reason why the husband was required to join with his wife in the conveyance was, that his assent might appear upon the face of it, and to show he was present to protect her from imposition; and the

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gain and sale, duly executed, acknowledged, and recorded, without being privately examined, whether she did it freely or not. Judge Trowbridge said, such had been the practice in the province down to his time, and he held such conveyances, so authenticated, to be valid. See his opinion in the American Jurist, No. 27. See, also, Fowler *v.* Shearer, 7 Mass. Rep. 14, 19–22. The Revised Statutes of Massachusetts, of 1836, give a sanction to the joint deed of husband and wife; but though the deed will pass her real estate, it will not bind her by any covenant or estoppel.

(*a*) N. Y. Revised Statutes, vol. i. p. 758, sec. 10.

(*b*) Ibid. vol. ii. p. 343. If, however, the party was an *infant* as well as a *feme covert*, the disability arising from infancy remains, though she execute and acknowledge the deed in the form prescribed by the statute. Bool *v.* Mix, 17 Wendell's Rep. 119.

(*c*) New York Revised Statutes, vol. i. p. 578, sec. 11.

(*d*) Platt, J., in Jaques *v.* Method. Epis. Church, 17 Johns. Rep. 590. Sturges *v.* Corp, 13 Vesey, 190. When the wife's property settled on her is the subject of a deed, equity looks upon her as a *feme sole*, and as incident to the ownership in her, is her power of disposition without the concurrence of her husband. Powell *v.* Murray, 2 Edw. V. Ch. Rep. 636.

(*e*) Davey *v.* Turner, 1 Dall. Rep. 11. Watson *v.* Bailey, 1 Binney's Rep. 470. Jackson *v.* Gilchrist, 15 Johns. Rep. 89. Fowler *v.* Shearer, 7 Mass. Rep. 14. Gordon *v.* Haywood, 2 N. H. Rep. 402. Thatcher *v.* Omans, Supplement to 3 Pick. Rep. 521. Lithgow *v.* Kavenagh, 9 Mass. Rep. 172. Elmer's N. J. Dig. 83. Acts of North Carolina, 1715, 1750. The method of conveying lands by fine and common recovery was never in use in North Carolina, and the statutes of 1715 and 1750 required the wife's previous private examination before her conveyance by deed was binding. The law of the island of Jamaica allows a married woman to convey by a simple conveyance with her separate acknowledgment.

weight of authority would seem to be in favor of the existence of a general rule of law, that the husband must be a party to the conveyance or release of the wife. Such a rule is founded on sound principles arising from the relation of husband and wife. But there are exceptions to the rule, and it is not universal in its application. In New Hampshire, the wife, according to statute and usage, may release her right of dower by her separate deed, executed without her husband; (a) and in Massachusetts it has been said, by a very high authority, that the wife, by her separate deed executed subsequently to a sale by her husband, and in consideration of that sale, may release her right of dower. (b) In the State of Maine the same exception has been adopted; and it is declared to be the usage or common law of New England, that a wife, in consideration of her husband's conveyance, may, by her own separate deed, release her right of dower to the grantee of her husband. (c)

*153 Subject to this exception, *the general rule is explicitly recognized in those states where the exception prevails. But in Massachusetts, even the exception is now understood not to exist, and it is declared that the husband must be a party to the deed of release by the wife of her dower, and the previous conveyance by the husband is not sufficient to give the wife's deed, executed by her alone, validity. (d)[1] In New York, this particular question has never been judicially settled; it is, however, declared by statute, (e) that if a married woman execute a power by grant, the concurrence of her husband, as a party, is not requisite; and if she reside out of the state, though she may convey any real estate situated within the state, without any other acknowledgment or proof of the execution of it than that required of a *feme sole*, she is in that case to "join with her

(a) Woodbury, J., in 2 N. H. Rep. 176, 405.

(b) Parsons, Ch. J., in Fowler v. Shearer, 7 Mass. Rep. 14.

(c) Rowe v. Hamilton, 3 Greenleaf's Rep. 63.

(d) Powell v. Monson and Brimfield Manufacturing Company, 3 Mason's Rep. 347. Hall v. Savage, 4 Ibid. 273. Jackson on Real Actions, 326.

(e) N. Y. Revised Statutes, vol. i. p. 736, sec. 117.

[1] Gerrish v. Mason, 4 Gray, (Mass.) 432.

husband" in the conveyance. (a) The substitute in favor of a conveyance by the wife, of a deed for a fine or common recovery, was made in Maryland, by the colony statutes of 1715, 1752, and 1766; and the statute law of that state is explicit, that the husband and wife must join in the conveyance. (b) So, in Massachusetts, from the earliest periods of the colony, the wife, with the concurrence of her husband, could convey her estate in fee by deed duly acknowledged and recorded. (c) In South Carolina, Georgia, and Kentucky, the wife conveys in the same way; and in Rhode Island, Connecticut, Ohio, Indiana, Missouri, and North Carolina, (and this is no doubt the general rule,) the husband must join in the conveyance by the wife, and she must be separately examined before an officer. (d) In Virginia, it is laid *down as the general rule, that the wife's deed, to be valid, must be executed by the husband also. (e) In New Jersey, by their early colony laws, the wife might convey her estate by deed, provided she was previously and privately examined by a magistrate. (f) Upon the view of our American law on this subject, we may conclude the general rule to be, that the wife may convey by deed; that she must be privately examined;[1] that the husband must show his concurrence to the wife's conveyance by becoming a party to the

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(a) N. Y. Revised Statutes, vol. i. p. 758, sec. 11.

(b) Lawrence v. Heister, 3 Harr. & Johns. Rep. 371.

(c) 4 Mason's Rep. 45, 62.

(d) Manchester v. Hough, 5 Mason's Rep. 67. Revised Statutes of Ohio, 1831. See, also, Ter. Law of Ohio, 1795. Chase's Statutes, vol. i. p. 186. The statute law of Ohio requires the certificate of the separate examination of the wife to her deed, to state that the contents of the deed were made known to her. Chase's Statutes, vol. iii. Act of North Carolina, 1751. Brown v. Starke, 3 Dana's Ken. Rep. 320. Prince's Dig. of Statutes of Georgia, (2d edit. 1837,) p. 159. Revised Statutes of Indiana, 1838, p. 313. Statutes of Connecticut, 1838, p. 392. R. S. of Missouri, 1835. But in Maryland it has been held, that if the wife gives a mortgage of lands held in trust for her separate use, though it be not acknowledged as the statute requires in respect to deeds of *femes covert*, the deed creates a specific lien, to be enforced in equity. Brundige v. Poor, 2 Gill & Johns. Rep. 1.

(e) Sexton v. Pickering, 3 Randolph's Rep. 468.

(f) Leaming & Spicer's Collections, pp. 235, 268.

[1] In Dewey v. Campau, 4 Mich. 565, it was held that a deed was void, in which the acknowledgment of the wife was taken by the notary through a sworn interpreter.

deed; and that the cases in which her deed without such concurrence is valid, are to be considered as exceptions to the general rule. (*a*)

(2.) *To sue and be sued.*

If the husband was banished, or had abjured the realm, it was an ancient and another necessary exception to the general rule of the wife's disability to contract, and she was held capable to contract, and to sue and be sued, as a *feme sole.*[1] In such a case, both she and her creditors would be remediless without that exception. In the case of *Belknap* v. *Lady Weyland*, (*b*) it was held, 2 Hen. IV. ch. 7, that the wife of a man exiled or banished, could sue alone, though that exception was regarded at that day almost as a prodigy; and some one exclaimed *ecce modo mirum, quod fœmina fert breve regis, non nominando virum conjunctum robore legis.* Lord Coke seems to put the capacity of the wife to sue as a *feme sole* upon the ground that the abjuration or banishment of the husband amounted to civil death. But if the husband be banished for a limited time only, though it be no civil death, the better opinion is, that the consequences as to the wife are the same, and she can sue and be sued

(*a*) It was adjudged in Vermont, in Sumner *v.* Conant, 10 Vermont Rep. 1, or Shaw's R. S. N. vol. i., that a *feme covert* could not, either separately or jointly with her husband, execute a valid *power of attorney* to convey lands held in her right. The statute giving her a right to convey by deed, did not reach the case. So in Maine, the agreement of a married woman for the sale of her real estate, though made with her husband's assent, and for a valuable consideration, is void. Lane *v.* McKeen, 15 Maine, 304.

(*b*) Cited in Co. Litt. 132 b, 133 a; and see, also, Wilmot's case, Moore's Rep. 851, in which 18 Edw. I., 10 Edw. III. ch. 399, and 1 Hen. IV. ch. 1, and also cited by Lord Coke and Dodderidge, J., as precedents to the same point.

[1] In Kentucky, a wife may sue alone, if the action relates to her separate property. Petty *v.* Malier, 14 B. Mon. (Ky.) 246. In New Jersey, a *feme covert* can make no contract, except as to her separate estate. Young *v.* Paul, 2 Stockt. (N. J.) 401. A *feme covert* cannot contract, under the laws of California, so as to render her liable in a suit at law. Rowe *v.* Kohle, 4 Cal. 285. In Wisconsin, a married woman has not the power to contract debts, so as to be liable to a personal action. Wooster *v.* Northrup, 5 Wis. 245. In New York, by the Code of Procedure, a married woman may sue alone when the action concerns her separate property; and when the action is between herself and husband, she may sue or be sued alone. In no case need she prosecute by a guardian or next friend.

as a *feme* *sole. (a) And if the husband be an alien *155 always living abroad, the reason of the exception also applies; and it was held, in the case of *Deerly* v. *Duchess of Mazarine*, (b) that in such a case, the wife was suable as a *feme sole*, in like manner as if the husband had abjured the realm. Though it was mentioned in that case that the husband was an alien enemy, and had been divorced in France, yet, as Lord Loughborough said, (c) the decision did not rest on either of those grounds, but solely and properly on the ground that the wife lived in England, on a fortune of her own, and separate from her husband, who had always resided abroad as an alien.[1]

Again, in *Walford* v. *The Duchess of Pienne*, (d) Lord Kenyon held, that the wife was liable as a *feme sole*, for goods sold, when the husband was a foreigner, residing abroad, and that this case came within the principle of the common law, applicable to the case of the husband abjuring the realm. If the wife was not to be personally chargeable for debts contracted under such circumstances, she would be without credit, and might starve. And if the husband was a *native* instead of an alien, he thought the rule might be different, as in that case he was to be presumed to have the *animus rever- *156 tendi. (e) In the case of *De Gaillon* v. *L'Aigle*, (f) the

(a) Note 209 to lib. 2, Co. Litt. Sparrow *v.* Carruthers, decided by Yates, J., and cited as good authority in 1 Term Rep. 6. 1 Bos. & Pull. 359. 2 Bos. & Pull. 233. Carrol *v.* Bleucow, 4 Esp. N. P. Rep. 27. In Robinson *v.* Reynolds, 1 Aiken's Vt. Rep. 174, the English cases are ably reviewed, and the conclusion seemed rather to be that the wife could only sue and be sued as a *feme sole*, when the husband was an alien who had always resided abroad, or was *civiliter mortuus*, as when he was exiled, banished for life, or had abjured the realm. In that case, the husband had voluntarily withdrawn himself from the United States, and that was held not to be sufficient; and the question was by that case still left unsettled, whether transportation or banishment by law, for a limited time only, would be sufficient. But in the English case, *Ex parte* Franks, 1 Moore & Scott, 1, more recently decided, the wife of a convicted felon, sentenced to transportation for 14 years, but detained in confinement in the hulks, was held liable to be made a bankrupt, if she traded on her own account.

(b) 1 Lord Raym. 147. 1 Salk. Rep. 116.

(c) 1 H. Blacks. Rep. 349.

(d) 2 Esp. N. P. Rep. 554. Bean *v.* Morgan, 1 Hill's S. C. Rep. 8, S. P.

(e) Franks *v.* Duchess of Pienne, 2 Esp. N. P. Rep. 587.

(f) 1 Bos. & Pull. 357.

[1] McArthur *v.* Bloom, 2 Duer, 151.

court of C. B. held the same doctrine, and that a *feme covert* was chargeable with her contracts, where the husband, being a foreigner, had voluntarily abandoned her, and resided abroad, and that it was for her benefit that she should be liable, in order to enable her to obtain a credit and secure a livelihood. It was also said, in that case, that there was no instance in which the wife was held personally liable on her contracts, on the ground of her husband residing abroad, when he was an Englishman born. In corroboration of the distinction contained in that suggestion, we may refer to the case of *Bogget* v. *Frier*, (*a*) in which the K. B. held that the plaintiff could not sue as a *feme sole* for trespass to her property, when her husband, *being a natural-born subject*, had deserted her for years before, and gone beyond sea, but without having abjured the realm, or been exiled or banished. The case of *Kay* v. *Duchesse De Pienne*, (*b*) introduced a qualification of the distinction in the former cases, between the wife of a foreigner and the wife of a native; and it held that if a foreigner, though a resident abroad at the time of the suit brought, had ever resided in England, his wife was disabled to sue. The distinctions in the English law, subject to this qualification, have been assumed as the law in this country. (*c*)

*157 * This is the extent of the authorities on this subject; and it is easy to see that there might be most distressing cases under them, for though the husband be not an alien, yet if he deserts his wife and resides abroad permanently, the necessity that the wife should be competent to obtain credit, and acquire and recover property, and act as a *feme sole*, exists in full force. (*d*) It is probable that the distinction between hus-

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(*a*) 11 East, 301. The rejoinder in this case, among its averments, stated that the husband had never *abjured* the realm. This would imply that abjuration was known in modern practice, and yet it is admitted in the books, that abjuration or banishment upon oath, taken by a felon on fleeing to a sanctuary, that he would, within forty days, leave the realm forever, has been disused since the reign of James I., and abolished. Hawk. P. C. b. 2, c. 9, sec. 44. 4 Blacks. Comm. 326. The privilege of sanctuary was also abolished in France by Louis XII. Henault's Abr. Chro. tom. ii. p. 446.

(*b*) 3 Campb. Rep. 123.

(*c*) Gregory *v.* Paul, 15 Mass. Rep. 31. Robinson *v.* Reynolds, 1 Aiken's Rep. 74, *supra*, p. 155, n. *c*.

(*d*) If a *feme covert* be driven by cruelty from her husband's house, and she retires

bands who are aliens and who are not aliens, cannot long be maintained in practice, because there is no solid foundation in principle for the distinction. (*a*)[1]

If the wife be divorced *a mensa et thoro*, it has been suggested, in some of the books, that she can sue and be sued as a *feme sole*. (*b*) But in *Lewis* v. *Lee*, (*c*) it was adjudged, in the English court of K. B., upon demurrer, that though the wife be divorced *a mensa et thoro*, and lived separate and apart from her husband, with an ample allowance as and for her separate maintenance, she should not be sued as a *feme sole*. The question is not settled in the jurisprudence of this country. In Massachusetts, it has been held, after a full consideration of the subject, that a wife divorced *a mensa et thoro*, might sue and be sued as a *feme sole*, for property * acquired, or debts contracted by her subsequently to the divorce. (*d*) *158

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to another state, and maintains herself by her labor, without any provision for her made by her husband who abandoned her, she may sue as a *feme sole*, though her husband be a citizen. Gregory *v.* Paul, 15 Mass. Rep. 31. Abbot *v.* Bayley, 6 Pick. Rep. 89.[2]

(*a*) In Bean *v.* Morgan, 4 M'Cord's Rep. 148, it was held, that if the husband departs from the state, with intent to reside abroad, and without the intention of returning, his wife becomes competent to contract, and to sue and be sued as a *feme sole*. This was breaking down the distinction mentioned in the text. So in Gregory *v.* Pierce, 4 Metcalf's Rep. 478, it was held, that if the husband deserts his wife absolutely and completely, by a continued absence from the state, and with an intent to renounce *de facto* the marital relation, the wife may sue and be sued as a *feme sole*. This was considered to be an application of an old rule of the common law, and equivalent to an abjuration of the realm.[3]

(*b*) Bacon, tit. Baron and Feme, M. Lord Loughborough, in 2 Vesey, Jr., 145. In Stephens *v.* Tot, Moore's Rep. 665, it was intimated (*il sembloit*) that the wife, on divorce *a thoro et mensa*, could sue without her husband, in like manner as she could sue if her husband was exiled.

(*c*) 3 Barnew. & Cress. 291.

(*d*) Dean *v.* Richmond, 5 Pick. Rep. 461. Pierce *v.* Burnham, 4 Metcalf's Rep. 303, S. P.

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[1] The wife of an alien enemy cannot maintain an action in her own name on a contract made either before or during coverture. De Wahl *v.* Braune, 38 E. L. & Eq. 300.

[2] Rose *v.* Bates, 12 Mis. 30; Roland *v.* Logan, 18 Ala. 307; Krebs *v.* O'Grady, 23 Id. 726; Love *v.* Moynehan, 16 Ill. 277.

[3] In Ohio, a wife may sue or be sued as a *feme sole* on contract for necessaries for her maintenance, where her husband has deserted her and she maintains herself. Wagg's Executor *v.* Gibbons, 5 Ohio (N. S.) 580. And it was held, in Smith *v.* Silence, 4 Iowa, 321, that where a wife has been a long time absolutely deserted by her husband, and left wholly to her own means of support, she is free to act as a *feme sole*.

This is the more reasonable doctrine; and it seems to be indispensable that the wife should have a capacity to act for herself, and the means to protect herself, while she is withdrawn by a judicial decree, from the dominion and protection of her husband. The court of Massachusetts has intentionally barred any inference that the same consequence would follow if the husband was imprisoned by law for a public offence or crime. But such a case might be equivalent to an abondonment of the wife, and ground for a divorce *a mensa et thoro*; and there are as much reason and necessity in that case as in any other, that the wife should be competent to contract, and to protect the earnings or her own industry. (*a*)

In *Hatchett* v. *Baddeley*, 16 Geo. III., (*b*) the C. B. held that a *feme covert* eloping from her husband, and running in debt, could not be sued alone, for that *no act of the wife* could make her liable to be sued alone. If she could be sued, she could sue, acquire property, and release actions, and this would overturn first principles. In no case, said one of the judges, can a *feme covert* be sued alone, except in the known excepted cases of abjuration or exile, where the husband is considered as dead, and the woman as a widow. It was afterwards held, by the same court, in *Lean* v. *Schutz*, 18 Geo. III., (*c*) that if the wife had even a separate maintenance, and lived apart from her husband, she could not be sued alone. There was no instance in the books, said the court, of an action being sustained against the wife, when the husband was living at home, and under no civil disability. A wife may acquire a separate character by the civil death of her husband, but she cannot acquire it by a voluntary separation.

(*a*) Massachusetts Revised Statutes of 1836, authorized a divorce from the bond of matrimony if either party be sentenced to imprisonment in the state prison. *Supra*, p. 96. They likewise clothe the wife with power to act in many respects as a *feme sole*, if her husband absents himself from the state, and abandons his wife, and makes no sufficient provision for her maintenance. She is, in such cases, authorized to contract, and to sue and be sued as a *feme sole*, so long as her husband remains absent. The same power and capacity are given to a married woman who comes into the state without her husband, he having never lived with her in the state. If the husband afterwards comes into the state, he assumes his marital rights. Massachusetts Revised Statutes, part 2, tit. 7, ch. 77.

(*b*) 2 Wm. Blacks. Rep. 1079. Gilchrist *v*. Brown, 4 Term. Rep. 766, S. P.

(*c*) 5 Wm. Blacks. Rep. 1195.

* But a few years afterwards, the court of K. B., under *159 the influence of Lord Mansfield, in the celebrated case of *Corbett* v. *Poelnitz*, (a) introduced a new principle into the English law, respecting the relation of husband and wife; but a principle that was familiar to the Roman law, and to the municipal law of most of the nations of Europe. The court, in that case, held that a *feme covert* living apart from her husband, by deed of separation mutually executed, and having a large and competent maintenance settled upon her, beyond the control of her husband, might contract and sue, and be sued at law as a *feme sole*. Lord Mansfield put the action upon the ground of the wife having an estate settled upon her to her separate use, and acquiring credit, and assuming the character and competency of a *feme sole*. The ancient law had no idea of a separate maintenance; and, when that was introduced, the change of customs and manners required, as indispensable to justice, the extension of the exceptions to the old rule of law, which disabled a married woman from contracting. The reason of the rule ceased when the wife was allowed to possess separate property, and was disabled from charging her husband.

This decision of the K. B. was in 1785, and it gave rise to great scrutiny and criticism. It was considered as a deep and dangerous innovation upon the ancient law.

In *Compton* v. *Collinson*, (b) Lord Loughborough held, notwithstanding that decision, that it was an unsettled point, whether an action could be maintained against a married woman separated from her husband by consent, and enjoying a separate maintenance. Again, in *Ellah* v. *Leigh*, (c) the K. B., in 1794, indirectly assailed the decision of *Corbett* v. *Poelnitz*, and did not agree that the court could change the law, so as to adapt it to the fashion of the times. They declared, however, without touching the authority of the decision, * that upon a voluntary separation of husband and wife, *160

(a) 1 Term Rep. 5. Ringsted *v.* Lady Lanesborough, and Barwell *v.* Brooks, 3 Doug. Rep. 197, 371, were cases that preceded the one of Corbett *v.* Poelnitz, and declared the same doctrine.

(b) 1 H. Blacks. Rep. 350.

(c) 5 Term Rep. 679.

without a permanent fund for her separate use, she could not be sued alone as a *feme sole.* Afterwards, in *Clayton* v. *Adams*, (*a*) the court of K. B. went a step further towards overturning the authority of *Corbett* v. *Poelnitz*, and held, that though the wife lived apart from her husband, and carried on a separate trade, she was not suable; for if she could be sued as a *feme sole*, she might be taken in execution, which would operate as a divorce between husband and wife. At last, in *Marshall* v. *Rutton*, (*b*) the K. B. decided, in 1800, after a very solemn argument before all the judges, that a *feme covert* could not contract and be sued as a *feme sole*, even though she be living apart from her husband, with his consent, and have a separate maintenance secured to her by deed. The court said, that the husband and wife, being but one person in law, were unable to contract with each other, and that such a contract, with the consequences attached to it, of giving the wife a capacity to contract, and to sue and be sued, would contravene the general policy of the law in settling the relations of domestic life, and would introduce all the confusion and inconvenience which must necessarily result from so anomalous and mixed a character as such a married woman would be. The only way in which such a separation can be safe and effectual is, by having recourse to trustees, in whom the property, of which it is intended the wife shall have the disposition, may vest, uncontrolled by the rights of the husband; and it would fall within the province of a court of equity to recognize and enforce such a trust. (*c*) At law, a woman cannot be sued as a *feme sole* while the relation of marriage subsists, and she and her husband are living under the same government. (*d*)

Lord Eldon, afterwards, in the case of *Lord St. John* v. *Lady St. John*, (*e*) speaking of these decisions at law, expressed

(*a*) 6 Term Rep. 604.

(*b*) 8 Term Rep. 545.

(*c*) 2 Story's Equity, 652. Clancy on the Rights of Husband and Wife, b. 4, c. 3, *et seq.* Bettle *v.* Wilson, 14 Ohio Rep. 257. In this last case, it was adjudged that articles of separation between husband and wife, through the medium of a trustee, for her support, were valid.

(*d*) It has been adjudged, in Benedict *v.* Montgomery, 7 Watts & Serg. 238, that if husband and wife join in a sale of her real estate, and he takes the proceeds to his own use, there is no implied fund raised in favor of the wife.

(*e*) 11 Vesey, 537.

*himself very decidedly against the policy and the power *161 of a *feme covert* becoming a *feme sole* by a deed of separation. She was incompetent to contract for the husband; and, if separated, she could not be a witness against her husband; she could not commit felony in his presence; she must follow the settlement of her husband; her husband would be suable for her trespass. In short, the old rule is deemed to be completely reëstablished, that an action at law cannot be maintained against a married woman, unless her husband has abjured the realm. (*a*)

But if the husband and wife part by consent, and he secures to her a separate maintenance, suitable to his condition and circumstances in life, and pays it according to agreement, he is not answerable even for necessaries; and the general reputation of the separation will, in that case, be sufficient. This was so ruled by Holt, Ch. J., in *Todd* v. *Stoakes*, (*b*) and this general doctrine was conceded in the modern case of *Nurse* v. *Craig*, (*c*) in which it was held, that if the husband fails to pay the allowance, according to stipulation in the deed of separation, the person who supplies the wife with necessaries can sue the husband upon an *indebitatus assumpsit*. This rule, in all its parts, was adopted by the Supreme Court of New York, in *Baker* v. *Barney*. (*d*) But our courts have not gone further, and have never adopted the rule in *Corbett* v. *Poelnitz*, (*e*) and I apprehend that the general rule of the common law, as understood before and since that case, is to be considered the law in this country; though, perhaps, not *exactly under the same strait- *162 ened limitation mentioned in the books. (*f*) [1]

(*a*) See the observation of the Master of the Rolls, in 3 Vesey, 443, 444, 445.

(*b*) Salk. Rep. 116.

(*c*) 5 (2 N. S.) Bos. & Pull. 148.

(*d*) 8 Johns. Rep. 72. The same rule applies where the husband and wife are separated by a divorce *a mensa et thoro*, with an allowance to the wife for alimony, and the husband omits to pay it. Hunt v. De Blaquiere, 5 Bing. Rep. 550.

(*e*) See 2 Halsted's Rep. 150, where that case was expressly condemned.

(*f*) In some of the states, as Pennsylvania and South Carolina, a wife may act as a *feme sole* trader, and become liable, as such, in imitation of the custom of London.

[1] By a late statute in Massachusetts, (1855, ch. 304,) a married woman may carry on any

IV. *Wife's capacity in equity.*

(1.) *Of property in trust for wife.*

At common law a married woman was not allowed to possess personal property independent of her husband.. But in equity she is allowed, through the medium of a trustee, to enjoy property as freely as a *feme sole;* and it is not unusual to convey or bequeathe property to a trustee in trust, to pay the interest or income thereof to the wife, for her separate use, free from the debts, control, or interference of her husband, and payable upon her separate order or receipt, at and after the times that the payments respectively become due, and after her death in trust for her issue. In such cases, the husband has no interest in the property, though after the interest is actually received by the wife, it then might be considered as part of the husband's personal estate. (*a*) [1] It is not necessary that the trustee should be a

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Act of 1718, Purdon's Dig. 424. Burke *v.* Winkle, 2 Serg. & Rawle, 189. Newbiggin *v.* Pillans, 2 Bay's Rep. 162. State Reports in Equity, S. C. 148, 149. But, for greater protection to the wife, no suit can be brought, in South Carolina, by or against a *feme covert* sole trader, unless her husband be joined. 4 M'Cord's Rep. 413; and in Pennsylvania, the privilege extends only to the wives of husbands gone to sea, and whose wives are left at shop-keeping, or to work at any trade for a livelihood. In Louisiana, the wife has peculiar powers and privileges, and may be a public merchant, and bind herself, yet she cannot contract a debt by note without the authorization of her husband. Civil Code of Louisiana, art. 128, 2412. 12 Louisiana Rep. 13.

(*a*) Lee *v.* Prieaux, 3 Bro. Ch. 381. Norris *v.* Hemingway, 1 Hagg. Eccl. Rep. 4. *Ex parte* Gadsden, S. C. Law Journal, No. 3, 343. Carroll *v.* Lee, 3 Gill & Johns. 504. Beable *v.* Dodd, 1 Term Rep. 193. In this last case it was established at law, that a gift or devise to the sole and separate use of a *feme sole*, independent of the control and debts of a future husband, was valid, but the *feme sole* might, by a marriage settlement, in consideration of marriage, convey the estate to her husband. Being for her benefit, she might waive it.

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trade and perform any labor or services on her own sole and separate account; and she may sue and be sued as a *feme sole* in all matters relating to her property.

Under a similar statute in Maine, it is held, that the husband cannot be charged with the price of goods purchased by the wife, in her separate business transactions, even though she devote a portion of the proceeds of such property to the support of their children. Colby *v.* Lamson, 39 Maine, 119. Oxnard *v.* Swanton, Id. 125. Smith *v.* Gorman, 41 Maine, 405.

[1] If the real estate of a wife, secured to her by an ante-nuptial settlement, be sold and converted into furniture, intended to be held in trust for her, such furniture cannot be reached by the creditors of the husband. Danforth *v.* Woods, 11 Paige, R. 9. Merritt *v.* Lyon, 3 Barb. S. C. Rep. 110. It is otherwise where the *rents* and *profits* of her real estate

stranger. The husband himself may be the trustee; and if property be settled to a married woman's separate use, and no trustee be appointed, the Court of Chancery will protect her interest therein against the creditors of the husband, and the husband may be considered as such trustee, notwithstanding *he was not a party to the instrument under which the wife *163 claims. (a)[1] Where the husband stipulates, before mar-

(a) Bennet v. Davis, 2 P. Wms 316. More v. Freeman, Bunb. 205. Hamilton v. Bishop, 8 Yerger, 33. Abbott, Ch. J., 2 Carr. & Payne, 62. Newlands v. Paynter, 4 My. & Cr. Rep. 408. Picquet v. Swan, 4 Mason's Rep. 455. Escheator v. Smith, 4 M'Cord's Rep. 452. Clancy on the Rights of Married Women, pp. 15–30. (Clancy's Hus. & Wife, b. 3, c. 1.) Carroll v. Lee, 3 Gill & Johns. 504. Wallingsford v. Allen, 10 Peters's U. S. Rep. 583. Harkins v. Coalter, 2 Porter's Ala. Rep. 463. McKennan v. Phillips, 6 Wharton, 576. Trenton Banking Company v. Woodruff, 1 Green's N. J. Ch. Rep. 117. Shirley v. Shirley, 9 Paige's Rep. 363. Griffith v. Griffith, 5 B. Monroe, 115. The intention to create a trust estate for the wife must distinctly appear. Clancy, 262, 268. In Griffith v. Griffith it was held, that any words in giving personal estate to the wife, showing an intention to secure a use to the wife separately, would suffice, and that no particular form of expression was necessary—*for her own proper use* is sufficient.[2] The wife may give or lend the income of her separate estate, if at her disposal, to her husband or to any other person, and he will be accountable

are so invested generally, and with no intention of keeping the furniture as her separate property. Shirley v. Shirley, 9 Paige, R. 363.

[1] Hutchins v. Dixon, 11 Md. 29.

[2] For forms of expression which have been held sufficient to create a separate use, see Woodrum v. Kirkpatrick, 2 Swan, 218. Fears v. Brooks, 12 Geo. 195. Strong v. Gregory, 19 Ala. 146. Petty v. Boothe, Id. 633.

The words "for me and in my name," in a power of attorney given by the wife to the husband, do not reserve a separate interest in the money received under it. Turton v. Turton, 6 Maryl. 375. A bequest of a legacy to the wife "to hold to her and her heirs forever," does not exclude the husband's right to reduce it to possession. Wells v. Tyler, 5 Fost. 340. A devise to a wife "to be by her freely enjoyed to every intent and purpose as her own in every respect," held not to create a separate estate. Wilson v. Bailor, 3 Strobh. Eq. 258. And see Houston v. Embry, 1 Sneed, 480. Bryan v. Duncan, 11 Geo. 67. Goodrum v. Goodrum, 8 Ired. Eq. 313. Clevenstine's Appeal, 15 Penn. 495. Jenkins v. McConico, 26 Ala. 213. Betts v. Betts, 18 Ala. 787. The mere appointment of a trustee does not create a separate interest in the wife. Williams v. Maull, 20 Ala. 721.

To give effect to the contract of a third person in favor of a wife, it is only necessary that there should be a clear assent of the husband thereto. So as between the husband and wife, a deposit by him in a bank to her name and credit, and the delivery of the deposit book to her, will enure to her benefit, as against the *heirs* and *legatees* of the husband. Fisk v. Cushman, 6 Cushing, R. 20. A delivery of the money or of the evidence of the deposit is indispensable to the validity of the gift. Brown v. Brown, 23 Barb. 565.

A promissory note given by a husband to his wife for the amount of checks received from her and drawn on her separate banking account, and upon moneys settled to her separate use, was held a good declaration of trust by the husband in favor of the wife. Murray v. Glasse, 21 E. L. & Eq. 51. And see Darkin v. Darkin, 23 Id. 593.

riage, either that his wife shall enjoy her own property, or that she shall be entitled to a certain benefit out of his estate, he will be

for it. Towers *v.* Hagner, 3 Wharton's Penn. Rep. 46. Where a testator directed a share of the proceeds of his estate to be paid into the hands of his daughter, *for her own use and benefit*, and there was no intervention of trustees, and the gift was absolute, it was held, in that case, not to be a gift *to her separate use*; and the authority of the case of Hartley *v.* Hurle, 5 Vesey, 540, was shaken. Tyler *v.* Lake, 4 Simons's Rep. 351. In Faulkner *v.* Faulkner, 3 Leigh's Rep. 255, it was also decided that *at law* a marriage settlement, without the intervention of a trustee, would not avail to secure the property to the wife, as against the husband. So, in Simpson *v.* Simpson, 4 Dana's K. Rep. 141, it was held, that though a valid agreement for a separation between husband and wife, and for a separate allowance for her support, might be made through the medium of a third party as a trustee for the wife, and by whom the contract may be enforced, yet that where there was no third party, no suit could be maintained, either at law or in equity, on such a contract. The court thought the judiciary had no power to move one step in advance of the legislation and uniform judicial precedents on the subject. But if before marriage, and in contemplation of marriage, the husband conveys directly to his intended wife, without the intervention of a trustee, personal property, and she marries and dies without issue of the marriage, it was held that the property descended to her heirs, and that the marital rights of the husband did not attach. Allen *v.* Rumph, 2 Hill's S. C. Ch. Rep. 1. In Price *v.* Bigham, 7 Harr. & Johns. 296, where real estate was after marriage, conveyed in trust for the separate use of the wife, with power to her to sell by deed, she was allowed to charge the estate with the payment of her debts, and equity enforced the contract by decreeing a sale of the estate. So a *feme covert*, having a separate estate and living apart from her husband, may charge it by her general engagements or verbal promise, without any particular reference to that estate, as well as by a written instrument; and the creditor may reach it through a suit instituted in equity against her and her trustees. Murray *v.* Barlee, 3 Mylne & Keen, 209. 4 Simons, 82. She may charge her separate maintenance by accepting a bill of exchange. It amounts to a power of appointment *pro tanto* of her separate estate, but the vice-chancellor said that the court could not subject her separate property to general demands.[1] Stuart *v.* Kirkwall, 3 Madd. (387) 200, Am. ed. The cases on this point are contradictory. The Court of Chancery never provides for the children, while the wife is living, out of her separate property. She is not bound to provide for the children, or her husband, out of the property settled to her separate use. The husband is left to maintain her and the children. In the case of Anne Walker, Cases temp. Sugden by Lloyd & Goold, pp. 299, 328, 332.[2]

[1] A wife joining with her husband in making a promissory note charges her separate estate in equity with the payment of it. Yale *v.* Dederer, 21 Barb. 286. And see Bell *v.* Kellar, 13 B. Mon. 381. Ozley *v.* Ikelheimer, 26 Ala. 332. Collins *v.* Rudolph, 19 Id. 616. In Conn *v.* Conn, 1 Maryl. Ch. 212, it is held that in order to charge the wife's separate estate, it must be shown that her contract was made with direct reference to that estate, or upon her express agreement to that effect. Cherry *v.* Clements, 10 Humph. 551. Burch *v.* Breckinridge, 16 B. Mon. 482.

[2] See Mayer *v.* Galluchat, 6 Rich. Eq. 1. Callahan *v.* Patterson, 4 Texas, 61. Wylly *v.* Collins, 9 Geo. 223. Tupper *v.* Fuller, 7 Rich. Eq. 170.

bound in equity to perform his agreement, even though it was entered into with the wife herself, and became suspended at law by his subsequent marriage. (*a*)[1] Gifts from the husband to the wife may be supported as her separate property, if they be not prejudicial to creditors, even without the intervention of trustees; (*b*)[2] and where the husband, after marriage, agreed, in writing, to settle part of the wife's property upon her, the agreement was held to enure to the benefit of the children, and that the wife herself could not waive it. (*c*)

(*a*) It is to be considered as well settled, say the court in Stilley *v.* Folger, 14 Ohio Rep. 649, that almost any *bonâ fide* and *reasonable agreement*, made before marriage, to secure the wife either in the enjoyment of her own property or a portion of that of her husband, whether during coverture or after his death, will be carried into execution in chancery.

(*b*) Case of the Countess Cowper, before Sir Joseph Jekyll, cited in 1 Atk. Rep. 271. 3 Ibid. 293. Slanning *v.* Style, 3 P. Wms. 334. More *v.* Freeman, Bunb. Rep. 205. Lucas *v.* Lucas, 1 Atk. Rep. 270. 3 Ibid. 393. Brinkman *v.* Brinkman, cited in 3 Atk. Rep. 394. Rich *v.* Cockell, 9 Vesey, 369. Walter *v.* Hodge, 2 Swanston, 97. S. C. 1 Wilson's Ch. Rep. 445. Neufville *v.* Thomson, 3 Edwards's N. Y. Ch. Rep. 92. Taylor, Ch. J., in Liles *v.* Fleming, 1 Dev. Eq. 187. The English statute of 3 & 4 Wm. IV. has now given sanction to this doctrine, and the husband is allowed to make a conveyance to his wife without the intervention of a trustee. In Malony *v.* Kennedy, 10 Simons, 254, it was held, that where there are dividends on property settled to the separate use of the wife, and she makes no disposition of them by will, they pass by law to the husband in his marital right. The money must remain in the hands of trustees, to protect it from the husband.

In Graham *v.* Londonderry, 3 Atk. 393, it was held, that a gift to a wife by a third person, or by the husband, is construed to be a gift to her separate use, and she is entitled to the same in her own right as her separate estate; but mere ornaments for her parlor are considered as *paraphernalia*, and the husband may alien them in his lifetime; but if he only pledges them, and on his death leaves personal estate sufficient to pay his debts and redeem them, the widow is entitled to that redemption.

(*c*) Fenner *v.* Taylor, 1 Simons's Rep. 169. In South Carolina, all marriage settlements, ante-nuptial or post-nuptial, are required, by statute of 1823, to be recorded within three months after their execution; and any settlement of property by the husband on the wife after marriage, is a post-nuptial settlement within the rule. In default of such record, the marriage settlement is declared void. *Marriage settlements,* strictly speaking, are those settlements only, whether made before or after marriage,

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[1] Marriage articles between the guardians of an infant and her intended husband are not obligatory on her. Healy *v.* Rowan, 5 Gratt. 414.

[2] Barron *v.* Barron, 24 Verm. 375. Though an insolvent husband cannot give property to his wife, he may give his personal services, and her estate will not be made chargeable to his creditors. Hoot *v.* Sorrell, 11 Ala. R. 386. So he may secure to her sole and separate use the proceeds of his labor. Hodges *v.* Cobb, 8 Rich. 50. See Messenger *v.* Clark, Eng. Law Journal Rep. Excheq. p. 306, Oct. 1850.

The wife being enabled in equity to act upon property in the hands of her trustees, she is treated in that court as having interests and obligations distinct from those of her husband. *164 * She may institute a suit by her next friend, and she may obtain an order to defend separately suits against her; and, when compelled to sue her husband in equity, the court may order him to make her a reasonable allowance in money to carry on the suit. (*a*)

(2.) *Her power under settlements.*

The general grounds upon which equity allows a wife to institute a suit against her husband, are when anything is given to her separate use, or her husband refuses to perform marriage articles, or articles for a separate maintenance; or where the wife, being deserted by her husband, hath acquired by her labor a separate property, of which he has plundered her. The acquisitions of the wife, in such a case, are her separate property, and she may dispose of them by will or otherwise. (*b*) It is the settled rule in equity, that a *feme covert*, in regard to her separate property, is considered a *feme sole*, and may, by her contracts, bind such separate estate.[1] The power of appointment is inci-

which are made in consideration of marriage only; but the statute of South Carolina was intended to apply to all post-nuptial settlements on the wife. Price *v.* White and others, Carolina Law Journal, No. 3. See, also, in the same work, p. 352, an essay on the Registry Acts of South Carolina, pointing out their imperfections, and suggesting amendments. The Act of South Carolina, of 1792, required all marriage contracts and settlements to specify, either in the instrument or in a schedule annexed, the property intended to be settled, and, in default thereof, the settlement is void as to creditors and purchasers. In Virginia, deeds of settlement upon marriage, wherein either lands, slaves, or personal property shall be settled, or covenanted to be left or paid at the death of the party, or otherwise, shall be void as to creditors and subsequent purchasers for valuable consideration without notice, unless acknowledged or proved, and recorded, &c. 1 Revised Code, ch. 99, sec. 4. If not recorded, they are void only as against the creditors of the wife. Land *v.* Jeffries, 5 Rand. Rep. 211. Pierce *v.* Turner, 5 Cranch, 154.

(*a*) Mix *v.* Mix, 1 Johns. Ch. Rep. 108. Denton *v.* Denton, Ibid. 364, 441. Wilson *v.* Wilson, 2 Haggard's Consist. Rep. 203. N. Y. Revised Statutes, vol. ii. p. 148, sec. 58.

(*b*) Cecil *v.* Juxon, 1 Atk. Rep. 278. Starrett *v.* Wynn, 17 Serg. & Rawle, 130.

[1] The F. Ins. Co. *v.* Bay, 4 Barb. S. C. Rep. 407, affirmed in the Court of Appeals, 4 Comst. 9. Strong *v.* Skinner, 4 Barb. 546. Dickerman *v.* Abrahams, 21 Barb. 551. But

dent to the power of enjoyment of her separate property. It is sufficient that there is an intention to charge her separate estate, and the contract of a debt by her during coverture, is a presumption of that intention; and the later decisions held her separate estate responsible, without showing any promise.[1] Her contract amounts to an appointment. (*a*) Though a woman may be proceeded against in equity without her husband, and though her separate estate be liable for her debts *dum sola*, yet the court cannot make a personal decree against her for the payment of a debt. All it can do is, to call forth her separate personal property in the hands of trustees, and to direct the application of it. (*b*)[2] When the wife has separate property, the relief afforded

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(*a*) 2 Story's Eq. Juris. 628, 773. Gardner *v.* Gardner, 22 Wendell, 528. Mallory *v.* Vanderheyden, by Vice-Chancellor Parker, of the 3d circuit. N. Y. Legal Observer, No. 4, January 7th, 1846. The ground on which a creditor may proceed against the separate estate of a married woman, for a debt not charged upon her estate, pursuant to a deed of settlement, must be by showing that the debt was contracted for the benefit of her separate estate, or for her own benefit, upon the credit of the separate estate. Curtis *v.* Engel, 2 Sandford's Ch. Rep. 287, 288.

(*b*) Hulme *v.* Tenant, 1 Bro. Rep. 16. Norton *v.* Turville, 2 P. Wms. 144. Lillia *v.* Airey, 1 Vesey, Jr. 277. Lord Loughborough, 2 Vesey, Jr. 145. Dowling *v.* Maguire, 1 Lloyd & Goold's Rep t. Plunkett, 19. Montgomery *v.* Eveleigh, 1 M'Cord's Ch. R. 267. Maywood & Patterson *v.* Johnson, 1 Hill's Ch. R. 228. *Vide post*, 165,

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previously to the late Married Women's Property Acts, in New York, an instrument which conferred upon a wife the power to charge and dispose of her separate estate during coverture, as freely as if she were a *feme sole*, did not empower her to make a testamentary disposition of it. Wadhams *v.* Am. Home Miss. Society, 2 Kern. 415, reversing the judgment in the Supreme Court. 10 Barb. 597.

While the general rule of equity, as to the power of a married woman to charge her estate, under a settlement to her separate use, remains as stated in the text, under the Revised Statutes of New York, regulating trusts, such powers do not exist. In Noyes *v.* Blakeman, (3 Sandford's S. C. Rep. 531;) it is held, that, since the Revised Statutes, where real estate is settled to a married woman's separate use, neither the estate, nor the rents and profits, can be charged for any debt or liability created or imposed on it by her. It is no longer her estate. The whole estate is in the trustees, and her interest is inalienable. This decision was affirmed on appeal. Noyes *v.* Blakeman, 2 Seld. 567.

[1] Vanderheyden *v.* Mallory, 1 Comst. R. 452. Where the debt is contracted before marriage, the remedy against the separate property of the wife is suspended by marriage. And a promise, by the husband and wife, to pay such debt out of funds other than her separate property, will not enable the creditor to reach the separate property, nor will a discharge of her husband under the bankrupt laws. The decision of this case, in 3 Barb. Ch. 9, so far as inconsistent with the foregoing, must be considered as reversed. But see Dickson *v.* Miller, 11 S. & M. Rep. 594.

[2] Rogers *v.* Ludlow, 3 Sandf. Ch. R. 104. A debt contracted by a married woman is *primâ facie* chargeable on her separate estate. Greenough *v.* Wiggington, 2 Greene, (Iowa,)

is by following it in the hands of trustees; and, in this way, courts of equity can attain a pure and perfect justice, which courts of law are unable to reach.

If, by marriage settlement, the real and personal estate of the wife be secured to her separate use, the husband is accountable for that part of it which comes to his hands; and a *feme covert*, with respect to her separate property, is to be considered *165 a *feme sole sub modo* only, or to the extent of the * power clearly given her by the marriage settlement.[1] Her power of disposition is to be exercised according to the mode prescribed in the deed or will under which she becomes entitled to the property; and if she has a power of appointment by will, she can-

166. Prater's Law of Husband and Wife, 109. North American Coal Co. *v.* Dyett, 7 Paige, 1. Gardner *v.* Gardner, Ib. 112. If the wife has separate property, and lives apart from her husband, that property will be liable in equity to her contracts, though they do not specially refer to that property. Lord Kenyon, in Marshall *v.* Rutton, 8 Term Rep. 545. Murray *v.* Barlee, 4 Simons's Rep. 82. Gardner *v.* Gardner, *ut sup.* and S. C. 22 Wendell, 526. In Bullpin *v.* Clarke, 17 Vesey, 365, the master of the rolls decreed, that a debt by promissory note, given by a wife for money loaned to her for her separate use, be paid by her trustees out of her separate estate. So, in Stuart *v.* Kirkwall, 3 Madd. Ch. Rep. 387, a similar decree was made on a bill against husband and wife, on her acceptance of a bill of exchange, the vice-chancellor considering the act as an appointment by her *pro tanto* of her separate estate. The courts of equity in South Carolina have so far departed from the English doctrine, that the wife cannot, by her own act merely, charge the separate estate; but the cour will look into the circumstances, and see that a proper case existed, even if the appropriation was by herself, for the necessary support of herself and family. The husband cannot do it. Maywood *v.* Johnston, 1 Hill's Ch. Rep. 236.

435. But the judgment must be *in rem.* It must charge her estate. Dickerman *v.* Abrahams, 21 Barb. 551. She is not personally liable, though she has joined with her husband. Sweeney *v.* Smith, 15 B. Mon. 325; Lewis *v.* Yale, 4 Flor. 418. Where the credit is given exclusively to the married woman, for goods sold to her, it is held, in Georgia, that the promise of the husband to pay is void by the statute of frauds. Connerat *v.* Goldsmith, 6 Georgia, 14.

[1] Courts of equity will not interfere to reform an instrument giving a wife a right of disposing of her property, except upon the most overwhelming proof. Rogers *v.* Smith, 4 Barr's R. 93.

Where a woman by the marriage settlement was secured the control of her personal property *forever*, and died without having made any disposition of it, it was held to have become absolutely the property of the husband. Brown *v.* Brown, 6 Humph. R. 127. See, also, Wilkinson *v.* Wright, 6. B. Mon. R. 576.

If a wife invest the proceeds of lands, of which, under the marriage settlement, she had the right of disposal, in other lands, it has been held that she has not a right to dispose of the subsequently acquired lands. Newlin *v.* Freeman, 4 Ired. Eq. R. 312.

not appoint by deed; and if by deed, she cannot dispose of the property by a parol gift or contract. (a) These marriage settlements are benignly intended to secure to the wife a certain support in every event, and to guard her against being overwhelmed by the misfortunes, or unkindness, or vices of her husband. They usually proceed from the prudence and foresight of friends, or the warm and anxious affection of parents; and, if fairly made, they ought to be supported according to the true intent and meaning of the instrument by which they are created. A court of equity will carry the intention of these settlements into effect, and not permit the intention to be defeated. These general principles pervade the numerous and complicated cases on the subject; though, it must be admitted, that those cases are sometimes discordant in the application of their doctrines, and perplexingly subtle in their distinctions. (b)

(a) The Methodist Episcopal Church v. Jaques, 1 Johns. Ch. Rep. 450. 3 Ibid. 77. Lancaster v. Dolan, 1 Rawle's Rep. 231, 248. Thomas v. Folwell, 2 Wharton, 11. But in Vizonneau v. Pegram, 2 Leigh, 183, the doctrine declared was, that a *feme covert*, as to property settled to her separate use, was a *feme sole*, and had a right to dispose of her separate personal estate, and the profits of her separate real estate in the same manner as if she were a *feme sole*, unless her power of alienation be restrained by the instrument creating the separate estate.

(b) A gift of leasehold property was made to a daughter for her separate use, free from the control of any future husband, and she subsequently married without a settlement. She was held to be entitled, on a separation, to the leasehold property, for her separate use, and the marital right was excluded. Anderson v. Anderson, 2 Mylne & Keen, 427. This was decided by Sir John Leach, and affirmed by Lord Eldon. But a new doctrine on this subject has been recently started in England, and it has been held that gifts to a *feme sole*, or to trustees in trust for a *feme sole*, to her separate use, free from the control of any future husband, and not to be subject to his debts or disposition, are, as to such restraints, illegal and void, unless they be settlements made in immediate contemplation of marriage. A clause against anticipation annexed to such a gift, is equally inoperative. Massey v. Parker, 2 Mylne & Keen, 174.[1] It was also held, in Barton v. Briscoe, Jacob's Rep. 603, and in Benson v. Benson, 6 Simons's Rep. 126, that on a settlement in trust for the separate use of a married woman for life, the clause against anticipation became inoperative on the death of the husband, and no longer binding. And in Woodmeston v. Walker, 2 Russell & Mylne, 197, though the master of the rolls held that a gift of an annuity to a single woman, for her separate use, independent of any future husband, and with a restraint on the disposition of the same by anticipation, was valid and binding, in respect to a future

[1] It is held in Fears v. Brooks, 12 Geo. 195, that the creation of a separate estate in a *feme sole*, though no marriage be in contemplation, will operate upon her subsequent marriage to exclude the husband's marital rights.

In the case of *Jaques* v. *The Methodist Episcopal Church*, as reviewed in the Court of Errors of New York, (*a*) it was de-

marriage; yet Lord Ch. Brougham, on appeal, held, that the *feme sole* was entitled to the absolute disposal of the fund at once without any restraint. The object of these checks was only to exclude marital claims. He held the same doctrine in Brown *v.* Pocock, 5 Simons's Rep. 663. 2 Russell & Mylne, 210. 1 Coop. Sel. Ca. temp. Brougham, 70, S. C.; and so did Sir John Leach, in Acton *v.* White, 1 Sim. & Stuart's Rep. 429. The principle declared by these cases in equity was, that unless the female to whom the gift be made be married at the time the interest vests, and the coverture be continuing down to the moment when the alienation is attempted, a female of full age stands precisely on the same footing with a male, and equally with him may exercise all the rights of ownership, notwithstanding a clause against anticipation and against marital interference. The trust fund is at her free disposal while she is *sui juris*, and a court of equity only gives effect to the restriction upon her marriage, and while remaining married, against marital claims.' In any other view the right of disposition is incident to property. Smith *v.* Starr, 3 Wharton, 62. Hamersley *v.* Smith, 4 Wharton, 126, S. P. The trust estate created by will for the separate use of a married woman, not only ceases when she becomes a widow, but does not revive on her subsequent marriage, Ib. Knight *v.* Knight, 6 Simons's Rep. 121. But see *contra*, *post*, p. 170, note.[1] In Newton *v.* Reid, 4 Simons's Rep. 141, the vice-chancellor, Sir L. Shadwell went further, and held, that though the annuity be given by will, in trust for a daughter for life, not subject to the debts or control of any future husband, nor alienable by her, and intended for her support, and she marries, the restrictions were still void, and she and her husband might sell the annuity, and apply the proceeds to pay his debts, and for his use. This was carrying the new doctrine to an unreasonable extent, and it is not the law in this country. The lord chancellor in Nedby *v.* Nedby, (1839,) 4 Myl. & Cr. 375, disclaimed being bound by the decision in Massey *v.* Parker, and he said he had difficulties in supporting it. He said further, that Newton *v.* Reid went beyond what anybody had ever contended for. He was for preserving trusts created for the separate use of married women, and the rule seems to be established in equity that marriage does not *per se* merge the rights of property to the *feme sole* in those of her husband. A gift or devise to her separate use, independent of her future husband, will be sustained, but not so far as to restrain her from conveying by gift or devise her property, in contemplation of marriage, to the future husband. The doctrine in this country is, that the marital claims will be defeated, if the gift by will to the daughter be to her *for her sole and separate use.* 1 Iredell's N. C. Eq. 307. See the N. Y. statute, *infra*, p. 170, note. The latest English rule requires negative words excluding the marital right to render the payment of money into the proper hands of the wife for her own proper use, a trust for her separate use. Blacklow *v.* Laws, 2 Hare's Ch. R. 49.[2]

(*a*) 17 Johns. Rep. 548.

[1] Where a husband settled property to the separate use of his wife, free from the control of her husband, with the power of absolute disposition by deed or will, it was held that the settlement operated to exclude the rights of a second husband. Cole *v.* O'Neill, 3 Md. Ch. 174. See Robert *v.* West, 15 Geo. 122.

[2] In 1838, in the case of Tullett *v.* Armstrong, 1 Beavan, R. 1, 32, the master of the rolls,

clared, that a *feme covert*, with respect to her separate property, was to be regarded in a court of equity as a *feme sole*, and might dispose of it without the assent and concurrence of her trustee, unless she was specially restrained by the instrument under which she acquired her separate estate. But it was held, (and in that consisted the difference between the decision in chancery and the correction of it on appeal,) that though a particular mode of disposition was specifically pointed out in the instrument or deed of settlement, it would not preclude the wife from adopting any other mode *of disposition, *166 unless she was, by the instrument, specially restrained in her power of disposition, to a particular mode. The wife was, therefore, held at liberty, by that case, to dispose of her property as she pleased, though not in the mode prescribed, and to give it to her husband as well as to any other person, if her disposition of it be free, and not the result of flattery, force, or improper treatment.

This decision of the Court of Errors renders the wife more completely and absolutely a *feme sole*, in respect to her separate property, than the English decisions would seem to authorize; and it unfortunately withdraws from the wife those checks that

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The above cases will be found selected and reported in the Condensed English Chancery Reports, published at Philadelphia, by Grigg & Elliot, and which were originally edited by Mr. Peters, and are now by Mr. Ingraham. They are edited with skill and judgment, and contain all the English chancery cases in the late voluminous and oppressive English Reports that are applicable here, and necessary to be known. They are, therefore, most valuable, and every way well deserving the patronage of the American bar.

Lord Langdale, reviewed the contradictory cases, and arrived at the following conclusions viz:—

1. If the gift be made to a woman for her sole and separate use, without more, she has, during coverture, an alienable estate, independent of her husband.

2. If the gift be made to her sole and separate use without power to alienate, she has, during the coverture, the present enjoyment of an unalienable estate.

In either case she has, while discovert, the power of alienation; the restraint is annexed to the separate estate only, and the separate estate has its existence only during coverture.

In Baggett *v.* Meux, 1 Phillips, 627, the lord chancellor considered the case of Tullett *v.* Armstrong as settling the doctrine of the court.

See, also, *In re* Gaffee, 19 Law Journ. (Eng. Chy.,) before Lord Cottenham, 1850, where it is held, that the power to alienate exists only while the woman is discovert, and that on her second marriage the restriction on alienation revived.

were intended to preserve her more entirely from that secret and insensible, but powerful marital influence, which might be exerted unduly, and yet in a manner to baffle all inquiry and detection. (*a*)

A wife may also contract with her husband, even by parol, after marriage, for a transfer of property from him to her, or to trustees for her, provided it be for a *bonâ fide* and valuable consideration; and she may have that property limited to her separate use. (*b*) This was so held in the case of *Livingston* v.

(*a*) In Morgan *v.* Elam, 4 Yerger's (Tenn.) Rep. 375, the points discussed in Jaques *v.* The Methodist Episcopal Church, were examined by counsel and by the court with great research and ability, and the decision was favorable to the doctrine as declared in the Court of Chancery in New York, in the above case. It was held, that the power of a married woman over her separate estate did not extend beyond the plain meaning of the deed creating the estate, and that she was to be considered a *feme sole* in relation to the estate, *only so far* as the deed had expressly conferred on her the power of acting as a *feme sole;* and that when a particular mode was pointed out for the disposition of the separate estate of a married woman, she could not dispose of it *in any other way.* The same principle is recognized and established in Ewing *v.* Smith, 3 Desaus. S. C. Rep. 417, in Lancaster *v.* Dolan, 1 Rawle's Rep. 231, and in Thomas *v.* Folwell, 2 Wharton, 11. In Whitaker *v.* Blair, in the Court of Appeals in Kentucky, 3 J. J. Marshall, 236, the decision in the case of Jaques, *in Chancery*, was considered as carrying the greater force of reason and principle with it; but the court held, in Johnson *v.* Yates, 9 Dana, 500, and in Shipp *v.* Bowmar, 5 B. Monroe, 163, that a *feme covert*, to whose separate use lands have been conveyed to trustees, might, with her husband, and on her private examination, and by deed duly recorded, convey all her interest therein, without any power for that purpose, though I apprehend not against restrictive words. We may perhaps venture to consider the doctrine in Jaques *v.* The Methodist Episcopal Church, declared in the Court of Chancery of New York, as the better doctrine.[1]

(*b*) Lady Arundell *v.* Phipps, 10 Vesey, 139, 145. Bullard *v.* Briggs, 7 Pick. Rep. 533. Garlick *v.* Strong, 3 Paige's Rep. 440. But as against creditors existing at the time, post nuptial agreements will not be permitted to stand beyond the value of the consideration. Ibid.

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[1] This doctrine is approved in Maryland. Miller *v.* Williamson, 5 Maryl. 219. Tarr *v.* Williams, 4 Maryl. Ch. 68. Williams *v.* Donaldson, Id. 414. Cooke *v.* Husbands, 11 Maryl. 492. In Tennessee; Marshall *v.* Stephens, 8 Humph. 159. Litton *v.* Baldwin, Id. 209. In South Carolina; Nix *v.* Bradley, 6 Rich. Eq. 53. Adams *v.* Mackey, Id. 75. In Georgia; Wylly *v.* Collins, 9 Geo. 233. In Mississippi; Doty *v.* Mitchell, 9 Sm. & M. 435. In Rhode Island; Metcalf *v.* Cook, 2 R. I. 355. And in Florida; Maiben *v.* Bebo, 6 Florida, 381. But see *contra* in Connecticut; Imlay *v.* Huntington, 20 Conn. 146, 175. In Alabama; Bradford *v.* Greenway, 17 Ala. 797. In North Carolina: Harris *v.* Harris, 7 Ired. Eq. 111. And in Virginia; Hume *v.* Hord, 5 Gratt. 374. As to the power of married women in New York, over their separate estates, under the Revised Statutes, see *ante*, 156, n. (1), and *post*, p. 767, note a.

Livingston, (*a*) and as the wife died, in that case, after the contract had been executed on the part of the husband, and before it had been executed on the part of the wife, the infant children of the wife were directed to convey, as infant trustees, by their guardian, the lands which their mother, by agreement with her husband, had contracted to sell.

A wife may, also, sell or mortgage her separate property *for her husband's debts, and she may create a valid power in the mortgage to sell in default of payment. (*b*)[1] She can convey upon condition, and she may prescribe the terms. (*c*) It was long since held, even at law, in the case of *Wotton* v. *Hele*, (*d*) that the husband and wife might grant land belonging to the wife, by fine, with covenant of warranty, and that if the grantee should be evicted by a paramount title, covenant would lie after the husband's death, against the wife upon the warranty. This is a very strong case to show that the wife may deal with her land by fine as if she were a *feme sole*; and what she can do by fine in England, she may do here by any legal form of conveyance, provided she execute under a due examination.[2] The case states that the court of K. B. did not make any scruple in maintaining that the action of covenant was good against the wife on her warranty contained in her executed fine, though she was a *feme covert* when she entered

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(*a*) 2 Johns. Ch. Rep. 537.

(*b*) The general rule is, that if the wife joins her husband in a mortgage of her estate for his benefit, the mortgage, as between the husband and wife, will be considered the debt of the husband, and after his death the wife, or her representatives, will be entitled to stand in the place of the mortgagee, and have the mortgage satisfied out of the husband's assets. Lord Thurlow, in Clinton *v.* Hooper, 1 Vesey, Jr. 186.[3]

(*c*) Demarest *v.* Wynkoop, 3 Johns. Ch. Rep. 129. Pybus *v.* Smith, 1 Vesey, Jr. 189. Essex *v.* Atkins, 14 Id. 542.

(*d*) 2 Saund. Rep. 177. 1 Mod. Rep. 290, S. C.

[1] Vartie *v.* Underwood, 18 Barb. 561. So she may covenant that *scire facias* may issue upon default of payment. Black *v.* Galway, 24 Penn. 18. And see Wilson *v.* McCullough, 19 Penn. 77. Miner *v.* Graham, 24 Penn. 491.

[2] Where the trustees of a marriage settlement were *required* to pay money to the husband, taking his bond as security, upon the order of the wife, it was held, that after the husband became insolvent, the trustees were justified in refusing such payment. Boss *v.* Godsall, 1 You. & Call. Ch. Cas. 617.

[3] A wife, appropriating her own separate property to her husband's use, cannot charge his assets with it. Edelen *v.* Edelen, 11 Md. 415.

into the warranty. It is also declared in the old books, (*a*) that if the husband and wife make a lease for years of the wife's land, and she accepts rent after his death, she is liable on the covenants in the lease; for, by the acceptance of the rent, she affirms the lease, though she was at liberty, after her husband's death, if she had so chosen, to disaffirm it. (*b*)

(3.) *Protection against her covenants.*

This doctrine, that the wife can be held bound to answer in damages after her husband's death, on her covenant of *168 *warranty, entered into during coverture, is not considered by the courts in this country to be law; and it is certainly contrary to the settled principle of the common law, that the wife was incapable of binding herself by contract.[1] In the Supreme Court of Massachusetts, (*c*) it has been repeatedly held, that a wife was not liable on the covenants in her deed, further than they might operate by way of estoppel; and though the question in these cases arose while the wife was still married, yet the objection went to destroy altogether the effect of the covenant. So, also, in *Jackson* v. *Vanderheyden*, (*d*) it was declared that the wife could not bind herself personally by a covenant, and that a covenant of warranty, inserted in her deed, would not even estop her from asserting a subsequently acquired interest in the same lands.[2]

(*a*) Greenwood *v.* Tyber, Cro. Jac. 563, 564. 1 Mod. Rep. 291.

(*b*) 2 Saund. Rep. 180, note 9. Worthington *v.* Young, 6 Ohio Rep. 313.

(*c*) Fowler *v.* Shearer, 7 Mass. Rep. 21. Colcord *v.* Swan, Ibid. 291.

(*d*) 17 Johns. Rep. 167. Martin *v.* Dwelly, 6 Wendell's Rep. 1, S. P. This last point, as to estoppel, is contrary to the cases of Hill *v.* West, 8 Ohio Rep. 225. Colcord *v.* Swan, 7 Mass. Rep. 291. Ibid. 21. 4 Bibb's Ken. Rep. 436.

[1] Watkins *v.* Halstead, 2 Sandf. (Law) R. 311. In this case it was held, that a promise by a woman, after her divorce, to pay for goods furnished her during coverture, was not binding in law, for want of consideration.

A contingent remainder cannot be conveyed, until the contingency happen, except by estoppel, and therefore cannot be conveyed (under the New Jersey statute) by a married woman. Den *v.* Demarest, 1 N. J. Rep. 525.

In New Jersey, by a late statute, (Laws, 1857. c. 189,) any married woman of full age who joins with her husband in the execution of a deed, may enter into covenants for title, of warranty, or against incumbrances; and such covenants shall have the same force and effect as if she were sole.

[2] Lowell *v.* Daniels, 2 Gray, 161. Dominick *v.* Michael, 4 Sandf. 374. The rule is the

Though a wife may convey her estate by deed, she will not be bound by a covenant or agreement to levy a fine or convey her estate. The agreement by a *feme covert*, with the assent of her husband, for a sale of her real estate, is absolutely void at law, and the courts of equity never enforce such a contract against her. (*a*) In the execution of a fine or other conveyance, the wife is privately examined, whether she acts freely; and without such an examination, the act is invalid. But a covenant to convey is made without any examination; and to hold the wife bound by it, would be contrary to first principles on this subject, for the wife is deemed incompetent to make a contract, unless it be in her character of trustee, and when she does not possess any beneficial interest in her own right.[1] The chancery jurisdiction is applied to the cases of property settled to the separate use of the wife by deed or will, with a power of appointment, and rendered * subject to her disposition. *169 On the other hand, the husband has frequently been compelled, by decree, to fulfil his covenant, that his wife should levy a fine of her real estate, or else to suffer by imprisonment the penalty of his default. (*b*)

(*a*) Butler v. Buckingham, 5 Day's Rep. 492. See, also, Watrous v. Chalker, 7 Conn. Rep. 224, S. P. In Baker v. Child, 2 Vern. Rep. 61, it was stated, as by the court, that where a *feme covert* agreed with her husband to levy a fine, and he died before it was done, the court would compel the wife to perform the agreement. But this case was said, in Thayer v. Gould, 1 Atk. Rep. 617, to have been falsely reported, and that there was no such decree; and the master of the rolls, in Ambler, 498, spoke of it as a loose note. It is not law. *Sed quæ.* In the case of Stead v. Nelson, 2 Beavan, 245, a wife having an estate for life, for her separate use, in lands, with an absolute power over the reversion, joined her husband in an agreement to execute a mortgage; —held, that such agreement was binding, on the wife's surviving.

(*b*) Griffin v. Tailor, Tothill, 106. Barrington v. Horn, 2 Eq. Cases Abr. 17, pl.

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same where the deed is a joint one of herself and her husband, of property he holds in her right. Carpenter v. Schermerhorn, 2 Barb. Ch. R. 314.

[1] If the husband joins in an executory contract, though the deed is to be given to the wife, and the payment to be made by her property, *he* may be compelled to a specific performance. Johnston v. Jones, 12 B. Monroe, 326.

As a general rule, the court will not compel the husband, who has agreed to sell lands, to procure his wife's execution of the deed. Hulmes v. Thorpe, 1 Halsted's Ch. R. (New Jersey,) 415.

Where an antenuptial contract gave the wife power to dispose of her real estate, it was held that she could make a binding contract to convey. Van Allen v. Humphrey, 15 Barb. 555.

But Lord Cowper once refused to compel the husband to procure his wife to levy a fine, as being an unreasonable coercion, since it was not in the power of the husband duly to compel his wife to alien her estate. (a)[1] In other and later cases, the courts have declined to act upon such a doctrine; (b) and Lord Ch. B. Gilbert questioned its soundness. (c) In *Emery* v. *Wase*, (d) Lord Eldon observed, that if the question was perfectly *res integra*, he should hesitate long before he undertook to compel the husband, by decree, to procure his wife's conveyance; for the policy of the law was, that the wife was not to part with her property, unless by her own spontaneous will. Lastly, in *Martin* v. *Mitchell*, (e) where the husband and wife had entered into an agreement to sell her estate, the master of the rolls held, that the agreement was void as to the wife, for a married woman had no disposing power, and a court of equity could not give any relief against her on such a contract. She could not bind herself by contract, except in the execution of a power, and in the mode prescribed; nor would the court compel the husband to procure his wife to join in the conveyance. Such, said the master of the rolls, is not now the law.

*170 * The English courts of equity have, until recently, thrown a further and very important protection over the property settled on the wife on her marriage, for her separate use, with a clause against a power to sell or assign by anticipation. It was declared in *Ritchie* v. *Broadbent*, (f) that a bill would not be sustained, to transfer to the husband property so settled in trust, even though the wife was a party to the bill, and ready to consent, on examination, to part with the funds.

Sir Joseph Jekyll, in Hall v. Hardy, 3 P. Wms. 187. Withers v. Pinchard, cited in 7 Vesey, 475. Morris v. Stephenson, 7 Vesey, 474.

(a) Ortread v. Round, 4 Viner's Abr. 203, pl. 4.

(b) Prec in Ch. 76. Amb. Rep. 495.

(c) Gilbert's Lex Prætoria, 245.

(d) 8 Vesey, 505, 514.

(e) 2 Jac. & Walk. 413. Sir James Mansfield, in Davis v. Jones, 4 Bos. & Pull. (1 N. S.) 269. Brick v. Whelley, cited in Howell v. George, 1 Mad. Rep. 7, note, S. P.

(f) 2 Jac. & Walk. 456.

[1] Hulmes v. Thorpe, 1 Halsted's Ch. R. (New Jersey,) 415.

The opinion of the Lord Ch. Baron was grounded on the effect to be given to the clause against anticipation, and does not apply to ordinary cases, or affect the general power of the wife, where no such check is inserted in the settlement. A clause in a gift or deed of settlement upon the wife, against anticipation, is held to be an obligatory and valid mode of preventing her from depriving herself, through marital or other influence, of the benefit of her property. But that restraint on anticipation ceases on the death of the husband, for the reason and expediency of the restraint have then also ceased. (*a*)

(*a*) Barton *v.* Briscoe, 1 Jacob's Rep. 603. The history of the fluctuations of the English chancery decisions on this subject is curious. Thus, the English rule formerly was, that in cases of property in trust for a married woman, to be paid into her own hands, upon her own receipts, the wife might still dispose of that interest, and her assignee would take it. Hulme *v.* Tenant, 1 Bro. Rep. 16. Pybus *v.* Smith, 3 Id. 340. 1 Vesey, Jr. 189, S. C. But in Miss Watson's case, Lord Thurlow altered his opinion, and held that a proviso in a settlement that the wife should not dispose of her interest by any mode of anticipation, would restrain her; and Lord Alvanley, in Sockett *v.* Wray, 4 Bro. Rep. 483, held it to be a valid clause; and so it has been since considered. Lord Eldon, in Brandon *v.* Robinson, 18 Vesey, 434, and in Jackson *v.* Hobhouse, 2 Merivale's Rep. 487. Vice Ch. Shadwell said, that when he was in the habit of drawing conveyances, the proviso that he inserted against the power of anticipation was, that the receipts of the lady under her own hand, to be given from time to time for accruing rents or dividends, should be, *and that no other receipt should be* sufficient discharges to the trustees. Brown *v.* Bamford, 11 Sim. 127.[1] This case was reversed on appeal by Lord Lyndhurst, on the ground that a general limitation in default of appointment did not enable the wife to anticipate, and it did not depend on the form of the receipt clause Now, again, such a clause against anticipation, inserted in a will in favor of an unmarried female, and without any connection with coverture, is held to be not valid. See Woodmeston *v.* Walker, 2 Russ. & Mylne, 197. Jones *v.* Salter, Ibid. 208. Brown *v.* Pocock, Ibid. 210. Newton *v.* Reid, 4 Simons's Rep. 141; and see *supra*, p. 165, note *a* The Supreme Court of North Carolina, sitting in equity, has followed the spirit of these latter decisions, and held that though real and personal property be conveyed in trust to apply the proceeds to A. for life, with a clause against a sale or anticipation, but without any disposition over in the case of such sale or anticipation, yet if the *cestui que trust* be a male or single, the restraint on his alienation or assignment was inoperative and void. Dick *v.* Pitchford, 1 Dev. & Battle, Eq. 480. *The disposition over* would seem to be material in the construction of the instrument. Lord Eldon, in Brandon *v.* Robinson, 18 Vesey, 429, observed, that property might be limited to a man until he became a bankrupt, and then over. But that if property be given to a man for life, the donor cannot take away the incidents to a life estate, or add a valid clause that he should not alien it. It cannot be preserved from creditors, unless given to some one else in trust. But we

[1] See Ross's Trust, 2 E. L. & Eq. 148. Baker *v.* Bradley, 35 E. L. & Eq. 449.

(4.) *Power to appoint by will.*

A wife cannot devise her lands by will, for she is excepted out of the statute of wills;[1] nor can she make a testament of chattels, except it be of those which she holds *en autre droit*, or which are settled on her as her separate property, without the license of her husband. He may covenant to that effect, before or after marriage, and the Court of Chancery will enforce the performance of that covenant. It is not strictly a will, but in the nature of an appointment, which the husband is bound by his covenant to allow. (*a*)[2] The wife may dispose by will, or by act in her lifetime, of her separate personal estate, settled upon her, or held in trust for her, or the savings of her real es-

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have again, in the English courts of equity, a recurrence to the old and juster doctrine; for it was held in Tullett *v.* Armstrong, 1 Beavan, 1, 21, that a devise and bequest in trust for an unmarried woman, to her separate use, and with an inability to alien, was effectual on any subsequent marriage, both as to the separate use and the restraint upon anticipation, though, if unaccompanied by any restraint, it was subject to her power of alienation. And afterwards, in Dixon *v.* Dixon, 1 Beavan, 40, it was held, that a settlement on the first marriage of a woman, in trust for her separate use, exclusive of any husband, the trust to her separate use attached upon a remarriage.

The New York Revised Statutes, vol. i. p. 728, sec 55, (as amended in 1830,) and 730, sec. 63 and 65, have thrown an effectual protection over the interests of persons not well able to protect themselves, by declaring, (1.) that an express trust may be created to receive the rents and profits of land, and *apply them* to the use of any person, during the life of such person, or for any shorter term, (2.) by declaring, that no person beneficially interested in a trust for the receipt and profits of lands, can assign, or in any manner dispose of such interest; and, (3.) that where the trust shall be expressed in the instrument creating the estate, every sale, conveyance, or other act of the trustees, in contravention of the trust, shall be absolutely void. Under these provisions, a father may create a trust in favor of a daughter, and the interest would be unalienable even with the consent of the husband. Nothing can impair such a trust during the life of the *cestui que trust;* and the recent English decisions on this subject are wholly inapplicable, and not law in New York.[3]

(*a*) Pridgeon *v.* Pridgeon, 1 Ch. Cas 117. Rex *v.* Betteswortli, Str. Rep. 891. Newlin *v.* Freeman, 1 Iredell, N. C. Rep. 514.

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[1] In New York, under the Act of April 11, 1849, a married woman may devise her lands by will. Van West *v.* Benedict, 1 Bradf. (N. Y.) 144.

[2] It has been held in New York that statute provisions fixing the age requisite to give validity to a will, do not affect the right of a *feme covert* to execute a power of appointment. Strong *v.* Wilkin, 1 Barb. Ch. R. 9.

[3] See Leggett *v.* Leggett, 2 Comst. 297. L'Amoreux *v.* Van Rensselaer, 1 Barb. Ch. 34. Rogers *v.* Ludlow, 3 Sandf. Ch. 104. Noyes *v.* Blakeman, 3 Sandf. 531. S. C. 2 Seld. 567. Cruger *v.* Jones, 18 Barb. 467.

tate given to her separate use; and this she may do without the intervention of trustees, for the *power is *171 incident to such an ownership. (*a*) It has been held, even at law, in this country, (*b*) that the wife may, by the permission of her husband, make a disposition in the nature of a will, or personal property, placed in the hands of trustees, for her separate use, by her husband, or by a stranger, and either before or after marriage.[1] If a *feme sole* makes a will, and afterwards marries, the subsequent marriage is a revocation in law of the will. The reason given is, that it is not in the nature of a will to be absolute, and the marriage is deemed equivalent to a countermand of the will, and especially as it is not in the power of the wife after marriage, either to revoke or continue the will, inasmuch as she is presumed to be under the restraint of her husband. (*c*) But it is equally clear, that where an estate is limited to uses, and a power is given to a *feme sole*, before marriage, to declare those uses, such limitation of uses may take effect; and though a married woman cannot be said strictly to make a will, yet she may devise, by way of execution of a power, which is rather an appointment than a will; and whoever takes under the will, takes by virtue of the execution of the power. (*d*)[2] Thus, in the case of *Bradish* v. *Gibbs*, (*e*) it was *held that a *feme covert* might exe- *172

(*a*) Peacock *v.* Monk, 2 Vesey, 190. Rich *v.* Cockell, 6 Vesey, 369. West *v* West, 3 Randolph's Rep. 373. Holman *v.* Perry, 4 Metcalf's Rep. 492.

(*b*) Emery *v.* Neighbour, 2 Halsted's Rep. 142.

(*c*) Forse & Hembling's case, 4 Co. 60, b. 2 P. Wms. 624. 2 Term Rep. 695, S. P.

(*d*) She may, under a power of appointment over personalty in a marriage settlement, appoint by deed in favor of her husband; and if it appear that she did it freely and understandingly, equity will enforce it. Chesslyn *v.* Smith, 8 Vesey, 183. Whitall *v.* Clark, 2 Edwards's V. C. Rep. 149.

(*e*) 3 Johns. Ch. Rep. 523. By the New York Revised Statutes, vol. i. pp. 732–

[1] Cutter *v.* Butler, 5 Fost. (N. H.) 343.

[2] Such a power of appointment is well executed, though it be exercised by means of an instrument which purports to be a will; and though it also assume to dispose of property not embraced within the power. Heath *v.* Withington, 6 Cush. 497. In the matter of Stewart, 11 Paige's R. 398. In this case, the power was exercised by a resident of Ohio over lands situated in New York.

An antenuptial contract made in one country, may operate as a grant of real estate situated in another. De Barante *v.* Gott, 6 Barb. S. C. Rep. 492.

cute by will, in favor of her husband, a power, given or reserved to her while sole, over her real estate. In that case, the wife before marriage entered into an agreement with her intended husband, that she should have power, during the coverture, to dispose of her real estate by will, and she afterwards, during coverture, devised the whole of her estate to her husband; and this was considered a valid disposition of her estate in equity, and binding on her heirs at law. The point in that case was, whether a mere agreement entered into before marriage between the wife and her intended husband, that she should have power to dispose of her real estate during coverture, would enable her to do it, without previously to the marriage vesting the real estate in trustees, in trust for such persons as she should by deed or will appoint; and it was ruled not to be necessary; and the doctrine has received the approbation of the Supreme Court of Pennsylvania. (*a*) Equity will carry into effect the will of a *feme covert*, disposing of her real estate in favor of her husband, or other persons than her heirs at law, provided the will be in pursuance of a power reserved to her in and by the antenuptial agreement with her husband.[1]

(5.) *Marriage settlements.*

With respect to antenuptial agreements, equity will grant its

737, sec. 80, 87, a general and beneficial power may be granted to a married woman, to dispose during the marriage, and without the concurrence of her husband, of lands conveyed or devised to her in fee, or a special power of the like kind, in respect to any estate less than a fee, belonging to her, in the lands to which the power relates. She may, under the power, execute a mortgage, and, generally, she may execute a power during coverture, by grant or devise, according to the terms of it; and if she executes a power by grant, the concurrence of her husband as a party is not requisite, but she must acknowledge, on a private examination, the execution of the power. And if a married woman be entitled to an estate in fee, she may, by virtue of a power, create any estate which she might create if unmarried; but she cannot exercise any power during her infancy, nor if, by the terms of the power, its execution by her during marriage be expressly or impliedly prohibited. Ibid. sec. 90, 110, 111, 117, 130.[2]

(*a*) 10 Serg. & Rawle, 447.

[1] In Massachusetts, a married woman may dispose of her separate property by will, but it shall not operate to deprive her husband of his rights as tenant by the courtesy, and she shall not bequeathe away from him more than half of her personal property, without his written consent. Mass. Laws, 1855, c. 304.

2 Wright *v.* Tallmadge, 15 N. Y. (1 Smith,) 307.

aid, and enforce a specific performance of them, provided the agreement be fair and valid, and the intention of the parties consistent with the principles and the policy of the law.[1] A voluntary deed is made good by a subsequent marriage. (a) Equity will execute covenants in marriage articles at the instance of any person who is within the influence of the marriage consideration, and in favor of collateral relations, as all such persons rest their claims on the ground of valuable *consideration.(b)[2] The husband and wife, and their *173 issue, are all of them considered as within that influence, and at the instance of any of them, equity will enforce a specific performance of the articles. (c)

Settlements after marriage, if made in pursuance of an agreement in writing entered into prior to the marriage, are valid, both against creditors and purchasers.[3] The marriage is itself

(a) See *infra*, vol. iv. 463.

(b) Pulvertoft v. Pulvertoft, 18 Vesey, 92.

(c) Osgood v. Strode, 2 P. Wms. 255 Bradish v. Gibbs, 3 Johns. Ch. Rep. 550. But if the settlement be made through the instrumentality of a party whose concurrence is necessary to the validity of the settlement, such person is held not to be a mere volunteer, but falls within the range of the consideration of the agreement. Neves v. Scott, U. S. C. C. for Georgia, Law Reporter, Boston, for June, 1846, No. 9, p. 67. An antenuptial settlement, founded on a valuable consideration, such, for instance, as marriage, cannot be affected by fraud in the settler, if the other party be innocent. Magniac v. Thompson, 7 Peters's U. S Rep. 348. In North and South Carolina and Tennessee, the registration of marriage settlements and contracts is required by statute, in order to render them valid as a lien on the property of the settler as against creditors. 2 Dev. & Battle, Eq. 46. 1 Rev. Stat. (N. C.) 1837, p. 233. Statute of Tennessee, 1831.[4]

[1] An expectation as devisee of one yet living, may be settled on marriage. *In re* Wilson's Estate, 2 Barr's R. 325. Marriage articles entered into by a wife, when a minor, may be ratified by her and her successors in estate. Whichcote v. Lyle, 28 Penn. State R. 73.

[2] The rule, in a late case, was stated to be, that, if from the circumstances or the instrument it appears to have been intended that the collateral relatives, in a given event, should take the estate, and there be a proper limitation to that effect, a court of equity will enforce the trust for their benefit. Neves v. Scott, 9 How. U. S. 196, 210. Eaton v. Tillinghast, 4 R. I. 276.

[3] A husband, having sold the wife's lands under an agreement to purchase lands of equal value for her benefit, and having accordingly made such purchase, and caused the conveyance to be made to his wife: held, that these lands were not subject to his debts contracted subsequently to his payment for the lands. Barnett v. Goings, 8 Blackford's R. 284.

[4] This is also the law in Georgia. Reinhart v. Miller, 22 Geo. 402.

a valuable consideration for the agreement, and sufficient to give validity to the settlement. This was so decided in the case of *Reade* v. *Livingston;* (*a*) and it was there held, that voluntary settlements after marriage, upon the wife or children and without any valid agreement previous to the marriage to support them, were void as against creditors existing when the settlement was made. (*b*)[1] But if the person be not indebted at the time, then it is settled that the post-nuptial voluntary settlement upon the wife or children, if made without any fraudulent intent, is valid against subsequent creditors. This was not only the doctrine in *Reade* v. *Livingston*, and deduced from the English authorities, but it has since received the sanction of the Supreme Court of the United States, in the case of *Sexton* v. *Wheaton.* (*c*)[2]

A settlement after marriage may be good, if made upon a valuable consideration. Thus, if the husband makes a settlement upon the wife, in consideration of receiving from the trustees of the wife, possession of her equitable property, that will be a sufficient consideration to give validity to the settlement,

(*a*) 3 Johns. Ch Rep. 481. Thomson v. Dougherty, 12 Serg & Rawle, 448, and Magniac v. Thompson, 1 Baldwin's C. C U. S. Rep. 344. Duffy v. The Ins. Company, 8 Watts & Serg. 413, S. P.

(*b*) A post-nuptial settlement, founded on a *parol* agreement before marriage, was good against creditors prior to the statute of frauds, and the marriage was the valuable consideration which sustained it. Griffin v. Stanhope, Cro. J. 454. Ralph Bovy's case, 1 Vent. 194. Lavender v Blackstone, 2 Lev. 146. But though good at law, a specific performance would not be enforced in equity, unless the agreement was confessed by the party in his answer, or there had been a part performance. Sugden on Vendors, 107, 108. 2 Story on Eq. Jur. 62. Nor, of course, will equity enforce it since the statute, though the marriage takes place in pursuance of it, unless in cases of *fraud*. Montacute v. Maxwell, 1 P Wms. 618. S. C. Str. 236. There must be some evidence *in writing* of the previous parol promise before marriage. It is doubtful whether *a recital* in a post-nuptial settlement of a previous parol agreement before marriage, be sufficient to take the case out of the statute. It may be sufficient as against parties, and not as against creditors. See the cases of Beaumont v. Thorpe, 1 Vesey, 27; Dundas v. Dutens, 1 Vesey. Jr. 199; 2 Cox, 235; Reade v Livingston, 3 Johns. Ch. 481. And see the American Law Magazine for July, 1843, art. 2, (vol. i. p. 302,) where the subject is critically and learnedly discussed.

(*c*) 8 Wheaton, 229. Picquet v. Swan, 4 Mason's Rep. 443, S. P.

[1] Wray's Trusts, 15 E. L. & Eq. 265. Borst v. Corey, 16 Barb. 136. Albert v. Winn, 5 Maryl. 66. Kinnard v. Daniel, 13 B. Mon 496.

[2] Jewell v. Porter, 11 Foster, (N. H.) 34.

if it was a case in which a court of equity would have directed a settlement out of the equitable estate itself, in case the husband had sought the aid of the court, in order to get * possession of it. (*a*) The settlement made after marriage between the husband and wife may be good, provided the settler has received a fair and reasonable consideration in value for the thing settled, so as to repel the presumption of fraud. It is a sufficient consideration to support such a settlement, that the wife relinquishes her own estate, or agrees to make a charge upon it for the benefit of her husband, or even if she agrees to part with a contingent interest. (*b*)[1] But the amount of the consideration must be such as to bear a reasonable proportion to the value of the thing settled; and, when valid, these post-nuptial settlements will prevail against existing creditors and subsequent purchasers. (*c*) A settlement upon a meritorious consideration, or one not strictly valuable, but founded on some moral consideration, as gratitude, benevolence, or charity, will be good against the settler and his heirs; but whether it would be good as against creditors and purchasers, does not seem to be entirely settled, though the weight of opinion and the policy of the law would rather seem to be against their validity in such a case.[2]

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If the wife, previous to marriage, makes a settlement of either her real or personal estate, it is a settlement in derogation of the marital rights, and it will depend upon circumstances,

(*a*) Moore *v.* Ryeault, Prec. in Ch. 22. Brown *v.* Jones, 1 Atk. Rep. 190. Middlecome *v.* Marlow, 2 Atk. Rep. 519. Picquet *v.* Swan, 4 Mason's Rep. 443.

(*b*) Ward *v.* Shallett, 2 Vesey, 16.

(*c*) Lady Arundell *v.* Phipps, 10 Vesey, 139. Bullard *v.* Briggs, 7 Pick. Rep. 533.

1 A wife's release of dower, in a conveyance of her husband's real estate, is a valuable consideration, and money paid for it may be secured to her through a trustee. Hale *v.* Plummer, 6 Ind. 121. Andrews *v.* Andrews, 28 Ala. 432. Although a deed from a husband to his wife is void in law, such a grant will be upheld in equity, where the wife, in good faith and for a valuable consideration paid out of her separate estate, purchased the land conveyed to her. Simmons *v.* McElwain, 26 Barb. (N. Y.) 420.

2 It was held, in Wells *v.* Treadwell, 28 Miss. (6 Cush.) 717, that a deed of gift directly from a husband to a wife, where there is no ground to suspect fraud, and it only amounts to a reasonable provision for the wife, is valid in equity against the claims of the husband or his representatives. And see Riley *v.* Riley, 25 Conn. 154.

whether it be valid. (a)[1] Where the wife, before marriage, transferred her entire estate, by deed, to trustees, who were to permit her to receive the profits during life, and no power was reserved over the principal except the *jus disponendi* by will, a court of equity has refused, after the marriage, to modify the trust, or sustain a bill for that purpose against the trustees by the husband and wife. (b)[2] In case the settlement *175 be * upon herself, her children, or any third person, it will be good in equity, if made with the knowledge of her husband. If he be actually a party to the settlement, a court of equity will not avoid it, though he be an infant at the time it was made. (c) But if the wife was guilty of any fraud upon her husband, as by inducing him to suppose he would become possessed of her property, he may avoid the settlement, whether it be upon herself, her children, or any other person. (d) If the settlement be upon children of a former husband, and

(a) St. George v. Wake, 1 Mylne & Keen, 610. Bill v. Cureton, 2 Ib. 503.

(b) Lowry v. Tiernan, 2 Harr. & Gill, 34.

(c) Slocombe v. Glubb, 2 Bro Rep. 545.

(d) Buller, J., and Lord Ch. Thurlow, in Strathmore v. Bowes, 2 Bro. 345. 1 Vesey, Jr. 22, S. C. Goddard v. Snow, 1 Russell's Rep. 485. Howard v. Hooker, 2 Rep. in Ch. 81. St. George v. Wake, 1 Mylne & Keen, 610. Secret and voluntary conveyances by a woman, in contemplation of marriage, are a fraud upon the marital rights and void. Tucker v. Andrews, 13 Maine Rep. 124, 128. Jordan v. Black, Meig's Tenn. Rep. 142. Ramsay v. Joyce, 1 McMullan's S. C. Eq Rep. 236. Logan v. Simmons, 3 Iredell's N. C. Eq. R. 487.

1 So, if she convey away her property. Fletcher v. Ashley, 6 Gratt. 332. Cheshire v. Payne, 16 B. Mon. 618. The evidence must show fraud. O'Neill v. Cole, 4 Maryl. 107. As in other cases, the registration of the deed of conveyance must be regarded as constructive notice to the intended husband. Cole v. O'Neill, 3 Maryl. Ch. 174. It is not necessary that a husband should prove actual fraud or deception; but his equity to set aside her settlement may be precluded by his conduct, whereby she is deprived of the power of retiring from the marriage, or of stipulating for a settlement. Taylor v. Pugh, 1 Hare's R. 608. For circumstances under which such a settlement was held valid, see Cheshire v. Payne, 16 B. Mon. (Ky.) 618.

2 In McDonnell v. Hesilrige, 15 E. L. & Eq. 587, a woman while sole, in contemplation of marriage, assigned the whole of her property to trustees for the benefit of herself until the marriage, if any; or in case no such marriage should be solemnized, and after the solemnization, if any, of the same marriage, upon trust for her; and after her decease, in case she should marry and have issue, upon trust for her children. Another marriage than the one contemplated took place; it was held, that the trusts arose on the vesting of the fund in the trustees; and that they could not, at the request of the settler, allow any part of the fund to be withdrawn.

there be no imposition practised upon the husband, the settlement would be valid, without notice; (a) and it would seem from the opinion of the lord chancellor, in *King* v. *Colton*, that such a settlement, even in favor of a stranger, might be equally good under the like circumstances. It is a general rule, without any exception, that whenever any agreement is entered into for the purpose of altering the terms of a previous marriage agreement, by *some only* of the persons who are parties to the marriage agreement, such subsequent agreement is deemed fraudulent and void. The fraud consists in disappointing the hopes and expectations raised by the marriage treaty.

It is a material consideration respecting marriage settlements, whether they are made before or after marriage; and if after marriage, whether upon a voluntary separation, by mutual agreement, between the husband and wife. Lord Eldon, in *St. John* v. *St. John*, (b) intimated that a settlement by way of separate maintenance, on a voluntary separation of husband and wife, was against the policy of the law, and void; and he made no distinction between settlements * resting on articles, and a final complete settlement by deed; or between the cases where a trustee indemnified the husband against the wife's debts, and where there was no such indemnity. The ground of his opinion was, that such settlements, creating a separate maintenance by voluntary agreement between husband and wife, were in their consequences destructive to the indissoluble nature and the sanctity of the marriage contract; and he considered the question to be the gravest and most momentous to the public interest that could fall under discussion in a court of justice. Afterwards, in *Worrall* v. *Jacob*, (c) Sir William Grant said he apprehended it to be settled, that chancery would not carry into execution articles of agreement between husband and wife. The court did not recognize any power in the married parties to *vary* the rights and duties growing out of the marriage contract, or to effect at their pleasure a partial dissolu-

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(a) King v. Colton, 2 P. Wms. 674. Jones v. Cole, 2 Bailey's S. C. Rep. 330.

(b) 11 Vesey, 530. Beach v. Beach, 2 Hill's Rep. 260, S. P.

(c) 3 Merivale's Rep. 256, 268.

tion of the contract. But he admitted that engagements between the husband and a third person, of a trustee, for instance, though originating out of, and relating to, a separation, were valid, and might be enforced in equity. (*a*) It was, indeed, strange that such an auxiliary agreement should be enforced, while the principal agreement between the husband and wife to separate, and settle a maintenance on her, should be deemed to be contrary to the spirit and policy of the law. If *177 the question was *res integra*, said * Lord Elden, untouched by *dictum* or decision, he would not have permitted such a covenant to be the foundation of a suit in equity. But *dicta* have followed *dicta*, and decision has followed decision, to the extent of settling the law on this point too firmly to be now disturbed in chancery. (*b*)

(*a*) This is now the settled law in England and in this country. Fitzer *v.* Fitzer, 2 Atk. Rep 511. Cooke *v* Wiggins, 10 Ves. 191. Lord Rodney *v.* Chambers, 2 East's Rep. 283. 2 Raithby's Vernon. 386, note 1. Ros *v.* Willoughby, 10 Price's Rep. 2. Carson *v.* Murray, 3 Paige's Rep 483. Reed *v.* Beazley, 1 Blackf. Ind. Rep. 97, S. P. It is an interesting fact to find not only the *lex mercatoria* of the English common law, but the refinements of the English equity system, adopted and enforced in the state of Indiana, as early as 1820, when we consider how recently that country had then risen from a wilderness into a cultivated and civilized community. The reports in Indiana here referred to, are replete with extensive and accurate law learning, and the notes of the learned reporter, annexed to the cases, are very valuable. The general principle is established, that the law does not authorize or sanction a voluntary agreement for a separation between husband and wife. The wife cannot make a valid agreement with the husband for a separation, in violation of the marriage contract, except under the sanction of the courts or equity,[1] and except in the cases where the conduct of the husband would have entitled her to a separation. The law merely tolerates such agreements when capable of being enforced by or against a third person acting in behalf of the wife. Rogers *v* Rogers, 4 Paige's Ch Rep. 516. Champlin *v.* Champlin, 1 Hoffman's Ch. Rep. 55. So, in the ecclesiastical courts of England, on the same principle, a deed of separation is no bar to a suit instituted for the restitution of conjugal rights. Westmeath *v.* Westmeath, 2 Hagg. Eccl. Rep Supp. p. 115. A private separation is an illegal contract, a renunciation of stipulated duties, from which the parties cannot release themselves by any private act of their own Mortimer *v.* Mortimer, 2 Hagg. Consist. Rep. 318. Legard *v.* Johnson, 3 Vesey, 352 McKennan *v.* Phillips, 6 Wharton's Rep. 571, 576 Mercein *v.* The People, 25 Wendell, 77, Bronson, J. Nothing can be clearer or more sound than this conjugal doctrine.

(*b*) Westmeath *v.* Westmeath, Jacob's Rep 126. In Todd *v.* Stoakes, 1 Salk. Rep 116, Nurse *v.* Craig, 5 Bos. & Pull. 148, Hindley *v.* Westmeath, 6 Barnew, &

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[1] Calkins *v.* Long, 22 Barb. (N. Y.) 97. Lippey *v.* Masonheimer, 9 Md. 310.

*The law respecting marriage settlements is essentially the same in Pennsylvania, Virginia, North Caro- *178

Cress. 200; and in Shelthar v. Gregory, 2 Wendell's Rep. 422, the separation of husband and wife by deed, and a stipulation on his part with the wife's trustees to pay her a certain allowance, were admitted to constitute a valid provision at law, sufficient to exempt the husband from being chargeable with her support. But if the husband fails to pay the stipulated allowance, he then becomes chargeable for necessaries furnished his wife; and if the deed providing for a separate maintenance be made without any *actual and present separation*, it is void. A deed, providing for the future separation of husband and wife, is void. Durant v. Titley, 7 Price, 577. Hindley v. Westmeath, *ut supra*.[1] So, a subsequent reconciliation and return to the husband's house, destroys the deed. 1 Jacob, 140. Pidgin v. Cram, 8 N. Hamp. Rep. 350. The wife after a separation retains the character of a married woman. The husband may recover damages for adultery committed by the wife while living apart from him, though the adultery does not cause any forfeiture of her provision under the deed of settlement. 2 Roper by Jacob, 301, 322. These deeds of separation and settlement are inauspicious, for they condemn the husband and wife to an ambiguous celibacy, and facilitate the means of breaking up families. In Picquet v. Swan, 4 Mason's Rep. 443, the doctrine of post-nuptial settlements was clearly and accurately discussed, and it was held, that a power of appointment therein to create new trusts and make new appointments, might be reserved to the wife, and be exercised by her *toties quoties*. It was deemed a necessary consequence of the validity of a post-nuptial settlement, that the income of profit arising to the wife thereon, follows the nature of the principal estate, and cannot be taken by the husband or his creditors, but is the separate property of the wife, and subject to her disposition and appointment. In Heyer v. Burger, 1 Hoffman's Ch. Rep. 1, the husband and wife voluntarily executed articles of separation, and the husband covenanted *with a trustee*, who was a party to the instrument, that the wife might live separate and he would not disturb her, and he and his wife assigned over to the trustee all her estate, real and personal, *in trust*, to apply it to her future maintenance, and the wife was not to apply to the husband for assistance, nor to contract debts on his account, and the articles gave her authority to dispose of the property by will, and if not so disposed of, to go to her heirs. The assistant vice-chancellor held, that the settlement was binding on the husband, though subject to be annulled by a subsequent reconciliation; and that the wife had a valid power to make a will of the personal estate by the post-nuptial settlement. It may be further noticed on this subject, that the equity of a married woman for a settlement does not survive to her children. They have no independent equity, where there is no contract for a settlement or decree. Lloyd v. Williams, 1 Madd. Rep. 450. Story's Equity, sec. 1417. Barker v. Woods, 1 Sandford's Ch. R. 129.

In addition to the general abridgments, there are several professed treatises recently published on this head, as Atherley's Treatise on the Law of Marriage and other Family Settlements and Devises, published in 1813; Keating's Treatise on Family Settlements and Devises, published in 1815; Bingham on the Law of Infancy and

[1] The Court of Chancery will decree the specific performance of an agreement to execute a deed of separation. Wilson v. Wilson, 31 E. L. & Eq. 29. Florentine v. Wilson, Hill & Denio, (N. Y.) 303.

lina, South Carolina, Kentucky, and probably in other states, as in England and in New York. (a) But in Connecticut it has been decided, that an agreement between husband and wife, during coverture, was void, and could not be enforced in chancery. (b) The court of appeals in that state would not admit the competency of the husband and wife to contract with each other, nor the competency of the wife to hold personal estate to her separate use. Afterwards, in *Nichols* v. *Palmer*, (c) an agreement between the husband and a third person, as trustee, though originating out of and relating to a separation between husband and wife, was recognized as binding.

V. *Other rights and disabilities incident to the marriage union.*

The husband and wife cannot be witnesses for or against each other in a civil suit. This is a settled principle of *179 law and equity, and it is * founded as well on the interest of the parties being the same, as on public policy. (d) [1] The foundations of society would be shaken, according to the

Coverture, published in 1816; Roper on the Law of Property arising from the relation between Husband and Wife, republished in New York in 1824; and the title of Baron and Feme, in Ch. J. Reeve's work on the Domestic Relations. In those essays the subject can be studied and pursued through all its complicated details.

(a) Rundle v. Murgatroyd, 4 Dall. Rep. 304, 307. Magniac v. Thompson, 1 Baldwin's C. C. U S Rep. 344. Scott v. Loraine, 6 Munf. Rep. 117. Bray v. Dudgeon, Ibid. 132. Tyson v. Tyson, 2 Hawks's Rep. 472. Crostwaight v. Hutchinson, 2 Bibb, Rep. 407. Browning v. Coppage, 3 Bibb, Rep. 37. South Carolina Eq Rep. *passim*.

(b) Dibble v. Hutton, 1 Day's Rep. 221.

(c) 5 Day's Rep 47

(d) Davis v. Dinwoody, 4 Term Rep. 678. Winsmore v. Greenbank, Willes's Rep. 577. Vowles v. Young, 13 Vesey, 140. City Bank v. Bangs, 3 Paige's Rep. 36. Copous v. Kauffman, 8 Id. 583.

[1] Mayrant v. Guignard, 3 Strobh. Eq. 112. Manchester v. Manchester, 24 Verm. 649. Coburn v. Mellen, 19 N. H. 198. By virtue of a late statute in Connecticut, a woman is now a competent witness in behalf of her husband, (Merriam v. Hartford, &c. R. R. Co. 20 Conn. 354,) except in criminal prosecutions. Lucas v. State, 23 Conn. 18. The New York Code of Procedure, which abolishes incompetency on the ground of interest, except in the case of those for whose immediate benefit an action is brought, and allows parties to be examined by the opposite parties, does not affect the competency of husband and wife, as depending upon the matrimonial relation. Ervin v. Smaller, 2 Sandf. (Law) R. 340.

strong language in one of the cases, by permitting it. Nor can either of them be permitted to give any testimony, either in a civil or criminal case, which goes to criminate the other; and this rule is so inviolable, that no consent will authorize the breach of it. (a)[1] Lord Thurlow said, in *Sedgwick* v. *Watkins*, (b) that for security of the peace, *ex necessitate*, the wife might make an affidavit against her husband, but that he did not know one other case, either at law or in chancery, where the wife was allowed to be a witness against her husband. (c)

But where the wife acts as her husband's agent, her declarations have been admitted in evidence to charge the husband; for if he permits the wife to act for him as his agent in any particular business, he adopts, and is bound by her acts and

(a) The King *v.* Cliviger, 2 Term Rep. 263. In this case the court of K. B. would not allow any testimony that *tended that way;* but afterwards the rule was, by the same court, somewhat restricted, and confined to testimony that went *directly* to criminate the husband, or could afterwards be used against him. The King *v.* Inhabitants of All-Saints, 4 Petersdorff's Abr. 157. On the question of legitimacy, neither husband nor wife can be admitted to prove non-access. This is an old and well-settled rule.

(b) 1 Vesey, Jr. 49.

(c) In Bentley *v.* Cooke, 3 Doug. Rep. 422, Lord Mansfield said that there had never been any instance, in a civil or criminal case, where the husband or wife had been permitted to be a witness for or against each other, except in case of particular necessity, as where the wife would otherwise be exposed, without remedy, to personal injury. There are exceptions to the rule stated in the text, when the necessity of admitting the wife as a witness against her husband is so strong as to overbalance the principle of public policy upon which the rule of exclusion is founded, as when the wife is the injured person, complaining of cruel treatment by her husband. The People *v.* Mercein, 8 Paige's Rep. 47. The exception to the general rule, excluding persons interested from being witnesses in civil and criminal cases, applies in other cases, as where a statute can receive no execution, unless the party interested (as the owner of goods stolen or robbed) be admitted as a witness. U. States *v.* Murphy, 16 Peters's Rep. 203. The law will not permit any disclosure by the wife, even after the husband's death, which implies a violation of the confidence reposed in her as a wife, though she may in other cases testify to his acts or declarations of a public nature and not affecting his character. McGuire *v.* Maloney, 1 B. Monroe's Rep. 221. May *v.* Little, 3 Iredell's N. C. Rep. 27.

The policy and force of the general rule of exclusion also applies to render the wife incompetent, even after a divorce *a vinculo,* to testify *against* her husband, as to matters of fact occurring during the coverture, and which affect the husband in his pecuniary interest and character. Monroe *v.* Twistleton, Peakes's Add. Cases, 219.

[1] Van Cort *v.* Van Cort, 4 Edw. Ch. 621. Cornelius *v.* State, 7 Eng. 782.

admissions, and they may be given in evidence against him.(a) The wife cannot bind her husband by her contracts, except as his agent, and this agency may be inferred by a jury in the cases of orders given by her in those departments of her husband's household which she has under her control. (b) So, also, where the husband permitted his wife to deal as a *feme sole*, her testimony was admitted, where she acted as agent, to charge her husband. (c) In the case, likewise, of *Fenner* v. *Lewis*, (d) where the husband and wife had agreed to articles of separation, and a third person became a party to the agreement as the wife's trustee, and provision was made for her maintenance and *180 enjoyment of *separate property, it was held, that the declarations of the wife relative to her acts as agent, were admissible in favor of her husband in a suit against the trustee. In such a case, the law so far regarded the separation as not to hold the husband any longer liable for her support. (e) The policy of the rule excluding the husband and wife from being witnesses for or against each other. whether founded, according to Lord Kenyon, (f) on the supposed bias arising from the marriage, or, according to Lord Hardwicke, (g) in the necessity of preserving the peace and happiness of families, was no longer deemed applicable to that case. In *Aveson* v. *Lord Kinnaird*, (h) dying declarations of the wife were admitted in a civil suit against her husband, they being made when no confidence was

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Doker v. Hasler, Ryan & M. 198. Ratcliff v Wales, 1 Hill's N. Y. Rep. 63. Babcock v. Booth, 2 Hill. 181. In an action of *crim. con.* brought by the husband, the wife is a competent witness for him, after a divorce *a vinculo*. Dickerman v. Graves, 6 Cush. 308.

(a) Anon. 1 Str. Rep. 527. Emerson v. Blonden, 1 Esp. N. P. Rep. 142. Palethorp v. Furnish, 2 Id. 511, note. Clifford v Burton, 8 Moore's Rep. 16. 1 Bing. Rep. 199, S. C. Dacy v. Chemical Manuf. Co. 2 Hall's N. Y. Rep. 550. Plummer v. Sells, 3 Neville & Manning, 422.

(b) Freestone v. Butcher, 9 Carr. & Payne, 643. Lane v. Ironmonger, 13 Meeson & W. 368.

(c) Rutter v. Baldwin, 1 Eq. Cas. Abr. 226, 227; but Lord Eldon said, in 15 Vesey, 165, that he had great difficulty in acceding to this case to that extent.

(d) 10 Johns. Rep. 38.

(e) Baker v. Barney, 8 Id. 72.

(f) 4 Term Rep 679

(g) Baker v. Dixie, Cases temp. Hardw. 261.

(h) 6 East's Rep. 188.

violated, and nothing extracted from the bosom of the wife which was confided there by the husband. Lord Ellenborough referred to the case of *Thompson* v. *Trevanion*, in Skin. Rep. 402, where, in an action by husband and wife for wounding the wife, Lord Holt allowed what the wife said immediately upon the hurt received, and before she had time to devise anything to her own advantage, to be given in evidence as part of the *res gestæ*.

These cases may be considered as exceptions to the general rule of law, and which, as a general rule, ought to be steadily and firmly adhered to, for it has a solid foundation in public policy. (*a*)

In civil suits, where the wife cannot have the property demanded, either solely to herself or jointly with her husband, or where the wife cannot maintain an action for the same cause if she survive her husband, the husband must sue alone. (*b*) In all other cases in which this rule does not apply, they must be joined in the suit; and where the husband is * sued *181 for the debts of the wife before coverture, the action must be joint against husband and wife, and she may be charged in execution with her husband;[1] though if she be in custody on mesne process only, she will be discharged from custody on motion. (*c*)[2] The husband may also be bound to keep

(*a*) The policy of the rule of the English law, that husband and wife cannot be witnesses for or against each other, is much questioned in Am. Jur. No. 30, p. 374. I remain, however, decidedly against the abolition of the rule.[3]

(*b*) If a note be given to the husband and wife, on a sale of her property, and she survive him, she, and not his administrator, must indorse it; for the interest being joint, it went, of course, to the survivor. Draper v. Jackson, 16 Mass. Rep. 480. Executors of Schoonmaker *v.* Elmendorf, 10 Johns. Rep. 49. Richardson *v.* Daggett, 4 Vermont Rep. 336.

(*c*) Anon. 3 Wils. Rep. 124. The wife will be discharged from execution in such

[1] If a judgment be rendered against husband and wife, the wife may be arrested for costs. Newton *v.* Rowe, 9 Ad. & El. N. S. 948.

[2] Where a woman was sued before marriage, and judgment taken against her after marriage in her maiden name, and she was taken into custody under a *ca. sa.*, the court refused to discharge her, though she had no separate property. The practice of discharging married women under similar circumstances was declared to stand on no very satisfactory foundation. Beynon *v.* Jones, 15 Mees. & Wels. R. 566. See 3 Cowen's R. 389; 2 Id. 581.

[3] See the Act 14 & 15 Vict. ch. 99. In construction of this Act, it had been held, that, neither husband nor wife was by its provisions competent to give evidence for or against

the peace as against his wife; and for any unreasonable and improper confinement by him, she may be entitled to relief upon *habeas corpus.* (a) But as the husband is the guardian of the wife, and bound to protect and maintain her, the law has given him a reasonable superiority and control over her person, and he may even put gentle restraints upon her liberty, if her conduct be such as to require it, unless he renounces that control by articles of separation, or it be taken from him by a qualified divorce. (b) The husband is the best judge of the wants of the family, and the means of supplying them; and if he shifts his domicil, the wife is bound to follow him wherever he chooses to go. (c) If a woman marries, pending a suit against her, the plaintiff may proceed to judgment and execution against her alone, without joining the husband; (d) but for any cause of action, either on contract or for tort, arising during coverture, the husband only can be taken in execution. (e) These provisions in favor of the wife are becoming of less consequence with us every year, inasmuch as imprisonment for debt is undergoing constant relaxation; and by statute in *several

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a case, if it appears that she has no separate property to pay the debt, Sparkes v. Bell, 8 Barnew. & Cress. 1. The application for her discharge has been held to rest in the discretion of the court Chalk v. Deacon, 6 J. B. Moore's Rep. 128.[1] The husband and wife may be jointly guilty of a tortious conversion of a chattel, and may be sued jointly, provided the conversion be charged to be *to the use of the husband.* 2 Saund. Rep. 47, i. Williams's notes.

(a) In the matter of William P. Brown, on *habeas corpus*, before the circuit judge of the first judicial circuit in New York, Feb. 1843, it was ruled that a wife may be kidnapped by the husband within the provisions of the Revised Statutes, vol. ii. 664, and he and his accessories be held to answer for the crime.

(b) Bridgman, Ch. J., in Manby v. Scott, Bridg. Rep. 233. Rex v. Mead, 1 Burr. Rep. 542. Lister's case, 8 Mod. Rep. 22.

(c) Chretien v. Her Husband, 17 Martin's L'a Rep. 60.

(d) Doyley v. White, Cro. Jac. 323. Cooper v. Hunchin, 4 East's Rep. 521.

(e) Anon. Cro. C. 513. 3 Black. Com. 414.

the other in civil cases. Stapleton v. Croft, 10 E. L. & Eq. 455. Barbat v. Allen, Id. 596. Alcock v. Alcock, 12 Id. 354. But the Evidence Amendment Act of 1853, 16 & 17 Vic. ch. 83, renders husbands and wives competent and compellable witnesses for each other, except in criminal cases, and in cases of adultery; but neither shall be compelled to disclose communications made during the marriage.

[1] Edwards v. Martyn; 33 E. L. & Eq. 83.

of the states, no female can be imprisoned upon any execution for debt. (*a*) [1]

I trust I need not apologize for having dwelt so long upon the consideration of this most interesting of the domestic relations. The law concerning husband and wife has always made a very prominent and extensive article in the codes of civilized nations. It occupies a large title in the English equity jurisprudence. So extensive have become the trusts growing out of marriage settlements, that a lawyer of very great experience (*b*) considered that half the property of England was vested in nominal owners, and it had become difficult to ascertain whether third persons were safe in dealing for fiduciary property with the trustee, without the concurrence of the beneficial owner. There are no regulations on any other branch of the law, which affect so many minute interests, and interfere so deeply with the prosperity, the honor, and happiness of private life. As evidence of the immense importance which in every age has been attached to this subject, we may refer to the Roman law, where this title occupies two entire books of the Pandects, (*c*) and the better part of the fifth book of the Code. Among the modern civilians, Dr. Taylor devotes upwards of one sixth part of his whole work on the Elements of the Civil

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(*a*) See *infra*, p. 399, n. *b*. (*b*) Mr. Butler.

(*c*) Lib. 23 and 24.

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1 By a recent statute in New York, in case of the death of a husband through the negligence of another, an action is given to his personal representatives, and the damages are to be distributed according to the law of distribution of intestate estates. See note (1) p. 197, *post*. But in Carey *v.* The Berkshire R. R. Co. 1 Cush. (Mass.) R. 475, it was held that no such action could be maintained at common law. An Act of Maryland (Laws of 1852, ch. 299) gives a similar right of action to a surviving wife, parent, husband, or child. Damages are confined to injuries for which a pecuniary estimate can be made. The mental sufferings of the survivors are not subjects for damages. Blake *v.* Midland Company, 10 Eng. L. & Eq. R. 437. Canning *v.* Williamstown, 1 Cushing's R. 451.

Under a statute which gives a remedy to those who receive any injury to their persons through defects in the highway, a husband cannot recover in a several action for medical and other expenses incurred in consequence of such an injury to the wife, nor for the loss of her service. Harwood *v.* Lowell, 4 Cush. 310. Starbird *v.* Frankfort, 35 Maine, 89. It is held in Maine, that a reasonable construction of such a statute will allow those damages to be recovered in the action brought by the husband and wife for the personal injury. Sanford *v.* Augusta, 32 Maine, 536. See Fuller *v.* Naugatuck R. R. Co. 21 Conn. 557, where allegations of expense and loss of service were construed to be descriptive of the extent of the injury, and recoverable in the joint action.

Law to the article of marriage; and Heineccius, in his voluminous works, pours a flood of various and profound learning on the subject of the conjugal relations. (*a*) Pothier, who has examined, in thirty-one volumes, the whole immense subject of the municipal law of France, which has its foundations principally laid upon the civil law, devotes six entire volumes to the law of the matrimonial state. When we reflect on the labors of those great masters in jurisprudence, and compare them with what is here written, a consciousness arises of the great imperfection of this humble view of the subject; and I console myself with the hope, that I may have been able to point out at least the paths of inquiry to the student, and to stimulate his *exertions to become better acquainted with this very comprehensive and most interesting head of domestic polity.

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There is a marked difference between the provisions of the common law and the civil law, in respect to the rights of property belonging to the matrimonial parties. Our law concerning marriage settlements appears, to us at least, to be quite simple and easy to be digested, when compared with the complicated regulations of the community or partnership system between husband and wife, which prevails in many parts of Europe, as France, Spain, and Holland, and also in the state of Louisiana. This system was carried by the colonists of those European powers into their colonies, such as Ceylon, Mauritius, the Cape of Good Hope, Guiana, Demarara, Canada, and Louisiana. Many of the regulations concerning the matrimonial union, though not the community system, are founded on the Roman law, which Van Leeuwen, in his Commentaries, terms the common law of nations. (*b*) I do not allude to the

(*a*) *Vide Opera Heinecc.* tom. ii. *De marito Tutore et Curatore Uxoris legitimo*, and tom. vii. *Commentarius ad legem Juliam et Papiam Poppæam.*

(*b*) In Louisiana, according to their new Civil Code, as amended and promulgated in 1824, (Art. 2312, 2369, 2370,) the partnership or community of acquets or gains (*communauté des biens*) arising during coverture, exists by law in every marriage contract in the state, where there is no stipulation to the contrary. This was a legal consequence of marriage, under the Spanish law. The doctrine of the community of acquets and gains was unknown to the Roman law, but it is common to the greater number of the European nations, and is supposed to have taken its rise with the Germans, and may be founded on the presumption that the wife, by her industry

*earlier laws of the Roman republic, by which the husband was invested with the plenitude of paternal power *184

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and care, contributes, equally with her husband, to the acquisition of property. All the property left at the death of either party, is presumed to constitute the community of acquets and gains, and this presumption stands good until destroyed by proof to the contrary. Toullier's Droit Civil Français, tom. xii. art. 72. 17 Martin's L'a Rep. 258. Christy, Dig. tit. Marriage. Cole's Wife v. His Heirs, 19 Martin's Rep. 41. But the parties may modify or limit this partnership, or agree that it shall not exist. They may regulate their matrimonial agreements as they please, provided the regulations be not contrary to good morals, and be conformable to certain prescribed modifications. (Art. 2305.) Parties can, by an express matrimonial contract, subject themselves to the *communio bonorum* as to personal property, or adopt the law of any country in respect thereof, and the courts will give effect to it, unless prohibited by a positive law, either of the matrimonial domicil or of the *locus rei sitæ*. *Vide infra*, p. 459, and note *b*, Ibid. In the case of married persons removing into the state from another state, or from foreign countries, their subsequently acquired property is subjected to the community of acquets. (Art. 2370.) This very point was decided at New Orleans, in Gale v. Davis, 4 Martin's Rep. 645, and in the case of Saul v His Creditors, 17 Martin's Rep. 569. The Supreme Court of Louisiana, in the able opinion pronounced by Judge Porter, on behalf of the court in the latter case, held, that though the marriage was contracted in a state governed by the English common law, yet if the parties removed into Louisiana, and there acquired property, such property, on the dissolution of the marriage in that state, by the death of the wife, would be regulated by the law of Louisiana. Consequently, a community of acquets and gains did exist between the married parties, from the time of their removal into the state, and the property they acquired after their removal became common, and was to be equally divided between them, on the principles of partnership. The decision was founded on an ancient Spanish statute, in the Partidas, which governed at New Orleans when it was a Spanish colony; and it is also the law of the Civil Code of Louisiana, as already mentioned. So, property acquired before the removal from the matrimonial domicil is governed by the law of that domicil, and if married persons move out of the country where the community of acquets and gains exist, into one where it does not, their future acquisitions are governed by the law of their new domicil. Porter, J., 4 Louisiana Rep. 193. McCollum v. Smith, Meig's Tenn. R. 342. Freeland v. Ensley, Ibid. 620. The principles declared in the case of Saul v. His Creditors, are essentially re-declared in the case of Packwood v. Packwood, 9 Robinson's L'a Rep. 438. The community of aquets and gains applies to all the property, real and personal, acquired while the parties were domiciled in Louisiana, though not to property previously acquired during their matrimonial domicil in another state, nor to property subsequently acquired after a change of domicil from Louisiana to another state. Saul v. His Creditors, *supra*. This was the doctrine in the Partidas; but is seems, according to the jurists in France and Holland, that the community principle prevails and follows the property even subsequently acquired after a change of domicil, on the ground of a tacit or implied contract having the effect of an actual marriage settlement. While it was admitted, in the case of Saul v. His Creditors, that by the comity of nations, contracts were to be enforced according to the principles of law which governed the contract in the place where it was made, yet it was equally part

*185 of life and death over the * wife, but to the civil law in the more polished ages of the Roman jurisprudence,

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of the rule, that a *positive* law, regulating property in the place where it was situated, and which the European continental jurists call *real* statutes, in contradistinction to those *personal* statutes which follow and govern the individual wherever he goes, must prevail when opposed to the *lex loci contractus.* The right of sovereignty settles the point, wherever the rules of the place of the contract, and of the place of its execution conflict. The comity of nations must yield to the authority of positive legislation; and it was admitted, that, independent of that authority, the weight of the opinion of civilians in France and Holland was, that the law of the place where the marriage was contracted ought to be the guide, and not that of the place where it was dissolved. The property of married persons is divided into *separate* property, being that which either party brings in marriage, or subsequently acquires by inheritance or gift; and *common* property being that acquired in any other way by the husband and wife during marriage. (Art. 2314.) The community of acquets and gains ceases on the death of either party, and the survivor takes only his or her undivided moiety of the common property. Cooney's Heirs *v.* Clark, 7 Louisiana Rep. 156. Broussard *v.* Bernard, Id. 216. Stewart *v.* Pickard, 10 Robinson's L'a Rep. 18. The surviving wife cannot renounce the community of gains, if she takes an active part in the community of gains, but in that case she is only responsible for one half of the debts contracted during the marriage. Code Civil, arts. 2378, 2982. Lynch *v.* Benton, 12 Robinson's L'a Rep. 113. The separate property of the wife is divided into *dotal*, being that which she brings to the husband to assist in the marriage establishment, and *extradotal*, or paraphernal property, being that which forms no part of the dowry. (Art. 2315.) The husband is the head and master, and the proceeds of the dowry belong to the husband during the marriage, and he has the administration of the partnership or community of profits of the matrimonial property, and he may dispose of the revenues which they produce and alienate them, without the consent of the wife. But he cannot convey the common estate, or the acquets and gains, to the injury of the wife during coverture, and she may, at his decease, by action, set aside the alienation. The wife has a tacit mortgage for her dotal and paraphernal property, and also upon the community property from the time it comes into the hands of the husband. There is a marked difference on this point between the community law in France and in Louisiana. In the latter, taken from the Spanish law, the wife has an interest in the community property, and not a mere hope or expectancy, during the coverture. It is not the law in force at the time the community is dissolved, but that in vigor when it was formed, which regulates the rights of husband and wife to the property acquired during coverture. (Art. 2373.) Porter, J., Dixon *v.* Dixon's Executors, 4 L'a Rep. 188, 192. He cannot alienate the dotal estate, though he may enjoy the fruits of it, nor can the income of the dotal property be seized by the husband's creditors. Buard *v.* De Russy, 6 Robinson, L'a 111. But he is subject, in respect to that property, to all the obligations of the usufructuary. (Art. 2344.) The paraphernal property of the wife is not bound for the debts contracted by the husband while at the head of the community; neither are the fruits of that property liable, when administered by the wife. (L. Code, art. 2371.) Lambert *v.* Franchebois, 16 L'a Rep. 1. If the husband and wife stipulate that there shall be no partnership between them, the wife preserves the entire administration of her property, movable and immovable, and

when the wife was admitted to the *benefit of a liberal *186 antenuptial contract, by which her private property

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may sell it. (Arts. 2394, 2395.) She has the right, during the existence of the community, to the administration of her paraphernal property, and on her death, her heirs take her separate estate, and moneys received by her husband on her account during marriage, form part of it. Robin *v.* Castille, 7 L'a Rep. 295. And if there be no agreement as to the expenses of the marriage, the wife contributes to the amount of one half of her income, (Art. 2387;) but a married woman cannot, under any circumstances, become a surety for her husband Hughes *v.* Harrison, 19 Martin's L'a Rep. 251. A sale by the husband to his wife, to replace her paraphernal property, sold by him, is good. Her land, whether dotal or not, is not affected by her husband's debts. Christy's Dig. tit. Husband and Wife. If the wife renounces the community, she in that case has a mortgage on the property purchased by the husband during coverture, which takes precedence of the ordinary creditors of the husband. M'Donough *v.* Tregre, 19 Martin's L'a Rep. 68. But she must, as against creditors, produce other proof of the payment of the *dot* or dotal portion on marriage, than the husband's confession in the marriage contract. Buisson *v.* Thompson, 19 (7 N. S.) Martin's L'a Rep. 460; and she has no mortgage on her husband's estate for the fruits of her paraphernal estate, 18 Ibid. 103; but she is a privileged creditor, 15 Id. 239, and has a tacit mortgage for replacing her paraphernal effects sold by the husband. 16 Id. 404. Johnson *v.* Pilster, 4 Rob. L'a Rep. 71. The civil law, in order to protect the wife, would not allow her dotal property to be alienated, during the coverture, even with her consent; and the Spanish laws declare void any contract in which the wife binds herself with her husband, unless the debt be contracted for her particular benefit. 1 Martin's L'a Rep. 296. But I cannot go further, and give a more detailed view of the rights of married persons in Louisiana. My object is merely to state enough to show that its regulations on the subject are entirely different from the laws of the other states: and to a mere English lawyer they will probably appear to be embarrassing, and rather forbidding. Our taste and modes of thinking are very much under the influence of education; and we are naturally led to give a preference to the institutions under which we live, and with which we are best acquainted.

The Louisiana Code appears to be a transcript in this, as well as most other respects, of the Code Napoleon; and the very complicated regulations of the French code on the subject of marriage property, occupy a wide space, even in that comprehensive and summary digest of the French law. Pothier had devoted three volumes of his works to the conjugal rights in community; and M. Toullier, who had discussed extensively the law of marriage in the former part of his Droit Civil Français suivant l'ordre du code, devoted his last volumes to a commentary upon the regulations of the Code Civil concerning the community system; and Mr. Burge, in his Commentaries on Colonial and Foreign Laws, vol. i. 332–413, and again from p. 599 to 640, has also digested, with much labor and research, the law of the community of goods between husband and wife. I have selected, for the information of the student, a few of the leading principles of the French code on the subject.

It is declared that the husband owes protection and maintenance to the wife, according to his means and condition. Code Civil, Nos. 213, 214. The wife owes him obedience, and cannot do any act in law without the authority of her husband; and without his concurrence she cannot give, alien, or acquire property. Ibid. Nos. 215,

was secured to her, and a more reasonable equality of *187 condition *between the husband and wife introduced.

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217. But if the husband refuses to authorize his wife to do any act in law, she may apply to a judicial tribunal for leave to act. Ibid. Nos. 218, 219. If she be a public trader, she may bind herself, without the authority of her husband, in whatever concerns that business. Ibid. No. 220. She may also make a will without his authority. Ibid. No. 226. No *general* authority, though stipulated by the marriage contract, is valid, except as the administration of the wife's property. Ibid. No. 223. But the law allows the husband and wife to make any special contract as to property which is not incompatible with good morals, and does not derogate from the power of the husband over the person of the wife and children, nor change the legal order of succession. Ibid. Nos. 1387, 1388, 1389. The parties may stipulate in writing, before marriage, that the conjugal relation, in respect to property, shall be regulated either under the community, or under the dotal rule, and the code prescribes their rights and powers under each of these systems, and they may modify as they please the management and disposition of the joint property placed in community. They may stipulate that each of the married parties shall separately pay their own debts, and this stipulation will bind them, on the dissolution of the community, to account to each other. Ibid. Nos. 1391, 1395, 1401, 1402, 1421, 1497, 1500, 1510, 1526. Before the French revolution, the northern provinces of France were under the customary law, and the *community of property* governed the nuptial contract; while in the southern provinces, where the Roman law prevailed, the contract was governed by the *dotal system.* The code, by way of compromise, left the parties to elect the law by which the marriage was to be governed; and if no election was made, the community system was to prevail. Ibid. Nos. 1391, 1393. These marriage contracts cannot be altered after marriage, and, ordinarily, the husband administers the personal property in community, and may sell or incumber it, but he cannot take away, by will, the rights of the wife as survivor. If they stipulate that they shall be separate in property, the wife retains the entire administration of her real and personal property and revenues, and each party contributes to the charges of the marriage according to agreement. Ibid. Nos. 1536, 1537. In no case can the wife have a power given to her to alienate her real estate, without the consent of her husband, and if they marry under the dotal rule, and not under the rule of the community, the husband has the sole administration of the dotal property during the marriage. Ibid. No. 1521.

The Dutch matrimonial law in respect to property is essentially the same. See Van Leeuwen's Commentaries on the Roman Dutch Law, b. 4, ch 23, 24. Voet's Commentaries on the Pandects, under the appropriate titles. Vanderlinden's Institutes of the Laws of Holland, translated by Henry, pp. 86-88. Burge's Commentaries on Colonial and Foreign Laws, vol. i. 276-332. The Master's Report on the Matrimonial Dutch Law, in the colony of Demarara, as given in Martin v. Martin, 2 Russ. & Mylne, 507. The Dutch and all the nations of Europe, except the Spaniards, have rejected that part of the Roman law which secured to the wife all her property, and protected it against the debts of her husband. In Holland, the goods of both parties are brought into community at marriage, and it includes all property subsequently acquired, and is liable for the debts of both parties, unless it be property affected by a trust or *fidei commissum.* At the death of either party, one half goes to the survivor, and the other half to the representatives of the deceased. In Scotland, the community of goods between the husband and wife is of a more limited character

The civil law at first prohibited the husband and wife from making valid gifts to each other *causa mortis;* yet the rigor of the law was afterwards done away, and donations between husband and wife were good if they were not revoked in the lifetime of the parties; and Justinian abolished the distinction between donations *inter vivos ante nuptias et post nuptias*, and he allowed donations *propter nuptias* as well after as before marriage. (*a*) The wife could bind herself by her contracts without charging her husband. She was competent to sue and be sued without him. They could sue each other, and, in respect to the property, were considered as distinct persons, and the contracts of the one were not binding on the other. (*b*)

Whatever doubts may arise in the mind of a person educated in the school of the common law, as to the wisdom or policy of the powers which, by the civil law and the law of those modern nations which have adopted it, are conceded to the wife in matters of property, yet, it cannot be denied, that the preëminence of the Christian nations of Europe, and of their descendants and colonists in every other quarter of the globe, is most strikingly displayed in the equality and dignity which their institutions confer upon the female character.

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than that which exists in the continental nations, and does not extend to real property or subjects which produce annual profits. The effect of marriage on the property of the husband and wife in Scotland, is largely and learnedly considered in Burge's Com. vol. i. pp. 423–462.

(*a*) Inst. 2, 7, 3. Bynk. Opera, tom. i. p. 166 Observ. Jur. Rom. lib. 5, ch. 18.

(*b*) A summary of the rules of the civil law on the rights and powers of the husband and wife, in relation to their property, is given in Burge's Com. on Colonial and Foreign Laws, vol. i. 262–275. The law concerning the conjugal obligations under the Scotch law is fully stated and condensed in Lord Stair's Institutions, by More, vol. i. note b. See also, a learned note of John George Phillimore, Esq., annexed to his translation of the celebrated case of Manby *v.* Scott, from 1 Siderfin, 109, on the early periods of the Roman law in respect to conjugal rights and duties.

LECTURE XXIX.

OF PARENT AND CHILD.

THE next domestic relation which we are to consider, is that of parent and child. The duties that reciprocally result from this connection are prescribed, as well by those feelings of parental love and filial reverence which Providence has implanted in the human breast, as by the positive precepts of religion, and of our municipal law.

I. *Of the duties of parents.*

The duties of parents to their children, as being their natural guardians, consist in maintaining and educating them during the season of infancy and youth, and in making reasonable provision for their future usefulness and happiness in life, by a situation suited to their habits, and a competent provision for the exigencies of that situation. (*a*)

(1.) *Of maintaining children.*

The wants and weaknesses of children render it necessary that some person maintains them, and the voice of nature has pointed out the parent as the most fit and proper person. The laws and customs of all nations have enforced this plain precept of universal law. (*b*) The Athenian and the Roman laws were so strict in enforcing the performance of this natural obligation of the parent, that they would not allow the father *190 * to disinherit the child from passion or prejudice, but only for substantial reasons, to be approved of in a court of justice. (*c*)

The obligation on the part of the parent to maintain the

(*a*) Paley's Moral Philosophy, p 233. Taylor's Elements of the Civil Law, p. 383. Puffendorf's Droit de la Nature, b. 4, ch. 11, sec. 4 and 5.

(*b*) Grotius, b. 2, ch. 7, sec. 4.

(*c*) Potter's Greek Antiq. vol. ii. p. 351. Dig. 28, 2, 30. Novel, 115, ch. 3.

child, continues until the latter is in a condition to provide for its own maintenance, and it extends no further than to a necessary support. The obligation of parental duty is so well secured by the strength of natural affection, that it seldom requires to be enforced by human laws. According to the language of Lord Coke, it is "nature's profession to assist, maintain, and console the child." A father's house is always open to his children. The best feelings of our nature establish and consecrate this asylum. Under the thousand pains and perils of human life, the home of the parents is to the children a sure refuge from evil, and a consolation in distress. In the intenseness, the lively touches and unsubdued nature of parental affection, we discern the wisdom and goodness of the great Author of our being, and Father of Mercies.

All the provision that the statute law of New York has made on this subject, applies to the case of necessary maintenance; and as the provision was borrowed from the English statutes of 43 Eliz. and 5 Geo. I., and is dictated by feelings inherent in the human breast, it has probably been followed, to the extent at least of the English statutes, throughout this country. The father and mother being of sufficient ability, of any poor, blind, lame, old, or decrepit person whomsoever, not being able to maintain himself, and becoming chargeable to any city or town, are bound, at their own charge and expense, to relieve and maintain every such person, in such manner as the overseers of the poor of the town shall approve of, and the court of general sessions shall order and direct. If the father, or if the mother, being a widow, shall abscond and leave their children a public charge, their *estate is liable to be sequestered, *191 and the proceeds applied to the maintenance of the children. (a) The statute imposes a similar obligation upon the children, under like circumstances. This feeble and scanty statute provision was intended for the indemnity of the public against the maintenance of paupers, and it is all the injunction that the statute law pronounces in support of the duty of parents to maintain their adult children. (b) During the minority

(a) N. Y. Revised Statutes, vol. i. p. 614.

(b) See *infra*, p. 208, n. *f*. The statute law of New York, prior to the Revised

of the child, the case is different, and the parent is absolutely bound to provide reasonably for his maintenance and education; and he may be sued for necessaries furnished, and schooling given to a child, under just and reasonable circumstances. (*a*) [1] The father is bound to support his minor children, if he be of ability, even though they have property of their own; but this obligation in such a case does not extend to the mother, (*b*) and the rule, as to the father, has become relaxed. (*c*) The courts now look with great liberality to the circumstances of each particular case, and to the respective estates of the father and children; and in one case, where the father had a large income, he was allowed for the maintenance of his infant children, who had a still larger income. (*d*) [2] The legal obligation of

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Statutes, which went into operation in January, 1830, extended this legal duty of necessary maintenance to grandparents and grandchildren, reciprocally. This is the provision in the statute of 43 Eliz., and it has probably been followed, generally, in the other states. See, to this purpose, 4 N. H. Rep. 162 Statute Laws of Connecticut, 1784, p. 98, and of 1838, p. 363. Act of South Carolina, 1712. 2 Bailey's Rep. 320. The Revised Statutes of Massachusetts of 1836, speak, on this point, only of parents and children.

(*a*) Simpson *v.* Robertson, 1 Esp. Cas. 17. Ford *v.* Fothergill, Ibid. 211. Stanton *v.* Willson, 3 Day's Rep. 37. Van Valkenburgh *v.* Watson, 13 Johns. Rep. 480.

(*b*) Hughes *v.* Hughes, 1 Bro. Rep. 387. Pulsford *v.* Hunter, 3 Id. 416. Haley *v.* Bannister, 4 Madd. Ch. Rep. 275 Whipple *v.* Dow, 2 Mass. Rep. 415. Dawes *v.* Howard, 4 Mass. Rep. 97.

(*c*) If the father be without means to maintain and educate his children according to their future expectations in life, courts of equity will interpose and make an allowance out of the estate of the children, and in an urgent case will even break into the principal of a vested legacy, for the purpose of educating an infant legatee. Newport *v.* Cook, 2 Ashmead, 332.

(*d*) Jervoise *v.* Silk, Cooper's Eq. Rep. 52. See, also, Maberly *v.* Tutton, 14 Vesey, 499. Massachusetts Revised Statutes, 1836, part 2, tit. 7, ch. 78, are to the same effect. If an infant becomes entitled to a sum of money during infancy, the Court of Chancery, on the application of the father, will order a reference in respect to the future maintenance of the child out of the fund; but it is not usual to make such an allowance retrospectively.[3] 1 Tamlyn, 22.

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[1] If the parent be of sufficient ability to furnish his children with the necessaries of life, *it seems* that a neglect to do so is an indictable offence. In the matter of Ryder, 11 Paige, R. 185. Rex *v.* Friend, Russ. & Ry. C. C. 20.

[2] Watts *v.* Steele, 19 Ala. 656. Osborne *v.* Van Horn, 2 Flor. 360. Matter of Burke, 4 Sandf. Ch. 617.

[3] If a father is of sufficient ability to maintain his children, a court will not order any allowance to the parent from the child's separate estate; but, in other cases, the rule with respect to retrospective allowances is not so strict as formerly. In the matter of Kane,

the father to maintain his child ceases as soon as the child is of age, however wealthy the *father may be, *192 unless the child becomes chargeable to the public as a pauper. (*a*) The construction put upon the statute of 43 Eliz. renders it applicable only to relations by blood; and the husband is not liable for the expenses of the maintenance of the child of the wife by a former husband, (*b*) nor for the expense of the maintenance of the wife's mother. (*c*) If, however, he takes the wife's child into his own house, he is then considered as standing *in loco parentis*, and is responsible for the maintenance and education of the child so long as it lives with him; for, by that act, he holds the child out to the world as part of his family. (*d*) [1] There was great force of reason and justice in the

(*a*) Parish of St. Andrew *v.* Mendez de Breta, 1 Lord Raym. 699.

(*b*) Tubb *v.* Harrison, 4 Term Rep. 118. Gay *v.* Ballou, 4 Wendell's Rep. 403. But now, by the English statute of 4 & 5 Wm. IV. c. 76, sec. 57, the person who marries a woman, the mother of legitimate or illegitimate children, becomes liable to maintain them as part of his family, until the age of sixteen years, or until the death of the mother.

(*c*) Rex *v.* Munden, 1 Str. 190. Anon. 3 N. Y. Legal Observer, 354.

(*d*) Stone *v.* Carr, 3 Esp. 1. Lord Ellenborough, in Cooper *v.* Martin, 4 East, 82.

2 Barb. Ch. R. 375. On a petition for an allowance to the parent from the child's separate estate, the father must show affirmatively, that he is, in point of means, unable to perform the duty of supporting and educating his children. Haase *v.* Roehrscheid, 6 Ind. 67.

A third person, who supplies an infant with necessaries, cannot maintain an action against the parent therefor, unless the latter has, expressly or impliedly, agreed to pay the amount. Raymond *v.* Loyl, 10 Barb. R. 483. Chilcott *v.* Trimble, 13 Barb. R. 502, S. P. Shelton *v.* Springett, 20 Eng. L. & Eq. R. 281. *Contra*, Dennis *v.* Clark, 2 Cushing, R. 353. State *v.* Cook, 12 Ired. R. 67. Weeks *v.* Merrow, 40 Maine, 151. Townsend *v.* Burnham, 33 N. H. 270. Clinton *v.* Rowland, 24 Barb. (N. Y.) 634. Keaton *v.* Davis, 18 Geo. 457. It was intimated in Van Valkenburgh *v.* Watson, 13 Johnson, (N. Y.) 480, that if a parent neglects his duty to furnish necessaries to his infant children, the law will imply an agreement to pay whoever supplies such necessaries.

The court will not, except under very special circumstances, make an allowance out of the infant's estate to his father for *past* maintenance. For a case in which such allowance was made, see Carmichael *v.* Hughes, 6 Eng. L. & Eq. 71, and see Presley *v.* Davis, 7 Rich. Eq. 105.

[1] And the relation which in such case he sustains to the child, will defeat any presumption which might otherwise arise, of a promise to pay the child for his services. Williams *v.* Hutchinson, 5 Barb. S. C. Rep. 122. S. C. 3 Comst. R. 312. Lantz *v.* Frey, 14 Penn. 201, S. C. 19 Penn. 366. And *e converso*, the step-son is not liable, on an express or implied promise, during minority, to pay for necessaries furnished by his step-father. The case of Gay *v.* Ballou (4 Wendell, R. 403) is so far overruled. Sharp *v.* Cropsey, 11 Barb. R. 224. Hussey *v.* Roundtree, Busbee, 110. And, generally, the law will imply no contract for

extrajudicial *dicta* referred to in the case in *Strange*, that the husband ought to maintain the parents of his wife, if he was able, and they were not; because the wife was liable before marriage to support them, and her personal property, and the use of her real estate passed, by the marriage, to her husband. But the statute does not reach the case; and when the wife, by her marriage, parts with her ability to maintain her children, she ceases to be liable. (*a*) If, however, the wife has separate property, the Court of Chancery would, undoubtedly, in a proper case, make an order charging that property with the necessary support of her children and parents.[1]

A father is not bound by the contract or debts of his son, even for articles suitable and necessary, unless an actual authority be proved, or the circumstances be sufficient to imply one.[2] Were it otherwise, a father who had an imprudent son might be prejudiced to an indefinite extent. What is necessary for the child is left to the discretion of the parent; and *193 where *the infant is *sub potestate parentis*, there must be a clear omission of duty, as to necessaries, before a third person can interfere, and furnish them, and charge the father. It will always be a question for a jury, whether, under the circumstances of the case, the father's authority was to be inferred. (*b*) If the father suffers the children to remain abroad

(*a*) Billingsly *v.* Critchet, 1 Bro. Rep 268. Cooper *v.* Martin, 4 East, 76.

(*b*) Baker *v* Keen, 2 Starkie, 501. Van Valkenburgh *v.* Watson, 13 Johns. Rep. 480. Mortimore *v.* Wright, 6 Meeson & W 482.

wages between those standing in the relation of parent and child, Davis *v.* Goodenow, 1 Wms. (Vt.) 715; though the plaintiff's claim have arisen since the attainment of his majority. Candor's Appeal, 5 W. & Serg. 513. Andrus *v.* Foster, 17 Verm. 556. Resor *v.* Johnson, 1 Carter, 100. It must be shown in such cases that both parties intended a contract for service and wages. Fitch *v.* Peckham, 16 Verm. 150. Weir *v.* Weir, 3 B. Mon. 645; and see Steel *v.* Steel, 12 Penn. 64. Munger *v.* Munger, 33 N. H. 581. Guenther *v.* Birkicht, 22 Miss. (1 Jones,) 439. House *v.* House, 6 Ind. 60. McRae *v.* McRae, 3 Bradford, (N. Y.) 199. Mosteller's Appeal, 30 Penn. State R. 473. But circumstances less than an express promise, may entitle a son to compensation from a father for whom the son works after his majority. Fisher *v.* Fisher, 5 Wisc, 472.

[1] But the court will not compel a mother to furnish the means of educating a child, especially when an education is not absolutely necessary to enable the child to gain a subsistence, though she is abundantly able. It *seems* a court of chancery has no such power. In the matter of Ryder, 11 Paige, R. 185.

[2] A parent is not liable for the wilful act of his minor child; as, for setting the parents'

with their mother, or if he forces them from home by severe usage, he is liable for their necessaries. (*a*) And in consequence of the obligation of the father to provide for the maintenance, and, in some qualified degree, for the education of his infant children, he is entitled to the custody of their persons, and to the value of their labor and services.[1] There can be no doubt that this right in the father is perfect, while the child is under the age of fourteen years. But as the father's guardianship, by nature, continues until the child has arrived to full age, and as he is entitled by statute to constitute a testamentary guardian of the person and estate of his children until the age of twenty-one, the inference would seem to be, that he was, in contemplation of the law, entitled to the custody of the persons, and to the value of the services and labor of his children, during their minority. This is a principle assumed by the elementary writers, (*b*) and in several of the judicial decisions. (*c*) In *Gale v. Parrot*, (*d*) it was observed, that if the minor was eloigned from the parent, he might, of necessity, be entitled to receive the fruits of his own labor, and that it would require only slight circumstances to enable the court to infer the parent's consent to the son's receipt and enjoyment of his *own wages.[2] The father, says Blackstone, has the *194 benefit of his children's labor while they live with him,

(*a*) Lord Eldon, in Rawlyns *v.* Van Dyke, 3 Esp. R. 252. Stanton *v.* Willson, 3 Day's Rep. 37. Though the father be liable for necessaries supplied to his child without his consent, because he is bound to support him, and is entitled to his services, yet a guardian is not so liable. Call *v.* Ward, 4 Watts & Serg. 118.

(*b*) 1 Blacks. Com. 453. Reeve's Domestic Relations, 290.

(*c*) Day *v.* Everett, 7 Mass. Rep. 145. Benson *v.* Remington, 2 Mass. Rep. 113. Plummer *v.* Webb, 4 Mason, 380. The father may maintain suits in the admiralty for the wages of a minor son, earned in a maritime service.

(*d*) 1 N. H. Rep. 28.

dog upon the hog of a third person. Tifft *v.* Tifft, 4 Denio's R 175. Nor for an assault committed by his minor son. Baker *v.* Haldeman, 24 Missouri, (3 Jones,) 219.

1 So, though the services were rendered by the son, in an unlawful business, if the father did not know the character of the service. Emery *v.* Kempton, 2 Gray, 257. See Jenness *v.* Emerson, 15 N. H 486. By Laws of New York of 1850, p. 579, the parent must notify a minor's employer, within thirty days after the commencement of service, that he claims the wages, or payment to the minor will be good. And see Letts *v.* Brooks, Hill & Denio, (N. Y.) 36.

2 An emancipation may be inferred where the father leaves his child to *manage* and

and are maintained by him; and this is no more than he is entitled to from his apprentices or servants. (*a*)

The father may obtain the custody of his children by the writ of *habeas corpus*, when they are improperly detained from him; (*b*) [1] but the courts, both of law and equity, will investigate the circumstances, and act according to sound discretion, and will not always, and of course, interfere upon *habeas corpus*, and take a child, though under fourteen years of age, from the possession of a third person, and deliver it over to the father against the will of the child. They will consult the inclination of an infant, if it be of a sufficiently mature age to judge for itself, and even control the right of the father to the possession and education of his child when the nature of the *195 case appears to warrant it. (*c*) * The father may also

(*a*) 1 Blacks. Com. 453 A father may, by agreement with his minor child, relinquish to the child the right which he would otherwise have to his services, and authorize those who employ him to pay him his own earnings. Jenney *v.* Alden, 12 Mass. Rep. 375. Whiting *v.* Earle, 3 Pick. Rep 201. Burlingame *v.* Burlingame, 7 Cowen's Rep. 92. Morse *v.* Welton, 6 Conn. Rep. 547. Varney *v.* Young, 11 Vermont Rep. 258 Tillotson *v.* McCrillis, Ibid. 477. The father is not entitled to the wages of a son, nor to avoid his reasonable contracts when he separates from the mother and leaves the son under her care. Wodell *v.* Coggeshall, 2 Metcalf's Rep. 89. The son, in such cases, may make a valid special contract with his employer Chilson *v.* Phillips, 1 Vermont Rep. 41.

(*b*) The King *v.* De Manneville, 5 East, 221.

(*c*) Archer's case, 1 Lord Raym. Rep 673. Rex *v.* Smith, 2 Str. Rep. 982. Rex *v.* Delaval, 3 Burr. Rep. 1434. Commonwealth *v.* Addicks, 5 Binney's Rep. 520. The case of M'Dowles, 8 Johns. Rep. 328. Commonwealth *v.* Nutt, 1 Browne's Penn. Rep. 143. Ozanne *v.* Delile, 17 Martin's L'a Rep 32. Matter of Wollstonecraft, 4 Johns. Ch. Rep. 80. Creuze *v.* Hunter, 2 Cox's Cases, 242. De Manneville *v.* De

contract for himself, for several years. Canovar *v.* Cooper, 3 Barb. S. C. Rep. 115. Clinton *v.* York, 26 Maine R. 167 Stiles *v.* Granville, 6 Cushing, R. 458. Dennysville *v.* Trescott, 30 Maine, 470. Armstrong *v.* McDonald, 10 Barb. 300. Cloud *v.* Hamilton, 11 Humph. 104. The *prima facie* presumption of emancipation arising from the arrival at majority may be rebutted. Poultney *v.* Glover, 23 Verm. 328. And there may be complete emancipation, though the minor continue to reside with his father. McCloskey *v.* Cyphert, 27 Penn. State R. 220. And see Everett *v.* Sherfey, 1 Clarke, (Iowa,) 356. And it is no defence to a suit for wages by an infant, to whom his time has been given by his father, and hired with a knowledge of this fact on the part of the defendant, that the wages had been trusteed in a suit against the father. Bray *v.* Wheeler, 3 Wms. (29 Vt.) 514. And it was held in McCloskey *v.* Cyphert, 27 Penn. State R. 220, that crops and stock raised by an infant on a farm leased by him, could not be taken for the debts of his father.

[1] But he cannot resort to an action at law. Dowling *v.* Todd 26 Missouri, (5 Jones,) 267.

maintain trespass for a tort to an infant child, provided he can

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Manneville, 10 Vesey, 52. In the matter of Mitchell, R. M. Charlton's Geo. Rep. 494. *In re* Ann Lloyd, 3 Manning & Granger, 547, an illegitimate child, between eleven and twelve years of age, brought up on *habeas corpus*, being allowed to choose between her mother and putative father, elected to go to the latter. Though the Court of Chancery has jurisdiction to control the father's possession of his child, yet in England a court of common law has no such delegated authority. *Ex parte* Skinner, 9 Moore's Rep. 278. M'Clellan's case, 1 Dowl. Rep. 81. See, also, *infra*, pp. 220, 221. In the case of The King *v.* Greenhill, 4 Adolph. & Ellis, 624, it was held that *the father* was entitled to the custody of his legitimate children when they were too young to exercise a discretion as to their custody. The father's right is superior to that of the mother, unless it appears that the child would be exposed to cruelty or gross corruption. See the case of The People *v.* Mercein, 3 Hill, 399; to the same point, *infra*, p. 205, note. Upon *habeas corpus* the chancellor in England has the same jurisdiction as a judge, and has nothing to attend to but personal ill-usage to the child, as a ground for taking it from the father. But when there is a cause *in court*, other circumstances may be considered; and if the father cannot educate the child in a *manner suitable to the property given to it by another, the court will not permit the father to withhold from it that education;* and in a special case of the kind, chancery would not, on the father's application, withdraw a child from the custody of its aunt. Lyons *v.* Blenkin, 1 Jacob's Rep. 245 Lord Thurlow, in Powel *v.* Cleaver, 2 Bro. C. C. 510, S. P. Lord Cottenham, in Campbell *v.* Mackay, 2 Mylne & Craig, 31, expressed himself strongly on the injurious effects of a permanent residence of English minors abroad, and he would not allow an infant ward of the court to be removed out of the jurisdiction of the court, except in a case of imperative necessity. The New York Revised Statutes, vol. ii. pp. 148, 149, sec. 59, have authorized the Supreme Court to award a *habeas corpus* on behalf of the wife, when the husband and wife lived separate, without being divorced, and to dispose of the custody of minor children in sound discretion; and the chancellor or a judge may, upon *habeas corpus*, recover and dispose of any child detained by the Society of Shakers.[1] So in the case of a suit by the wife for divorce or separation, the court may, pending the suit, or at or after a final hearing, as occasion may require, make such order for the custody, care, and education of the children as may seem proper. The severity of the rule in the English courts of law, that the father has an absolute control over the custody of his infant child, however young, and in opposition to the wishes of the mother, and in destruction of her claim to the custody of the child, has been so strongly felt, that in 1837, Mr. Sergeant Talfourd introduced or proposed in Parliament a bill, to empower the lord chancellor and judges to make orders relating to the custody of infant children of tender age, in cases where the parents are living apart, upon the application of either parent, or on the return of a writ of *habeas corpus* issued at the instance of the father. In Ahrenfeldt *v.* Ahrenfeldt, before the assistant vice-chancellor of New York, 1 Hoffman's Ch. Rep 497, in a bill by the mother for a separation from her husband for abandonment, and a claim for the custody of her infant children, the court considered it to be the settled English law, that the father had the right to the custody

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[1] The People *v.* Pillow, 1 Sandf. Law Rep. 672. Curtis *v.* Curtis, 5 Gray, (Mass.) 535.

show a loss of service, for that is the gist of the action by the father. (*a*)[1]

(2.) *Of educating children.*

The education of children in a manner suitable to their station and calling, is another branch of parental duty, of imperfect obligation generally in the eye of the municipal law, but of very great importance to the welfare of the state. Without some

of his children, with the exception of very tender infancy, unless his conduct was such as to endanger the bodily or moral welfare of them, or any of them, and that the doctrine of the common law had been weakened, though not overthrown, in the United States.[2] In the case of Mercein *v.* The People, 25 Wendell, 64, it was decided, in the Court of Errors of New York, that as a general rule the father was entitled to the custody of his minor children, but that, if the parents lived apart under a voluntary separation, and the father had left the infant in custody of the mother, that custody would not be transferred to the father on *habeas corpus* when the infant was of tender age and sickly habit, and especially if the qualifications of the mother for the care were superior. The decision in the Supreme Court was, that the husband had the better title and paramount right to the custody of his minor children, in the absence of any positive disqualification on his part for the discharge of his parental duties, and the alienism of the husband was not such a disqualification. See, also, the case of The People *v.* Mercein, 3 Hill, 399, *infra*, p. 205, note.[3]

(*a*) Hall *v.* Hallander, 4 Barnew. & Cress. 660.

[1] If an infant child, residing with his father, though too young to render any service, receive such an injury as would give the child himself a right of action, the father, who is put to necessary expense in the care and cure of the child, may maintain an action for an indemnity. Dennis *v.* Clark, 2 Cush. 347. A parent at common law cannot maintain an action for the loss of service of his child against a corporation, by the carelessness of whose servants the child had been killed. Skinner *v.* The Housatonic R. R. Co. 1 Cush. (Mass.) R. 475. But see Ford *v.* Monroe, 20 Wend. R. 210. A late English statute gives damages in such a case. St. 9 and 10 Vict. ch. 93. There is a similar provision in the statutes of New York. Laws, 1847, ch 450, p. 575. Laws, 1849, p. 388, ch. 256.

[2] See S. C. 4 Sandf. Ch. R. 493.

[3] In Regina *v.* Smith, the father's right was recognized, notwithstanding his agreement that the child should remain with a relative. 16 E. L. & Eq. 221. See editors' note citing Mayne *v.* Baldwin, 1 Halst. Ch. 454. Pool *v.* Gott, 14 Law Rep. 269. In Illinois, the father's right is not regarded as paramount, where a divorce has been decreed for his fault. Miner *v.* Miner, 11 Ill. 43. By section seventh of the Act relative to Libels for Divorce, (Laws of 1855, c. 137,) it is enacted, in Massachusetts, that the happiness and welfare of the children shall determine the custody in which they shall be placed, and the respective rights of the parents shall, in the absence of misconduct, be regarded as equal. A mother, who has married a second time, has not an absolute right to the possession of a child by the former marriage. State *v.* Scott, 10 Fost. 274. And see State *v.* Stigall, 2 N. J. 286. Gishwiler *v.* Dodez, 4 Ohio State R. 615.

preparation made in youth for the sequel of life, children of all conditions would probably become idle and vicious when they grow up, either from the want of good instruction and habits, and the means of subsistence, or from want of rational and useful occupation. A parent who sends his son into the world uneducated, and without skill in any art or science, does a great injury to mankind, as well as to his own family, for he defrauds the community of a useful citizen, and bequeathes to it a nuisance. This parental duty is strongly and persuasively inculcated by the writers on natural law. (*a*) Solon was so deeply impressed with the force of the obligation, that he even excused the children of Athens from maintaining their parents, if they had neglected to train them up to some art or profession. (*b*) Several of the states of antiquity were too solicitous to form their youth for the various duties of civil life, even to entrust their education solely to the parent; but this, as in Crete and Sparta, was upon the principle, totally inadmissible in the modern civilized world, of the absorption of the individual in the body politic, and of his entire subjection to the despotism of the state.

Distinguished exertions have been made in several parts of modern Europe, and with which none of the educational institutions of antiquity are to be compared, for the introduction of elementary *instruction accessible to the young *196 of all classes. This has been the case, particularly in Denmark, Norway, Sweden, Prussia, some parts of Germany, and Switzerland. (*c*) The Austrian empire is distinguished for an organized system of popular instruction, under the late Emperor Francis, pervading all classes of the people. The university, the classic gymnasium, the commercial academy, and the primary village schools, with licensed normal teachers, in a main degree are gratuitously open to all. The entire supervision and control of the whole system resides in the govern-

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(*a*) Puffendorf, b. 4, ch. 11, sec. 5. Paley's Moral Philosophy, pp. 224, 225.

(*b*) Plutarch's Life of Solon.

(*c*) Norway and Sweden are highly educated countries in elementary learning, and their parish schools are universal and excellent. Laing's Norway, 444. Laing's Sweden, 425.

ment, which directs the course of instruction and the books; and no person is competent to hold any office, or exercise any calling, who has not been educated within the realm. Like Prussia, Austria offers education to all; but not like Prussia, she compels it upon none, except by indirect influence. She combines education with religious instruction, but allows Protestants and Jews to have their separate religious instruction upon very tolerant principles.(a) In this branch of political economy Scotland attained to early and honorable preëminence. In 1616, the Scotch parliament adopted incipient measures for settling and supporting a common school in each parish, at the expense of the heritors or landed proprietors. By the statute of 1633, the assessments for the support of the parochial schools were to be made by the heritors of the parish, and on their refusal, by the majority of the inhabitants. The statute of 1646 rendered the assessment compulsory on each parish, for the purpose of building a school-house, and electing and supporting the schoolmaster. Though this latter statute was repealed at the restoration of Charles II., it was reënacted by the Scottish parliament in 1696; and this excellent school establishment and plan of national instruction has had a propitious influence on the moral and enterprising character of the nation.(b) The establishment of common schools, and provision for the education and supply of competent teachers, in the Prussian dominions, by Frederick II., was surprisingly liberal, and shed lustre on his reign. He began the system in 1750, and some years afterwards directed, by ordinance, that a school should be kept in every village, and subsistence for the school and the master

(a) Mr. Turnbull, in his work on Austria, and which is one of the best English books extant on the social and political condition of Austria, says that three fifths of the juvenile population of the Austrian empire, with the exception of Hungary, actually receive scholastic instruction. And as the system of education is uniform, mild, essentially practical, free from excitement, and without the indulgence or permission of any daring speculation or vagaries, political or religious, it conduces, according to Mr. Turnbull, to form the most patient, mild, orderly, benevolent, and happy people on the face of the globe. See Turnbull's Austria, vol. ii. ch. 5, edit. London, 1840.

(b) Dr. Currie's Life of Burns, vol. i. App. No. 1, note a. This elegant writer says, that he gave his statement of the history of the Scottish laws upon "unquestionable authority."

raised by a school-tax levied on the lord of the village, and the tenants without distinction. The boys were to be sent from their sixth to their thirteenth year, whether the parents were able to pay the school-tax or not; and the parent or guardian was doubly taxed who neglected, without sufficient cause, to send his child or pupil. (*a*)

(*a*) Adams's Lectures on Silesia, 361–372. In the more recent and more general Prussian system of common schools, and coercive popular instruction, the duty of parents to send their children to school is enforced by law. Each commune or parish is bound to maintain at its own expense, an elementary or *primary school*, by providing a suitable salary to the schoolmaster, and a good school-house properly supplied with books and other means of instruction. Every town must support one or more *burgher schools* of a somewhat higher order. This interference of government in the institution of a system of coercive instruction in the common schools, was in use in Germany, Scotland, and New England, in the 17th century; and it has been found, by experience, that coercion, in some indirect way, at least, is necessary to insure the requisite education to the lower classes. The *gymnasia*, or *colleges*, in Prussia, are principally supported at the expense of the state. *Primary seminaries*, or normal schools, for the training of schoolmasters, are provided, and supported partly at the expense of the state, and partly at the expense of the departments.

Each commune has its superintending committee, of which the magistrates of the commune constitute a part. The law, under strong penalties, imposes upon parents the obligation of sending their children to school; and the law of 1819 is applied to all the ten provinces of the Prussian dominion. A large proportion of the regulations enforced by the law of 1819, were contained in the enactments of the date of 1718 and 1736; and this system of public instruction has elevated the German people to a high rank in the scale of intelligence. Many other states besides Prussia, such as Bavaria, Saxony, Hesse-Cassel, Saxe-Weimar, Nassau, Wurtemberg, and Baden, have followed the same coercive system; and through the exertions of *M. Cousin*, the distinguished French professor, the Prussian system of popular instruction, as digested by law in 1819, and especially the system of primary normal schools for educating schoolmasters, has been introduced, and essentially adopted in France, in the beginning of 1833. These normal schools have been found the most efficient means of raising the standard of primary instruction in Prussia, Austria, Bavaria, Holland, and Scotland. The former French law of 1816, on the same subject, was wanting in means to give it effect. *Rapport sur l'état de l'instruction publique dans quelques pays de l'Allemagne et particulièrement en Prusse, par M. Victor Cousin, Conseiller d'Etat, Professeur de Philosophie, Membre d'Institution, &c.* This report was translated into English by Sarah Austin, and published in New York in 1835. It was made to the minister of public instruction in 1831, and was followed by a supplementary report in 1833, affording fresh proofs of the prosperity of primary instruction in Prussia under the coercive system. The work, as translated, is deemed so highly valuable, that it has been, by the order of the legislature of some of the United States, distributed in the school districts at the public expense. In France, every commune is obliged to have a school; and it is stated that there are 28,196 communes which have school-houses, and only 8,991 which have not. But parents are not compelled in France, as in Germany, to

Great pains have been taken, and munificent and noble provisions made, in this country, to diffuse the means of knowledge,

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send their children to school, and the inhabitants of the rural districts very greatly neglect it. The plan of elementary schools in *Austrian Lombardy* was introduced from Austria in Germany, in 1821. It is compulsory, like that of Prussia. All male children, between six and twelve years of age, must attend the elementary Schools, or a fine is inflicted on the parents. The teachers receive salaries, and must have been trained in the normal schools. The elementary schools are vigorously superintended. In 1832 they amounted to 3,535, and of these 71 were normal schools; and the teachers, male and female, then amounted to 3,484, and the pupils, male and female, to 166,767, besides 22,112 children and youths taught in more private establishments. The pupils in the schools amounted to 1-12th of the population. If we add thereto the number of elementary schools and pupils in the *Austro-Venetian* provinces, which are of slower advance, the whole number of pupils throughout *Austrian Italy* amounted, in 1830, to 220,419, or 1-19th of the gross population. The amount has since considerably increased, for, in 1837, the local or elementary schools amounted to 4,531. Part of the expenses was defrayed by the communes, and the residue by the government. And with respect to the educational system in Prussia, Mr. Laing, in his remarks on the social and political state of continental Europe, (Notes of a Traveller, London, 1842,) observes that the intervention of the military system, and the want of free, social institutions and of parental control and influence in Prussia, counteract the goodness and value of the educational machinery, and leaves the people without just and elevated moral influences, and without active, rigorous, free, and independent personal exertions.

With respect to the condition of the common-school system of education in the neighboring English colonies in America, I would refer the student to the valuable work of George R. Young, Esq., of Halifax, Nova Scotia, "on Colonial Literature, Science, and Education." He has given a very instructive detail of the state of education in Lower and Upper Canada, Nova Scotia, New Brunswick, Newfoundland, and Prince Edward's Island. In regard to East Canada, there has not been any legislative provision, until recently, for popular education. Its educational endowments for colleges and seminaries were owing to the liberality and zeal of the Catholic Church, and they have been munificent, and the course of education in them has been well conducted under accomplished teachers. Though they are Catholic institutions, Catholics and Protestants are admitted in the best of them indiscriminately, and no attempts made to convert the youth. They are institutions for the teaching of the higher branches of literature and science. Efforts have recently been made for the endowment of a high school as well as a Protestant college at Montreal. In 1841 there was an act of the united legislatures of East and West Canada for the establishment, endowment, and support of common schools throughout the United Province, for children from five to sixteen years of age. This statute requires local assessments on the school districts in aid of the public funds, and it is considered by Mr. Young as opening a new era in Canada, and laying the foundation of popular education. It contains no provision for the religious instruction of the scholar, and is so far radically defective, but it enables the minority of every parish professing a religion with different from that of the majority, to have separate trustees and schools, subject to the general visitation and rules provided by statute, and to receive their due portion of the moneys appropriated by law or raised by assessment. The new act has been

and to render ordinary instruction accessible to all. (a) Several of the states have made the maintenance of public schools an

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acted upon in West, but is inoperative in East Canada, because the French have declined to organize the districts according to the system. The insuperable difficulty in Lower Canada is the hostile division of the two races, French and English. They are to most intents and purposes two separate nations, with intense hatred of each other, and the French common people are in most deplorable ignorance. Young on Colonial Literature, &c., vol. i. pp. 179-221. Upper, or West Canada, has highly respectable collegiate institutions, but their district and common-school system is far from flourishing.

In Nova Scotia, the system of grammar and common schools is established and supported by funds from the treasury and by parents, and raised from the parishes. The system has, by several statutes in 1832, 1836, and 1841, been placed under the management of a board of commissioners, but it is not sufficiently vigorous, and a great number of children are left without any education. The great objection to the institution is the inadequacy of the funds, the absence of all religious instruction, the want of proper school-books, and the want of coercion, instead of the principle of voluntary assessments. Halifax has its schools for the higher classes, and its schools for the common people of all degrees, and they are well conducted and duly appreciated. New Brunswick has the same defective system, though the most praiseworthy efforts have been made on the part of the executive government to improve the laws and regulations on the subject, by the introduction of the use of the Bible, and of normal and industrial schools. One serious difficulty in the colonies arises from the Catholic population being opposed to the use of the Bible in schools, and the Protestant being adverse to the system without it.

(a) It has been uniformly a part of the *land system* of the United States to provide for public schools. By the ordinances of Congress, under the articles of confederation of May 20th, 1785, and of July 13th, 1787, respecting the territory of the United States northwest of the river Ohio; and by the Acts of Congress of March 30th, 1802, ch. 40, and of March 3d, 1803, ch. 74, for the admission of Ohio; and the Act of April 19th, 1816, ch. 57, for the admission of Indiana; and the Act of April 18th, 1818, ch. 62, for the admission of Illinois; and the Act of March 6th, 1820, ch. 20, for the admission of Missouri into the Union, it was made a specific condition, among other things, that a section of each township should be permanently applied for the use of public schools. So, the Act of February 15th, 1811, ch. 81, relative to the territory of Louisiana, and the Act of March 3d, 1823, ch. 28, relative to the territory of Florida; and the Act of June 23d, 1836, ch. 120, relative to the admission of Arkansas into the Union, all provided for the appropriation of lands in each township for the use of public schools. The elevated policy of the federal government, (and which applied equally to public roads and highways,) as one of our American statesmen (Mr. Cushing) has justly observed, was "a noble and beautiful idea of providing wise institutions for the unborn millions of the West; of anticipating their good by a sort of parental providence; and of associating together the social and the territoral development of the people, by incorporating these provisions with the land-titles derived from the public domain, and making school reservations and road reservations essential parts of that policy."

article in their constitutions. (*a*) In New England it has been a steady and governing principle, from the very foundation of the colonies, that it was the right and duty of government to provide, by means of fair and just taxation, for the instruction of all the youth in the elements of learning, morals, and religion. Each town and parish was obliged, by law, to maintain an English school a considerable portion of the year, and the school was under the superintendence of the public authority, and the poorest children in the country had access to these schools. (*b*) Selectmen in each town were to see that in every family, children and apprentices were taught to read, and taught a knowledge of the capital laws, and were catechized weekly. In Massachusetts, by statute, in 1647, each town, consisting of fifty householders, was directed to maintain a school to teach their children to read and write; and every town of one hundred families was to maintain a grammar-school to fit youth for the college. (*c*) The common schools in Massachusetts have been kept up to this day, by direct tax and individual subscription, and nowhere, in a population of equal extent, has common ele-

(*a*) The states of Maine, Massachusetts, Vermont, Connecticut, New York, Pennsylvania, Indiana, Michigan, Tennessee, Arkansas, and Alabama.

(*b*) Common schools for each town were instituted in Massachusetts in the early settlement of the colony, and the general instruction of children was made a public charge and duty. The colony, as the United States have since done, incorporated public instruction and improvement with their land-titles; and in assigning townships to settlers, it was the practice to reserve one lot for schools and another for parochial uses. The first legal provision for enforcing this duty, and sustaining the system of common schools, was in 1647; and Massachusetts has the honor of taking the lead, in this country, in this great and wise policy. Winthrop's History of New England, vol. ii. p. 215. This compulsory system upon parents and masters to teach their children and servants to read, and to give them some knowledge of the Scriptures, and of the capital laws, and to bring them up in some lawful employment, was enforced by fine in Massachusetts, by the Act of 1642, and in the Plymouth Colony Laws, 1671. Brigham's edit. 1836, p. 270. The *compulsory system* of supporting common and grammar schools in each town is sustained to this day in Massachusetts, and enforced by indictment. In 1818, the inhabitants of the town of Dedham were indicted, tried, and convicted under a statute of 1789, of the offence of neglecting for a year to keep and support a *grammar-school* to instruct children in the Greek, Latin, and English languages. 16 Mass. Rep. 141.

(*c*) See Statutes of Massachusetts published in 1675. The Plymouth Colony Laws confined the necessity of the Latin school to the county towns. See Plymouth Colony Laws, edit. 1836, p. 300.

mentary education been more universally diffused. In the early history of Connecticut we meet with similar provident provisions for the maintenance of public schools. In the colony of New Haven, in 1656, and in the colony of Connecticut, in the years 1650, 1672, 1677, 1690, and 1700, laws were enacted for the establishment and maintenance of common schools; and in that last year, their common schools were placed upon a permanent foundation. (a)

The state of Connecticut has a very large school fund, which was first created in 1795, and which has been economically and judiciously managed, and appropriated essentially to the support of common schools; and ordinary education is so far enforced in that state, that if parents will not teach their children the elements of knowledge, by causing them to read the English tongue well, and to know the laws against capital offences, the selectmen of the town are enjoined to take the children from such parents, and bind them out to proper masters, to be taught

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(a) Trumbull's History of Connecticut, vol. i. p. 303. N. A. Review, N. S. vol. vii. pp. 380, 381. Pitkin's History of the United States, vol. i. p. 151. Revised Statutes of Connecticut, 1821, p. 397, note. One of the early statutes of Connecticut, in 1650, contained in the revised code of 1702, p. 16, declared, that "the education of children was of singular behoof and benefit to any people;" and it was made a duty in the selectmen and grand-jurymen of the several towns, to see and enforce the law that all children and apprentices were taught to read the English tongue, with a knowledge of the capital laws. They were also, in each town of one hundred families, to maintain a grammar-school, to instruct youths for the university. By the law of 1677, each county town was bound to keep and maintain a Latin school. The statutes were preserved in force through the subsequent history of that colony, and by *capital laws* was meant the criminal code, so far as related to crimes punishable with death. Every town of 70 householders was to be constantly provided with a sufficient schoolmaster to teach children to read and write; and schoolmasters were maintained by a public tax. Statute Laws of Connecticut, 1784, p. 215. The digest of the system of school societies and common schools, in 1821, declared that all parents, and those who have the care of children, were bound to bring them up to some honest and lawful calling or employment, and to have them taught to read and write, and cipher, as far as the first four rules of arithmetic. Revised Statutes of Connecticut, 1821, pp. 107, 396. Pennsylvania went further than the New England Colonies as to teaching the laws, for one of its earliest provincial acts declared, that the laws of the province "should be one of the books taught in the schools of the province." Such a provision, however, could only be practicable in the early state of society, when the statute laws were few and simple. It would be idle and absurd to introduce as text-books into our common schools, if not into our academies, the bulky and complicated statute codes.

some useful employment, and to read and write, and the rules of arithmetic necessary to transact ordinary business. (*a*)

(*a*) During the twenty-seven years that Chief Justice Reeves was in extensive practice in Connecticut as a lawyer, he informs us, he never met with but one person in that state who could not write. The Connecticut school fund is, by the constitution of that state, declared to be inviolate and perpetual. In 1831, it amounted to $1,902,057, yielding a yearly income of $78,074. The whole number of scholars was 85,000; and as the entire population was short of 300,000 souls, this public charitable fund for the support of the common schools, when considered in the ratio of the population, was, in point of extent, without a parallel. But a good judge and zealous writer on this subject, Mr. J. Orville Taylor, author of the valuable treatise entitled "The District School," is of opinion that the Connecticut school fund has operated injuriously, by reason of its very magnitude. It does too much for the people, or it does not do enough. It damps all individual effort for the common schools, and the establishment cannot do without individual effort. It defrays the expense of the district schools for six months in the year, and then for the residue of the year the common schools are sadly neglected, and the school-houses closed. See his Preface to the American edition of M. Cousin's Report on Public Instruction in Prussia. Every provision of the kind must undoubtedly be pernicious, if it extinguishes stimulus, and leaves the inhabitants contented with the provision, and careless and indifferent to all further exertion.

We learn, from the Report of Seth P. Beers, Esq., the commissioner of the Connecticut school fund, made to the legislature in May, 1839, that the capital of the state school fund amounted in April, 1838, to $2,028,531; and the number of children between four and sixteen years of age, returned to the comptroller in 1838, from 211 school societies, was 83,977; and the dividends from the school fund, for the year ending March, 1839, was $104,906, being $1 25 to each child. In addition to this annual distribution, there was society and local school funds — town deposit fund — school society tax — district tax — and the tax on parents of children attending school. These subordinate funds are stated by other authority to amount to another million of dollars, and of which the town deposit fund has a capital of $764,670. But the system of common schools, so beautiful in theory, was in no correspondent degree efficient in practice. The report of the Board of Commissioners of Common Schools, instituted in 1838, and made to the legislature of Connecticut in May, 1839, was accompanied by the report to that board, of Henry Barnard, second secretary to the board, containing a laborious and thorough examination of the condition of the common schools in every part of the state. It is a bold and startling document, founded on the most pains-taking and critical inquiry, and contains a minute, accurate, comprehensive, and instructive exhibition of the practical condition and operation of the common-school system of education.

In pointing out the defects in the organization and administration of the school system, his object was to have them met and removed, and to establish a higher and more vigorous standard in the education and examination of teachers. He stated that the school system had fallen into feeble and irregular action, and a wide-spread apathy prevailed in regard to the condition and prospects of common schools; that the reliance on the public funds had led to the almost entire abandonment of property taxation; that private schools, supported by men of property, had operated most injuriously to the public schools, by reducing their means, drawing away the best teachers and the

Massachusetts had not, until recently, any permanent school fund, yet liberal donations were made for the support of gram-

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best patronage, and leading to the abandonment of all interest in them by some of the most intelligent families, that there were not less than 10,000 children under sixteen in private schools, at an aggregate expense of not less than $200,000 for tuition alone, and more than was paid for teachers' wages in all the public schools of the state. This alarming fact was conclusive evidence of the low condition of the common schools, and tended to degrade them into the character of charity schools — that those parents who abandon the patronage of common schools, avoid thereby all the expense of supporting them beyond the avails of the public money — that the distribution of the school fund dividends had not been in a way to excite local exertion, as was the policy in the states of New York, Ohio, and Pennsylvania — that there were 211 school societies, and 1700 school districts in the state, and yet in ten of the largest of the school societies, not above twelve persons attend to the election of school officers, though these societies include 10,000 electors, who voted at the state election — that there was a non-attendance of the proper children of the common schools to 17,000, and it was a frightful fact, showing the want of general interest in those institutions — that in the cities and populous districts, school money was drawn on nearly twice the number of children who attended the public schools — that more than one eighth of all the children are sent to private schools, and one sixth of all the children are in no school, public or private — that the school districts were injuriously multiplied, and school-houses generally badly built, badly arranged, and badly located; — that the great defects of the system, and the inadequate compensation to teachers, and their short time of employment in the year, and the forbidding and discouraging circumstances against the entrance of competent teachers into common schools, and the great inducements to enter private schools and academies, especially to female teachers, have contributed to this degradation of common schools. He proposed that one half of the dividends of the school fund should be proportioned to the amount of money raised by the school societies, or to the number of children, and their actual attendance for any given period. He further proposed that the expense of the schools should be made to fall, not exclusively upon those who send their children, but upon the property of the school society or town; — he stated that the great instrumentality to the prosperity of the common school system was *good teachers*, and they could be procured only by education for the very employment, and by higher wages; — he urged that a seminary for teachers, especially for females, with a model school annexed, ought to be endowed by the state and private contributions; and he pressed, in an animated manner, the necessity of the establishment of normal schools for the education of teachers, male and female, qualified to conduct the schools; and he held out the example of the efforts, not only in Prussia, Austria, Bavaria, Holland, France, and Scotland, but of New York, Massachusetts, Ohio, and Pennsylvania, as well worthy of imitation.

The above report was so impressive, that it led, in 1839, to further legislative provisions "concerning schools;" and in the annual reports of the commissioners of common schools, and of the secretary of the board, in May, 1840, it appears that the spirit of improvement in the system of common schools, and attention to their support, have been sensibly excited. This is encouraging information; we cannot rely entirely on the efficacy of compulsory legislation, respecting the education of children, though the voluntary system, if left to itself, will not be sufficient, and will absolutely fail. Common-school establishments and education ought to rest in part upon local assessment,

mar-schools, ordained by law in every town of the state of a certain size; and common schools in each town were supported by a town tax, required by law to be raised. In 1834, provision was made by law for a permanent school fund, to be limited to a million of dollars. (a) Further efforts were made by law in

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and to be sustained and enforced by law, according to the New England policy. That which costs nothing, is lightly esteemed, and people generally will not take or feel much interest in the welfare of common schools, unless they are taxed for their support. The essential means of success are the zealous coöperation of parents, with good teachers, well educated for the purpose, and with good books. The object of popular education should be to improve, not only the intellectual but the moral condition of the children; for knowledge, without practical morality, leads to evil. The teachings on this latter subject should rest for their basis on the Bible, as containing the only solid foundation of religious belief. Since the last edition of these commentaries, I have examined the Connecticut Common School Journal, published under the direction of the board of commissioners of common schools, at Hartford, between 1839 and 1842, in four volumes; and also the third and fourth annual reports of the board of commissioners of common schools in Connecticut; and also the several reports of Henry Barnard, Esq., secretary of the board, the most able, efficient, and best informed officer that could, perhaps, be engaged in the service, and the pamphlets from the same source, on *school-house architecture, and on legal provision respecting the education and employment of children in factories*, &c. They contain a digest of the fullest and most valuable information that is readily to be obtained on the subject of common schools, both in Europe and the United States. It would be unsuitable, in a work of this kind, to go further into the subject than I have already, or undertake any detail of that mass of information, and I can only refer to those documents, with the highest opinion of their merit and value.[1]

(a) The Massachusetts laws concerning common schools were redigested in 1826, and incorporated in the Revised Statutes in 1836. In 1836, there were in Massachusetts, 2,517 school districts, and 4,970 male and female teachers; and 146,369 children,

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[1] By the Revised Statutes of Conn. 1849, tit. 7, ch. 4, secs. 22 and 23, it is made obligatory on parents, &c., to cause their children to be instructed "in reading, writing, English grammar, geography, and the elements of arithmetic," and to be brought up to some honest calling; and in case of their neglect, the selectmen of the town, with the advice of a justice of the peace, may take the children from their parents, &c., and bind them to some proper master. By section 24, "stubborn children, refusing to obey their parents or masters, may be committed, by justices of the peace, on complaint and due inquiry, to the house of correction for a time not exceeding thirty days." Section 25 provides that no child, under fifteen years, shall be employed to labor in any business, unless he shall have attended a competent school during three months of the preceding year.

There is a similar provision to the last section, in supplement to the Rev. Stat. of Massachusetts, ch. 220, 1849.

In New Hampshire, no child, under fifteen years, shall be employed in any manufacturing establishment, unless he shall have attended some competent school twelve weeks of the preceding year; if under twelve years, the child must have so attended school six months. Laws of New Hampshire, 1848, ch. 622.

Massachusetts, in 1837 and 1838, to elevate the standard of common-school education, by the establishment of a board of education, and the gradual formation of district-school libraries. (*a*) In 1842, pecuniary provision was made in Massachusetts by law, for three years, for the support of normal schools, under the direction of the board of education, and also an appropriation was made from the school fund, to be expended in books for the school-district libraries. Common schools are established throughout all the New England states, and they are supported by a town tax, together with some auxiliary legislative provisions and permanent funds. It is computed, that in the six New England states, there are not less than half a million of children who receive elementary instruction yearly in the common schools.

The legislature of New Jersey, by statutes in 1816, 1817, 1818, 1819, 1821, and 1828, made provision for the establishment and gradual increase of a fund for the support of free schools; and in 1838, they organized and reduced to practice the system of common schools. The trustees of the school fund (and which, in 1835, amounted to $344,000) were directed to appropriate annually, out of the income of that fund, $30,000 for the support of public schools, and the same was to be apportioned among the counties and towns in a ratio to their tax-list. The school committee in each town were to divide the same into school districts, and trustees for the several districts were to be chosen to carry the law into effect. The money for each school district was to be apportioned in the ratio of the number of children between five and sixteen years of age, and the moneys might be appropriated for building, renting, and repairing school-

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between four and sixteen years of age, attended in that year. The *common* schools were supported by a *tax* levied by the towns and cities respectively, amounting to $391,993, and by *voluntary* contributions, to $47,953. The towns had also, all of them, their share of the $20,000 interest of the *state school fund*. And in addition to all this, the amount of tuition in *private* schools and academies was estimated for that year at $326,642, and the number of scholars attending those latter institutions was rated at 28,752. Bigelow's Abstract for 1836. In 1839, the Massachusetts school fund amounted to $437,592.

(*a*) The necessity of better educated teachers, and of a more thorough moral education, and of a deeper interest being taken in the success of common schools, was eloquently enforced in the North American Review for October, 1838, art. 1.

rooms, purchasing fuel, furniture, and books, and paying teachers. Each town was authorized, at its annual town-meeting, to raise by tax such further sum, not exceeding twice the amount received from the school fund, as might be deemed proper for the support of public schools. (*a*)

This is a feeble system, inasmuch as it leaves the annuity to be appropriated to buildings, fuel, &c., which the school districts or town should supply out of their own resources, and by which the compensation to competent teachers must greatly suffer; and it makes no provision for the education of teachers, and creates no compulsory duty upon the towns to raise, by taxation, moneys in aid of the school fund, but leaves the schools to rest upon this provision. The colony law of East New Jersey, in 1693, was at least as efficient, when it authorized each town to establish and levy a rate for the maintenance of a schoolmaster. These defects in the New Jersey system are noticed and urged in the annual report of the trustees for 1839. But by the constitution of New Jersey, in 1844, the funds for the support of free schools, and all moneys received therefor, shall be a perpetual fund, and the legislature is forbidden to divert it under any pretence.

The first eminent lawgiver of Pennsylvania took care to incorporate with the frame of government prepared for that province in 1682, the important truth, "that men of wisdom and virtue were requisite to preserve a good constitution, and that these qualities did not descend with worldly inheritance, but were to be carefully propagated by a virtuous education of youth." A law was passed a very few years after the colonists under William Penn first landed upon the soil, declaring that "instruction in good and commendable learning is to be preferred before wealth." And the law enjoined it as a duty upon the several county courts, to see that all the children in the province were instructed in reading and writing, so that they might be able, at least, to read the Scriptures; and it imposed a penalty of £5 upon every parent, guardian, or overseer, of sufficient estate and ability, for every child not thus educated. This compulsory provision was afterwards departed from, but how it happened we

(*a*) Elmer's Digest, 497–502.

cannot now ascertain. (*a*) The present constitution of Pennsylvania enjoins it upon the legislature as a duty, to provide by law for the establishment of schools throughout the state, and in such manner that the poor may be taught *gratis*. In 1831, the legislature established a school fund, with the means of its progressive enlargement, and the interest, when amounting to $100,000 annually, was to be applied to the support of common schools. In 1838, there were about 230,000 children in the common schools, which were kept open about seven months in the year. The state appropriation for schools in 1829, was $350,000, and a like sum was to be raised by taxes, in 840 school districts. (*b*)

The state of Ohio, in 1825, commenced the establishment of a system of free schools, and lands to the estimated amount of half a million of acres had been previously set apart for that purpose. (*c*) In 1839, the Ohio school fund amounted to $1,424,175. In Maryland, a law in favor of primary schools was passed in 1825, and the fund provided for that purpose amounted, in 1831, to $142,663. In 1796, the legislature of Virginia made provision for the establishment and support of elementary schools for all children, rich and poor, and a similar plan was adopted by the legislature in 1816, and the system was enlarged in 1820; but it was not a compulsory system, though it was said by a competent judge to be, in 1836, in a course of experiment that promised success. (*d*) In South Carolina there were, in 1829, 513 free schools, and $37,000 appropriated to them. (*e*) In the states of Indiana, Illinois, Missouri, Ken-

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(*a*) Wharton's Discourse before the Alumni of the University of Pennsylvania, 1836.

(*b*) See, in Purdon's Digest, 289–300, the various statute provisions in Pennsylvania for the general system of common schools, and for the common-school fund, and for the education of the poor.

(*c*) Statute Laws of Ohio, 1829, 1838. Professor Stowe was employed by the legislature of Ohio to visit Europe, and examine its educational institutions; and his report, in 1839, of the results of his mission to England, Scotland, France, Prussia, and several states of Germany, is very instructive and excellent on the subject of common and normal schools.

(*d*) Dr. Tucker, in his Life of Jefferson, vol. i.

(*e*) American Jurist, No. 4, p. 393. Jefferson's Writings, vol. i. 39. American Jurist, No. 11.

tucky, Tennessee, Mississippi, Louisiana, Georgia, and *197 Alabama, there are * funds either provided, or in preparation for common schools, and for the organization and government of them in every local district. In Georgia, by statute in 1821, half a million of dollars were appropriated as a school fund, one half for the support of free schools, and the other half to endow county academies. In 1836, one third of the surplus fund derived from the United States was added to the school fund, and a committee was appointed by the legislature to digest and report a plan of common-school education, adapted to the people of the state. The former system had been extremely imperfect and miserably executed. (*a*) In Kentucky, the system was understood to be prosperous, and in 1830 there were upwards of 30,000 children taught in the common schools, and in 1839 the annual income of the school fund was $50,000. The constitution of Tennessee, in 1835, declared that the common-school fund, and all property appropriated for that object, should be a perpetual fund, never to be diverted to any other use than the support and encouragement of common schools. A succession of statutes have created, enlarged, and nourished the common-school fund in that state. (*b*) So the constitution of Michigan, in 1835, enforced the duty which had been partly anticipated by the statute of April 18, 1833, providing for the laying out of school districts in each town, and the assessment of taxes for the erection of school-houses. But the act was no further compulsory, and yet we may look for effectual support and success to the cause of popular education in that state; for the university of Michigan is said, by the learned and elegant historian of that state, (*c*) to be founded on a wider scale, and with a more liberal endowment, than any other on this side of the Atlantic.

(*a*) Prince's Dig. 2d edit. pp. 19, 26, 27, 29. For the various and successive statutes making provision and establishing funds for free schools and academies, and for literary and charitable institutions in Georgia, see the Codification of the Statute Law of Georgia, by W. A. Hotchkiss, 1845, tit. 3, ch. 6, 7.

(*b*) Statute Laws of Tennessee, edit. 1836, pp. 168–175. See, in the case of the Governor, &c. *v.* McEwen, 5 Humphrey's Tenn. R. 241, the legislative effort to give security to the common-school fund.

(*c*) History of Michigan, by James H. Lanman, 1839, p. 247.

In Indiana, a provisional act, relative to schools in the congressional townships, was passed in 1838, and *the *198 acts of 1832 and 1835 contained provisions for the encouragement of common schools and county seminaries. (a) The capital of the school fund was stated to be, in 1839, two millions of dollars. In Mississippi, by a series of statutes, common schools in each town of the state are directed to be established by the trustees of school lands, reserved in each township, and the trustees are chosen by the resident heads of families in each township. (b)

From this brief and imperfect review of some of the most important state institutions on the subject, it would appear that the establishment of permanent school funds, and the zealous and efficient support of common schools was an increasing and favorite policy throughout the United States, and special provision for the education of common teachers was a matter of general interest and attention. (c)

(a) Revised Statutes of Indiana, 1838, pp. 509, 546, 547, 558.

(b) Laws of Mississippi, edit. 1839, by Alden & Vanhoesen, pp. 376–381.

(c) An excellent summary of the public provision made for the support of common schools in the United States, and one full in details of the existing system in each state, as it existed in 1834, is to be found, where we should not naturally have expected to find it, in the Appendix to Mr. Crawford's Report on the Penitentiaries of the United States, published in London, by order of government, during the year 1835. His reflections upon the value and defects of the system in each state are free and judicious. A bill for the general education of the poor, by the establishment of common schools, was introduced into the British Parliament, in 1820, by Mr. Brougham; and it appeared, from the estimate made in the House of Commons, that a large proportion of the children of England requiring common education were without its benefits. The bill was not acted upon, though supported with his customary zeal and ability by that distinguished statesman (Annual Register for 1820, part 1, pp. 49–56.) In 1829, it was estimated that there was not less than a million and a half of the children of the humbler classes in England receiving instruction from the endowed and the unendowed schools, and the Sunday schools. In 1833, the business of popular education was taken up in the British Parliament, and £20,000 voted in aid of it, for the erection of school-houses; and no aid was to be afforded, till one half of the estimated expense was raised by private contribution. It was found that private liberality outstripped that of Parliament, and 98 new school-houses were erected within the year. In May, 1835, Lord Brougham pressed again upon Parliament the necessity of further and more adequate provision for common schools, and he considered that the means of elementary instruction were greatly deficient. He introduced resolutions, declaring that seminaries, where good schoolmasters might be trained, ought to be established, and infant schools ought to be encouraged, yet not so as to relax the efforts of private beneficence, or to discourage the poorer classes of the people from contributing

*199 The laws of New York on this subject require a more particular consideration. They were formerly exceedingly deficient, and there was no legal provision for the establishment of town schools for the common education of children, except the very unimportant authority given to the overseers of the poor, and two justices, to bind out poor children as apprentices, according to their degree and ability, and the obligation imposed upon their masters to teach them to read and write. But since the year 1795, a more liberal and enlightened spirit has adorned its domestic annals, and from that era we date the commencement of a great and spirited effort on the part of government to encourage common schools throughout the state. The annual sum of $50,000 was appropriated for five years, and distributed equally among the several towns, for the establishment and encouragement of schools, for teaching children the most useful and necessary branches of a good English education. A sum equal to one half of the sum granted by the state to each town, was directed to be raised by each town during the same period, for an additional aid to the schools.(a) In 1805, a permanent fund for the support of common schools was first provided, (b) and it was enlarged by subsequent legislative appropriations. (c) An increasing anxiety for the growth, security, and application of the fund, and a deep sense of *200 its *value and importance, were constantly felt. In 1811, the legislature (d) took measures for a preparation and

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to the costs of educating their own children. In 1837, Lord Brougham introduced into the House of Lords his education bill, providing for an education department of the state, having the general superintendence of education. England was, at that time, in point of general education, far behind Germany. The introduction and prosperous establishment of common schools, by the Christian missionaries, in the South Sea Islands, and especially in the Sandwich Islands, within the last few years, is a fact deeply interesting. The rapid transformation of the natives of those islands from being savages and heathens, in 1820, to, in 1830, a civilized and Christian people, is very remarkable, and reflects honor, not only on the mild and teachable disposition of the natives, but also on the diligence, discretion, fidelity, and zeal with which the missionaries have devoted themselves to fulfil the purposes of their trust.

(a) Act of 9th April, 1795, ch. 75, entitled "An Act for the Encouragement of Schools."

(b) Act of April 2d, 1805, ch. 66.

(c) Act of March 13th, 1807, ch. 32.

(d) Act of April 9th, 1811, ch. 246, sec. 54.

digest of a system for the organization and establishment of common schools, and the distribution of the interest of the school fund. In 1812 (*a*) the present system was established, under the direction of an officer known as the superintendent of common schools. The interest of the school fund was directed to be annually distributed among the several towns in a ratio to their population, provided the towns should raise a sum equal to their proportion, by a tax upon themselves. Each town was directed to be divided into school districts, and town commissioners and school inspectors were directed to be chosen, and the children who had access to these schools were to be between the ages of five and fifteen years.

This system, thus established, has prospered to a surprising degree. In 1821 the fund distributed was $80,000, in addition to a like sum, which was raised by taxation, in the several school districts, and applied in the same way, and the secretary of state was declared to be *ex officio* superintendent of common schools. In 1823 there were 7,382 school districts, and consequently as many common schools; and upwards of 400,000 children, or more than one fourth of the entire population of the state, were instructed in these common schools. The sum of $182,000 and upwards was expended in that year from the permanent school fund, and the moneys raised by town taxes for that purpose in the support of common schools. The general and local fund, according to the report of the superintendent of common schools of the 8th of January, 1824, amounted to $1,637,000; and it has since been in a course of progressive enlargement.

According to the annual report of the superintendent of common schools made in January, 1831, there were in the state 9,062 district schools, in which were taught, during the year 1830, 499,429 children between five and sixteen years *of age; and the general average of instruction was for *201 the period of eight months. The sum appropriated among the common schools, in the year 1830, was $239,713, of which $100,000 was derived from the state treasury, and the residue was raised from taxes upon the towns, and from local funds.

(*a*) Act of June 19th, 1812, ch. 242.

The instruction is probably very scanty in many of the schools, from the want of school-books and good teachers; but the elements of knowledge are taught, and the foundations of learning are laid. (a) The school fund is solid and durable;

(a) On the 1st of January, 1835, there were 10,132 school districts in the state, and 541,401 children, between the ages of five and sixteen, were taught, in 1834, in the common schools. The sum of $732,059 (with the exception of a few thousand dollars expended in the city of New York upon school-houses) was paid, in 1834, to teachers for their wages; and, of that sum, $312,181 was distributed to the common schools from public funds, and the residue was contributed by the inhabitants. The surplus revenue of the literature fund is directed by law to be distributed by the regents of the university among the incorporated academies under their care, (of which there were. in 1833, 67, with 5,506 students,) for the education of common-school teachers. It was computed that $3,000 would be annually applied for that object. In 1845, the capital of the school fund was $2,646,453. The revenue distributed was $275,000, and with a like sum raised by taxation, amounted to $550,000. The number of organized schools was 11,018. Number of children between the age of 5 and 16, was 690,914. The capital of the literature fund was, in 1839, $268,164, yielding a revenue of $48,109, and placed at the disposal of the regents of the university, to pay tutors in the academies, and for instructing teachers of common schools.

It is computed that the state employs, annually, 10,000 common-school teachers; and the legislature, in 1835, made provisions to facilitate the education of common-school teachers, in the establishment of school-district libraries, and furnishing each school with the report of the regents of the university, on the education of the teachers. Laws of New York, 1835, ch. 34 and 80.

In 1838, great improvements were made by New York in the enlargement and efficiency of the system of popular education. The governor, in his annual message to the legislature, recommended the subject to their consideration in a forcible and enlightened manner; and the report of a committee of the house of assembly contained a liberal and comprehensive plan of improvement, which was carried essentially into effect by the Act of April 17th, 1838, ch. 237. It directed that the share of the state in the surplus revenue of the United States, under the Act of Congress of June 23d, 1836, should be wholly applied to the purposes of education. $110,000 thereof were to be annually distributed to the support of common schools, but upon the condition that, to entitle the general school districts to their share of the common-school fund, and of the surplus fund coming from the United States, each school district was to maintain a school taught by a qualified teacher for four months in each year. The further sum of $55,000 was to be appropriated by the trustees of the school districts for three years, (and which was enlarged by the Act of 1839, ch. 177, to five years,) for the purpose of a district library, and after that time, either for a library or for the payment of teacher's wages, in the discretion of the school districts. Five thousand dollars were also appropriated for five years, and until otherwise directed by law, to Geneva College; and the like sum for the like period to the University in New York, for the payment of professors and teachers; and $3,000 for the like period and purpose to Hamilton College; and the further sum of $28,000 of the like surplus to the literature fund, and which, with the $12,000 of the then existing literature fund, was directed to be annually distributed by the regents among the academies and incorpora-

and it is placed under the guaranty of the constitution, which

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ted schools, subject to their visitation; but the latter grant was upon the condition that a suitable building for each academy was erected and finished, and a suitable library and philosophical apparatus furnished, and a proper preceptor employed, and the whole to be of the value of at least $2,500; and it was further provided, that every academy so receiving a sum equal to $700 a year, should maintain a department for the instruction of common-school teachers. The residue of the income was to be annually added to the capital of the common-school fund, and duly invested. In 1839, further provision was made, that whenever the supervisors of any county should omit in any year to raise by tax a sum equal to that apportioned to the towns of the county under the common-school system, by the superintendent of common schools, the school moneys appropriated for such county should be withheld, or so much of that proportion as the county should not raise. The superintendent was to appoint visitors for the common schools of the counties, and at the request of the trustees to select the library, and provision was made for the use and preservation of the books of school-district libraries. Act of April 15th, 1839, ch. 177, and May 3d, 1839, ch. 330. These wise and enlightened provisions do great honor to the educational policy of New York. A plan of local supervision, through the agency of county and town superintendents, has been found most efficient towards the success of the common-school system. In 1839, more than 100,000 volumes of useful books were disseminated through the 10,000 school districts in New York. In the governor's message to the legislature of New York, in January, 1842, it was stated that the productive capital of the common-school fund was $2,036,625; and that there were 10,886 school districts and libraries, with an aggregate amount of 630,000 volumes; and that the whole capital permanently invested for the support of education, including the literary and common-school fund, the endowments of colleges and the value of school edifices, was ten and a half millions of dollars. But facts are not quite in accordance with the splendid vision, on paper, of the New York common-school system. In the report of Mr. Young, the secretary of state, in January, 1843, (and he is, *ex officio*, superintendent of common schools,) he is of opinion that the school districts have been needlessly multiplied and divided—that more than one half of the children residing in the school districts were irregular and uncertain attendants—that it was bad policy to distribute the proceeds of the school fund in proportion to the number of children *residing* within each district limits, instead of making the distribution according to the time the children are in *actual* attendance—that of the 7,534 school-houses under the system, only 4,000 were in good repair, and the rest unfit for use. The legislature of New York, by the Act of May, 1844, ch. 311, established a normal school in the county of Albany, "for the instruction and practice of teachers of common schools in the science of education, and in the art of teaching," and $10,000 were to be annually appropriated for that purpose. And in the New York Revised Statutes, vol. i. 3d edition, under the head of "public instruction," there is a well-digested code in detail of the establishment, organization, government, powers, and funds of the colleges, academies, select schools, normal schools, common schools, school districts, and libraries, which have from time to time been wisely and liberally provided and endowed; and for this system at large, I must refer to the statutes, without going into further particulars.

But the Revised Constitution of New York, in 1846, art. 9, has made some material alteration in the distribution of public moneys for education. It declares that the capital of the common-school fund, the capital of the literature fund, and the

declares, (*a*) that "the proceeds of all lands belonging to this state, except such parts thereof as may be reserved or appropriated to public use, which shall thereafter be sold or disposed of, together with the fund denominated the common-school fund, shall be and remain a perpetual fund, the interest of which shall be inviolably appropriated and applied to the support of common schools throughout this state."

Such provisions for the universal diffusion of common and useful instruction may be contemplated with pride and cheering anticipations. But the splendid provisions which have been made in some of the states, and especially in Connecticut and New York, for the support of common schools, ought not to relax the efforts of parents and guardians, and of the community at large, to encourage and sustain a more thorough and elevated system of education. They ought not to remain contented with the means the state fund affords, of instruction without taxation and without expense. The true province of a school fund is not to supersede, but to encourage and stimulate the proper efforts of parents and town authorities, in sustaining and perfecting the system of common-school education. Individuals ought to coöperate with the public authorities, and a wise and patriotic legislature cannot cease to patronize and endow academies and colleges, and render the elements of science and the higher branches of education accessible in every state. Without a large portion amongst us, of men of *202 superior * education, who can teach the teachers of common schools, we cannot expect that the great duties appertaining to public trusts will continue to be discharged with the requisite skill, ability, and integrity. It is not common schools alone; (for they must, of necessity, be confined to very

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capital of the United States deposit fund, shall be preserved inviolate, and that the revenues of the common-school fund shall be applied to the support of common schools; the revenues of the literature fund shall be applied to the support of academies, and the sum of $25,000 of the revenues of the United States deposit fund shall each year be appropriated to and make part of the capital of the common-school fund. These constitutional provisions seem to have drawn unwisely all legislative support from colleges, normal schools, and district libraries

(*a*) Art. 7, sec. 10.

humble teaching;) it is the higher schools, academies, and colleges, that must educate those accomplished men, who are fit to lead the public councils, and be intrusted with the guardianship of our laws and liberties, and who can elevate the character of the nation. (*a*)

The remaining branch of parental duty consists in making competent provision, according to the condition and circumstances of the father, for the future welfare and settlement of the child; but this duty is not susceptible of municipal regulations, and it is usually left to the dictates of reason and natural affection. Our laws have not interfered on this point, and have left every man to dispose of his property as he pleases, and to point out in his discretion the path his children ought to pursue. The writers on general law allow that parents may dispose of their property as they please, after providing for the necessary maintenance of their infant *children and those *203 adults who are not of ability to provide for themselves. (*b*) A father may, at his death, devise all his estate to strangers, and leave his children upon the parish; and the public can have no remedy by way of indemnity against the executor. "I am surprised," said Lord Alvanley, (*c*) "that this should be the law of any country, but I am afraid it is the law of England."

(*a*) President Humphrey justly remarks, that it was a great oversight, when the Connecticut school fund of two millions of dollars was established, that the academies were not brought in for a share of the income; and that it is a wise provision in the school laws of New York, which empowers the regents of the university to help the academies of that state. Mr. Young, of Nova Scotia, on Colonial Literature, Science, and Education, vol. i. p 246, says, the perfect and modern system of education ought to consist of — 1. Infant schools for the training of children, 2. Normal schools for the education of teachers; 3. Common schools; 4. Academies; 5. Useful knowledge institutions; 6. Itinerating libraries; 7. Colleges for the higher branches of learning and science. Again, he says, education ought to be conducted under the superintendence of the government, and regulated by law, and supported by legislative funds or local taxation, and the funds made permanent, certain, and compulsive.

(*b*) Puff. Droit de la Nature, lib. 4, ch. 11, sec. 7.

(*c*) 5 Vesey, 444. See *infra*, p. 327, and vol. iv. pp. 502, 503, as to the provision made by the laws of ancient Athens and Rome for children, out of the estates of their parents.

II. *Of the rights of parents.*

The rights of parents result from their duties. As they are bound to maintain and educate their children, the law has given them a right to such authority; and in the support of that authority, a right to the exercise of such discipline as may be requisite for the discharge of their sacred trust. (*a*) This is the true foundation of parental power; and yet the ancients generally carried the power of the parent to a most atrocious extent over the person and liberty of the child. The Persians, Egyptians, Greeks, Gauls, and Romans, tolerated infanticide, and allowed to fathers a very absolute dominion over their offspring; but the Romans, according to Justinian, exceeded all other people, and the liberty and lives of the children were placed within the power of the father. (*b*) It was not, however, an absolute *204 license of power among the Romans, to be executed in a wanton and arbitrary manner. It was

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(*a*) In the case of the Commonwealth *v.* Armstrong, in the session of the peace for Lycoming county, Pennsylvania, in 1842, Mr Justice Lewis, the president judge, decided, after a learned examination of the subject, that a minister of the gospel had no right, contrary to the express commands of the father, to receive an infant daughter, under the immediate guardianship of the father, from the church to which the father belonged, and in which the child was baptized and instructed, and initiate it, by baptism, into another church of a different denomination. It was held to be the right and the duty of the father, not only to maintain his infant children, but to instruct their minds in moral and religious principles, and to regulate their consciences by a course of education and discipline. All interference with the parental power and duty, except by the courts of justice, when that power is abused, is injurious to domestic subordination, and to the public peace, morals, and security. Parents, says a distinguished jurist on natural law, have the right by the law of nature, to direct the actions of their children, as being a power necessary to their proper education. It is the will of God, therefore, that parents should have and exercise that power. Nay, he observes, parents have the right to direct their children to embrace the religion which they themselves approve. (Heineccius's Elem. Jur. Nat. et Gentium, b. 2, ch. 3, *sec.* 52, 55.)

(*b*) Inst. 1, 9. De Patria Potestate. Law of the Twelve Tables. See vol. i. p. 524, note. Taylor's Elements of the Civil Law, pp. 395, 397, 402. Voyage du Anarcharsis en Grèce, tom. iii. ch. 26. Cæsar de Bel. Gal. lib. 6, ch. 19. St. John's History of the Manners and Customs of Ancient Greece, vol. i. pp. 120–125. Infanticide was the horrible and stubborn vice of almost all antiquity. Gibbon's History, vol. viii. pp. 55–57. Noodt de Partus Expositione et Nece apud veteres; which is considered to be a singular work of great accuracy on this subject. Sallust mentions the extreme exercise of the parental power at Rome, as a thing of course, and without any observation. In his erat Fulvius Senatoris filius, retractum ex itinere parens necari Jussit. Sal. Bel. Cat. ch. 39.

a regular domestic jurisdiction, though in many instances this parental power was exercised without the forms of justice. The power of the father over the life of his child was weakened greatly in public opinion by the time of Augustus, under the silent operation of refined manners and cultivated morals. It was looked upon as obsolete when the Pandects were compiled. (*a*) Bynkershoek was of opinion that the power ceased under the Emperor Hadrian, for he banished a father for killing his son. The Emperor Constantine made the crime capital as to adult children. In the age of Tacitus the exposing of infants was unlawful; but merely holding it to be unlawful, was not sufficient. (*b*) When the crime of exposing and killing infants was made capital, under Valentinian and Valens, then the practice was finally exterminated, (*c*) and the paternal power reduced to the standard of reason and of our own municipal law, which admits only the *jus domesticæ emendationis*, or right of inflicting moderate correction, under the exercise of a sound discretion. (*d*) In * everything that related to the domestic connections, the English common law has an undoubted superiority over the Roman. Under the latter, the paternal power continued during the son's life, and did not cease even on his arriving at the greatest honors. The son could not sue without his father's consent, or marry without his consent; and whatever he acquired, he acquired for the father's advantage; and in respect to the father, the son was considered rather in the light of property, than a rational being. Such a

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(*a*) Liceat eos exheredare, quos occidere licebat. Dig. 28, 2, 11.

(*b*) Numerum liberorum finire, aut quemquam ex agnatis necare, flagitium habetur, plusque ibi boni mores valent, quam alibi bonæ leges. Tac. de Mor. Ger. ch. 19.

(*c*) Dr. Taylor, in his Elements of the Civil Law, pp. 403-406, gives a concise history of the progress of the Roman jurisprudence, in its efforts to destroy this monstrous power of the parent; but Bynkershoek has composed a regular treatise, with infinite learning, on this subject. It is entitled, Opusculum de jure occidendi, vendendi, et exponendi liberos apud veteres Romanos. Opera, tom. i. p. 346, and it led him into some controversy with his predecessor, the learned Noodt, on the doubtful points and recondite learning attached to that discussion. Heineccius, in his Syntagma Antiq. Rom. Jur. lib. 1, tit. 9, Opera, tom. iv., has also given the history of the Roman jurisprudence, from Romulus to Justinian, relative to this tremendous power of the father, and which, he says, was justly termed, by the Roman authors, *patria majestas*.

(*d*) 1 Hawk. P. C. b. 1, ch. 60, sec. 23.

code of law was barbarous and unfit for a free and civilized people; and Justinian himself pronounced it inhuman, and mitigated its rigor so far as to secure to the son the property he acquired by any other means than by his father; and yet even as to all acquisitions of the son, the father was still entitled to the use. (*a*)

The father (and on his death, the mother) is generally entitled to the custody of the infant children, inasmuch as they are their natural protectors, for maintenance and education. (*b*)[1] But the courts of justice may, in their sound discretion, and when the morals, or safety, or interests of the children strongly require it, withdraw the infants from the custody of the father or

(*a*) Inst. 2, 9, 1. If an infant son marries against the will of his father, this does not emancipate him, and the father may sue for and recover his wages, or value of his services. White *v.* Henry, Law Reporter for July, 1846, No. 9, p. 116.

(*b*) The father is entitled to the custody of his legitimate children, to the exclusion of their mother, though they be within the age of nurture. Rex *v.* Greenhill, 6 Neville & Manning, 244. 4 Adolp & Ellis, 624, S C. If the child be brought up on *habeas corpus* and be of an age to exercise a choice, the court will leave him to elect where he will go. If not, he goes to the father, unless he had abused the right to the custody of his child, or there be an apprehension of cruelty, or some exhibition of gross profligacy, or want of ability to provide for his children. The People *ex relat.* Nickerson, 19 Wendell, 16. But if the parents live in a state of separation, without being divorced, and without the fault of the wife, the courts *may*, on the application of the mother, award the custody of the child to the mother, according to the provision of the New York R. S vol ii. p. 148, secs 1, 2 So in England, by the statute of 2 and 3 Vict. c. 54, if the child be within seven years, the lord chancellor or master of the rolls *may* upon the mother's petition, make an order on the father or testamentary guardian to deliver it into her custody. In the case of Foster *v.* Alston, 6 Howard's Miss. R. 406, the jurisdiction of the courts over the disposition of minors brought before them upon *habeas corpus*, was very elaborately discussed, and it was held, that the court was not bound to restore to a testamentary guardian a child forcibly taken from him and placed with the mother, though the guardian had not abused his trust, and was not incompetent to discharge it. The court, consulting the interests and inclinations of the child, allowed it to remain with the mother. See *supra*, pp. 194, 195.[2]

[1] People *v.* Wilcox, 22 Barb. (N. Y.) 178.

[2] It was the object of the statute 2 & 3 Vict. c. 54, amending the law relating to the custody of infants, to enable married women, who were ill-treated by their husbands, to assert their rights, without being restrained by the fear of separation from their children. It therefore invests the Court of Chancery with power to interfere with the father's common-law right, by admitting considerations of the husband's marital duty to the wife, and of the interests of the children. Warde *v.* Warde, 2 Phillips, Ch. 786. *Ex parte* Woodward, 17 E. L. & Eq. R. 77.

mother, and place the care and custody of them elsewhere. (*a*) The parent, or one in *loco parentis*, may, under certain circumstances, maintain an action for the seduction of his daughter, though if she be actually in the service or apprenticeship of another, he cannot maintain the action, unless the wrong be done under color of a contract. (*b*)[1] So the power allowed by

(*a*) Matter of Wolstonecraft, 4 Johns. Ch Rep. 80. Commonwealth *v.* Addicks, 5 Binney's Rep. 520. *Ex parte* Crouse, 4 Wharton, 9. United States *v.* Green, 3 Mason's Rep. 482. Case of Wellesley *v.* Duke of Beaufort, 2 Russell's Rep. 1. The State *v.* Smith, 6 Greenleaf's Rep. 462. See, also, *infra*, p. 221, note a. Macpherson on Infants, 142-152. In the case of The People *v.* Mercein, 3 Hill, 399, it was held, after an elaborate discussion, as a general rule of law, that as between husband and wife, the claim of the former to the custody of their infant children is paramount, and will be enforced on *habeas corpus*, though the child be a daughter under five years of age. It was further declared, that the husband could not, by agreement with the wife, alienate to her his right to the custody of their children, and the agreement was void.

(*b*) 3 Blacks. Comm. 141. Dean *v.* Peel, 5 East, 45. Harris *v.* Butler, 2 Mees. & Wels. 539. Speight *v.* Oliviera, 2 Starkie's N. P. Rep. 493. Blaymire *v.* Haley, 6 Meeson & Welsby, 55.[2] But the American cases hold a contrary doctrine. A

[1] *It seems* that a parent has no right, resulting from that relation alone, to commence an action for compromise, or release an assault committed upon his child. Loomis *v.* Cline, 4 Barb. S. C. Rep. 453. See Eades *v.* Booth, 8 Ad. & El. N. S. 718; nor maintain an action for any injury to the child, unless actual loss has accrued to the parent. Stephenson *v.* Hall, 14 Barb. Rep. 222.

On the other hand, the parent is not liable for the wilful acts of his children. See *ante*, p. 193, note (2.)

If no advantage be taken of the infant, and he pay the money of his parent in satisfaction of his own trespass to one ignorant that the money did not belong to the infant, the parent cannot recover it. Burnham *v.* Holt, 14 N. Hamp. Rep. 367.

[2] Eager *v.* Grimwood, 1 Wels. Hurls. & G. (Exch.) R. 61. Davies *v.* Williams, 10 Ad. & El. N. S. 725. The English cases preserve the rigor of the rule as stated in the text, and they are followed in some of the states. McDaniel *v.* Edward, 7 Ired. R. 408. But in Griffiths *v.* Teetgen, 28 E. L. & Eq. 371, where the plaintiff's daughter went to reside for a month with the defendant at his request and upon his promise to pay her something for doing so, the father maintained his action for her seduction during that time, on the ground that the daughter's absence was not inconsistent with her relation of servant to her father.

There has been a wide departure from the English rule in New York. Where the plaintiff had taken a girl to bring up as his own, who, after she became of age, went out to work *on her own account*, and was seduced, and returned to his house, and was there confined, he was allowed to recover against the seducer. Ingersoll *v.* Jones, 5 Barb. S. C. Rep. 661. Bartley *v.* Richtmyer, 2 Barb. S. C. Rep. 182.

In George *v.* Van Horn, 9 Barb. R. 533, the two last-mentioned cases are doubted; and it was decided that the parent could not maintain an action for the seduction of a daughter over the age of twenty-one, and not residing with the parents. The courts of New York seem desirous now (1850) of returning to the English rule, and hold that the relation

law to the parent over the person of the child, may be delegated to a tutor or instructor, the better to accomplish the purpose of education. (a) The father, and in certain cases, the mother, had, at common law, as guardian in socage, a right to the custody of the estate of the heir during his minority, and to take the rents and profits thereof, as will be more fully shown in the next lecture; and generally in this country, the father *206 may, by deed or will, *dispose, after his death, of the custody and tuition of his children under age. This power was originally given by the English statute of 12 Charles II. ch. 24; and the person so invested may take the care and management of the estate, real and personal, belonging to the in-

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parent may maintain the action for the seduction of his infant daughter, though she be living apart from him, and in the service of another, for he has a right to her services, and to claim them, and is legally bound to maintain her, and to bear her expenses as a consequence of the seduction. The case would be different if the parent had divested himself of all right to reclaim her services, and all his rights and liabilities had become extinguished. Martin *v.* Payne, 9 Johns. R. 387. Hornketh *v.* Barr, 8 Sergeant & R. 36. Sargent *v.* ——, 5 Cowen, 106. Clark *v.* Fitch, 2 Wend. 459. Hewitt *v.* Prime, 21 Wend. 79.

(a) A schoolmaster, who stands in that character, *loco parentis*, may in proper cases inflict moderate and reasonable chastisement. The State *v.* Pendergrass, 2 Dev. & Battle, 365. The father, even with the consent of the managers of a house of refuge, cannot commit a child to their custody, unless that child be adjudged a proper subject for such a place by due course of law. Commonwealth *v.* M'Keagy, 1 Ashmead's Rep. 248.

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of master and servant, actual or constructive, must exist as the basis of the action. Bartley *v.* Richtmyer, 4 Comstock, R. 38, reversing the decision in 2 Barb. 182. Knight *v.* Wilcox, 15 Barb. 279. Dain *v.* Wycoff, 3 Seld. 191. Mulvehall *v.* Millward, 1 Kern. 343. See, too, Roberts *v.* Connelly, 14 Ala. 235. Kendrick *v.* McCrary, 11 Geo. 603. Lee *v.* Hodges, 13 Gratt. 726. Parker *v.* Meek, 3 Sneed, 29. Bolton *v.* Miller, 6 Ind. 262.

It seems that a mother cannot maintain an action for the seduction of her daughter during the life of the father, though the child be not born until after the father's death. Vossel *v.* Cole, 10 Mo. R. 634.

By the code of Virginia, tit. 44, ch. 148, sec. 1, an action for seduction may be maintained without any allegation of loss of service of the female. And it was held, in White *v.* Campbell, 13 Gratt. (Va.) 573, that the plaintiff, in a suit for the seduction of his daughter, may, to increase the damages, prove, that the defendant succeeded in debauching her by promising to marry her.

The seduction of an unmarried woman of previous chaste character is, in Wisconsin, a misdemeanor. Rev. Stat. 1849, ch. 139, sec. 6. It is a misdemeanor also in New York, (Laws, 1848, ch. 111, p. 140); and also in Indiana, if the woman be under 21 years of age, and the seduction be under promise of marriage. Acts of Indiana, c. 95, 1847.

fants; and may maintain actions against any person who shall wrongfully take or detain them from his custody.

This power of the father ceases on the arrival of the child at the age of majority, which has been variously established in different countries, but with us is fixed at the age of twenty-one; and this is the period of majority now fixed by the French civil code. (*a*)[1] In this respect, the Napoleon code was an improvement upon the former law of France, (*b*) which, in imitation of the civil law, continued the minority to the end of twenty-five years.

In case of the death of the father during the minority of the child, his authority and duty, by the principles of natural law, would devolve upon the mother; and some nations, and particularly the French in their new civil code, (*c*) have so ordained. The father is, however, under the French law, allowed by will to appoint an adviser to the mother, without whose advice she can do no act relating to the guardianship. This is analogous to our law, which allows the father, and the father only, to create a testamentary guardianship of the child. But if there be no such testamentary disposition, the mother, after the father's death, is entitled to the guardianship of the person, and in some cases, of the estate of the infant, until it arrives at the age of fourteen, when it is of sufficient age to choose a guardian for itself. (*d*) In New York, * the mother is, in that case, *207 by statute, entitled to the guardianship of the estate. (*e*)

III. *Of the duties of children.*

The duties that are enjoined upon children to their parents are obedience and assistance during their own minority; and gratitude and reverence during the rest of their lives. This, as well as the other primary duties of domestic life, have generally

(*a*) No. 488.
(*b*) Instit. Droit Français, par Argou, b. i. c. 7.
(*c*) No. 390–402.
(*d*) Litt. sec. 123. 3 Co. 38. Co. Litt. 84, b. 2 Atk. 14. 3 Com. Dig. tit. Guardian, B. D. E. 7 Vesey, 348.
(*e*) N. Y. Revised Statutes, vol. i. p. 718, sec. 5.

[1] Postea, p. 258.

been the object of municipal law. Disobedience to parents was punished under the Jewish law with death; (*a*) and with the Hindoos it was attended with the loss of the child's inheritance. (*b*) Nor can the classical scholar be at a loss to recollect how assiduously the ancient Greeks provided for the exercise of filial gratitude. They considered the neglect of it to be extremely impious, and attended with the most certain effects of divine vengeance. (*c*) It was only an object of civil animadversion. Solon ordered all persons who refused to make due provisions for their parents to be punished with infamy; and the same penalty was incurred for personal violence towards them. (*d*) When children undertook any hazardous enterprise, it was customary to engage a friend to maintain and protect their parents; and we have a beautiful allusion to this custom in the speech which Virgil puts into the mouth of Euryalus, when rushing into danger. (*e*)

The laws of New York have, in some small degree, *208 taken *care to enforce this duty, not only by leaving it in the power of the parent, in his discretion, totally to disinherit, by will, his ungrateful children, but by compelling the children (being of sufficient ability) of poor, old, lame, or impotent persons, (not able to maintain themselves,) to relieve and maintain them. (*f*) This is the only legal provision made (for the common law makes none) to enforce a plain obligation of the law of nature. (*g*) It has more than once been held in this country, after a critical examination of authorities, that a moral obligation, without some preexisting legal obligation applicable to the subject-matter, was not a sufficient consid-

(*a*) Deut. c. xxi. 18.

(*b*) Gentoo Code, by Halhed, p. 64. The first emigrants to Massachusetts followed the Jewish law, and made filial disobedience a capital crime. Governor Hutchinson, in his History of Massachusetts, vol. i. p. 441, says that he had met with but one conviction under that sanguinary law, and that offender was reprieved.

(*c*) Iliad, b. 9, v. 454. Odyss. b. 2, v. 134. Hesiod's Oper. & Die. b. 1, v. 183–186.

(*d*) Potter's Greek Antiq. vol. ii. pp. 347–351.

(*e*) *At tu, oro, solare inopem, et succurre relictæ.* Æneid, 9, 290.

(*f*) N. Y. Revised Statutes, vol. i. p. 614.

(*g*) Le Blanc, J., 4 East's Rep. 84. Edwards *v.* Davis, 16 Johns. Rep. 281. Rex *v.* Munden, Str. Rep. 190.

eration for a promise; and, consequently, that the promise of a son to pay for past expenditures in relief of an indigent parent, or of a father to pay for the relief of a poor and sick son, who was of age and indigent, and not a member of his family, was not binding in law. (a) [1]

IV. *Of illegitimate children.*

I proceed next to examine the situation of illegitimate children, or bastards, being persons who are begotten and born out of lawful wedlock.

These unhappy fruits of illicit connection were, by the civil and canon laws, made capable of being legitimated by the subsequent marriage of their parents; and this doctrine of legitimation prevails at this day, with different modifications, in France, Germany, Holland, and Scotland. (b) But *this principle has never been introduced into the English law; (c) and Sir William Blackstone (d) has zeal- *209

(a) Mills v. Wymann, 3 Pick. Rep. 207. Cook v. Bradley, 7 Conn. Rep. 57.

(b) Coustoumier de Normandie, ch. 27. 2 Domat, 361. Code Civil, No. 331. 1 Ersk. Inst. 116. Inst. 1, 10, 13. Code, 5, 27, 10. Novel, 89, c. 8. Butler's note, 181 to lib. 3, Co. Litt. Voet, Com. ad Pand. 25, 7, sec. 6 and 11. Dissertation dans laquelle on discute les Principes du Droit Romain, et du Droit François, par rapport aux Batards. Oeuvres de Chancelier D'Aguesseau, tom. vii. 381, 470.

(c) In Doe *ex dem.* Birtwhistle v. Vardill, 5 Barnw. & Cress. 438, it was held, that a child born in Scotland of unmarried parents domiciled there, and who afterwards marries, could not inherit lands in England, for the English law does not recognize the legitimation of persons so born, by the subsequent marriage of the parents, and follows its own rules of descent. But the case was afterwards carried up on error to the House of Lords; and though the twelve judges gave their opinion to the lords that the judgment was correct, yet Lord Chancellor Brougham suggested doubts, and a further argument was ordered before the lords. Birtwhistle v. Vardill, 9 Bligh, Rep. 72-88. 6 Bing. N. C. 385. 2 Clark & Finn. 571-600. 1 Scott, N. R. 828, S. C., and the doctrine of the K. B. affirmed. The principle which Lord Brougham contended for was, that the law of the country where the marriage of the parents and the birth of the child took place, determined the legitimacy of the child; and that if by the law of the place the marriage had a retrospective effect, and by fiction of law held the child to have been born in lawful wedlock, the English courts ought so to regard it; and that he was entitled to take, as lawful heir, his father's inheritance in England. But on the rehearing of the case, the opinion of the judges was not changed, and the judgment below was affirmed. By the Scotch law, the subsequent marriage in Scot-

(d) Com. vol. i. p. 455.

[1] And the law implies no promise on the part of a mother to pay for boarding and necessaries furnished her, while living with a child. Lynn v. Lynn, 29 Penn. State R. 369.

ously maintained, in this respect, the superior policy of the common law. (a) We have, in relation to this subject, a memorable case in English history. When the English bishops, in the reign of Henry III., petitioned the lords that they would consent that persons born before matrimony should be legitimate, as well as those born after matrimony, in respect to hereditary succession, inasmuch as a canon of the church had accepted all such as legitimate, so far as regarded the right of inheritance, the earls and barons, with one voice, answered, *quod nolunt legis Angliæ mutare, quæ huc usque usitatæ sunt et approbatæ.* (b)

Selden, in his Dissertation upon Fleta, (c) mentions, that the children of John of Gaunt, Duke of Lancaster, born before marriage, were legitimated by an Act of Parliament in the reign of Richard II., founded on some obscure common-law custom; and Barrington, in his Observations upon the Statutes, (d) speaks of the Roman law on this subject as a very humane provision in favor of the innocent. The opposition of the English barons to the introduction of the rule of the civil law, is supposed to have arisen, not so much from any aversion

*210 to the principle itself, as to the sanction which *would

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land of the parents will not legitimate the previous issue born in a country where such marriage does not render legitimate such issue. Bell's Principles of the Law of Scotland, sec. 1628, *vide post*, p. 430[1]

(a) It is a remarkable fact, that in many of the United States, the rule of the civil law, that antenuptial children are legitimated by the father's marriage to the mother, and recognition of the children, prevails, in opposition to the common law, viz: In Vermont, Maryland, Virginia, Georgia, Alabama, Mississippi, Louisiana, Kentucky, Missouri, Indiana, Illinois, and Ohio. Griffith's Law Reg. *passim.* Aikin's Dig. 2d edit. 77. See pp. 212, 213.[2]

(b) Stat. of Merton, 20 Hen. III. c. 9. This statute is reprinted in Hotchkiss's Codification of the Statute Law of Georgia, 1845, p. 333, as part of the existing law of Georgia.

(c) Ch. 9, sec. 2.

(d) P. 38.

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[1] In South Carolina children are not legitimated by the intermarriage of their parents. Their *status*, under the laws of that state, renders them incapable of inheriting in Mississippi. Smith *v.* Kelly, 23 Miss. 167.

[2] So, in Massachusetts, bastards are rendered legitimate *to all intents and purposes* by the intermarriage of their parents and recognition by the father. (Mass. Rev. Stat. c. 61, sec. 4. Laws, 1853, c. 253.) See similar statutes in Maine; Laws, 1852, c. 266; and in Pennsylvania; Laws, 1857, May 14.

thereby be given to the superiority of the civil over their own common law. In the new civil code of France, (a) the rule of the civil law is adopted, provided the illegitimate children were not offsprings of incestuous or adulterous intercourse, and were duly acknowledged by their parents before marriage, or in the act of celebration. Voet (b) presses this doctrine of legitimation by a subsequent marriage to a very great extent. Thus, if A. has a natural son, and then marries another woman, and has a son, who is at his birth the lawful heir, and his wife dies, and he then marries the woman by whom he had the natural son, and has sons by her; according to the doctrine of the Dutch law, as stated by Voet, the bastard thus legitimated, excludes by his right of primogeniture, not only his brothers of the full blood, by the last marriage, but the son of the first marriage. The latter is thus deprived of the right of inheritance, once vested in him by his primogeniture, by an act of his father to which he never consented. The civil-law rule of retrospective legitimation will sometimes lead to this rigorous consequence. (c) [1]

But not only children born before marriage, but those who are born so long after the death of the husband as to destroy all presumption of their being his; and also all children born during the long and continued absence of the husband, so that no access to the mother can be presumed, are reputed bas-

(a) Code Civil, Nos. 331, 332, 333, 335.

(b) Com. ad. Pand. 25, 7, sec. 11.

(c) Mr. More, the learned editor of Lord Stair's Institutions, vol. i. note c. p. 33, says, that the weight of authority seems to be, that an intervening marriage, and the birth of lawful issue, would form a bar to the legitimation of the first-born children born out of wedlock. A recent traveller, of great intelligence and of a high moral tone, considers the legitimation of bastards by the subsequent marriage of the parents, as of a very immoral tendency, and an encouragement to the increase of spurious offspring. Turnbull's Austria, vol. ii. 205, edit. London, 1840.

[1] The legislature, it is held in Georgia, has the power to render bastard children legitimate and capable of inheriting. Beall v. Beall, 8 Geo. R. 210. But an Act of the legislature, changing the name of an illegitimate child, and declaring her capable of inheriting, inasmuch as it did not declare her the legitimate heir of any one, was construed to have no other effect than that of changing the name. Edmondson v. Dyson, 7 Geo. R. 512. Statutes of legitimation shall be favorably construed. Swanson v. Swanson, 2 Swan, 446. The right to inherit given by the statute was construed to confer by implication the right to take under the statutes of distribution.

tards. (*a*) The rule at common law (and which subsisted from the time of the Year Books down to the early part of the last century) declared the issue of every married woman to be legitimate, except in the two special cases of the impotency of the husband, and his absence from the realm. (*b*) But in *Pendrell* v. *Pendrell*, (*c*) the absurd doctrine of making legitimacy *211 rest *entirely and conclusively upon the fact of the husband being *infra quatuor maria*, was exploded, and ever since that time the question of the legitimacy or illegitimacy of the child of a married woman has been regarded as a matter of fact resting on decided proof as to the non-access of the husband, and it is a question for a jury to determine. (*d*) The rule

(*a*) Cro. Jac. 541. Co. Litt. 244 a. 1 Blacks. Com. 456, 457. The civil law and the Code Civil fixed the three hundredth day as the *ultimum tempus gestationis*. Dig. 38, 16, 3, 11. Code Civil, art. 312. Lord Coke considered nine months, or forty weeks, as the limitation in the English law; but the more modern doctrine is not to assign any precise limit to the period of gestation, but to leave it to be governed by circumstances. Harg. n 2, to Co. Litt. 244 a. Gardner Peerage Case, in 1825.

(*b*) Co. Litt. 244 a. Done & Egerton *v.* Hinton & Starkey, 1 Roll. Abr. 358.

(*c*) Str. Rep. 925.

(*d*) 3 P. Wms. 275, 276. Str. Rep. 925. Salk. Rep 123. Harg. note, No. 193, to lib. 2, Co. Litt. Butler's note, No. 178, to lib. 3, Co. Litt. 4 Term Rep. 251, 356. 4 Bro. Rep. 90. 8 East, 193. Com. Dig. tit. Bastard, A. B. Head *v.* Head, 1 Simons & Stuart, 150. 1 Turner & Russell, 138, S. C., and the opinions of the judges given to the House of Lords in the Banbury Peerage Case, in 1811, Ibid. 153. Shelford's Marriage and Divorce, 707–723. 4 Petersdorff's Abr. 170. Cross *v.* Cross, 3 Paige's Rep. 139. Commonwealth *v.* Wentz, 1 Ashmead's Rep. 269. Bury *v.* Phillpot, 2 Mylne & Keene, 349. Stegall *v.* Stegall, 2 Brockenbrough, 256. Commonwealth *v.* Shepherd, 6 Binney, 286. The decision in the Banbury Peerage Case has been severely criticized by Sir Harris Nicholas, in his Treatise on the Law of Adulterine Bastardy, 1836; and the old rule requiring proof, not of the improbability only, but of the *impossibility* of the husband being the father of the child, is supposed to be the better law and the better policy. It appears to me that justice and policy are concerned in some relaxation of the old rule of evidence. It was too stringent and violent to be endured. But we are admonished, on the other hand, of the necessity of requiring perfectly satisfactory proof of non-access of the husband, before the child is to be doomed to lose its legitimate rights and character. By the statute law of New York, if the husband continues absent, out of the state, for one whole year previous to the birth of the child, separate from the mother, and leaves the mother during the time continuing and residing in the state, the child is deemed a bastard. So it is a bastard if begotten and born during the separation of its mother from her husband, pursuant to the decree of any court of competent jurisdiction. N. Y. Revised Statutes, Vol. i. p. 641, sec. 1. The statute declares that the child, in such cases, *shall be deemed a bastard*. Still, the statute may be so construed as to let in proof to rebut the presumption of non-access of the husband, and justify the inference of cohabitation in the case of a

is, that where it clearly appears that the husband could not have been the father of the child, it is a bastard, though *born, or begotten and born, during marriage. (a)[1] It is *212 not necessary that I should dwell more particularly on this branch of the law; and the principles and reasoning upon which this doctrine of presumption applicable to the question of legitimacy is founded, will be seen at large in the cases to which I have referred. (b)

A bastard being, in the eye of the law, *nullius filius*, (c) or, as the civil law, from the difficulty of ascertaining the father, equally concluded, *patrem habere non intelliguntur*, (d) he has no

qualified divorce. If this be not the construction, then the law, as it stood before, resting on principles adapted to the circumstances, was wiser and safer. The Code Napoleon is stricter than the English rule, for it allows the issue to be bastardized only on proof that, by reason of distance or accident, cohabitation of husband and wife was impossible. Code Napoleon, n. 312. So, in Louisiana, it is held, in case of voluntary separation, that access is always presumed, unless cohabitation was physically impossible. Tate *v.* Penne, 19 Martin's Rep. 548. The observations of the master of the rolls, in Bury *v.* Phillpot, are almost as strong. The civil law admitted proof of a moral impossibility of access. See Edin. Review, No. 97, a review of Le Merchant's Report of the Proceedings in the House of Lords on the claims to the Barony of Gardner, in which the law of legitimacy is fully and ably discussed. See, also, Burge's Com. on Colonial and Foreign Laws, vol. i. 57–92, where the law of legitimacy is examined at large, and the civil law and the continental, as well as English authorities, brought to bear on the subject.[2]

(a) The King *v.* Luffe, 8 East, 193.

(b) If the child be born immediately after marriage, it is still a legitimate child, unless the non-access of the husband prior to the marriage be sufficiently proved. Co. Litt. 244 a. 1 Blacks. Com. 455. Lawrence, J., and Le Blanc, J., in The King *v.* Luffe, 8 East, 210, 211. *Pater est quem nuptiæ demonstrant: Subsequenti connubii fœdere omnem conceptionis maculam tollente.*

(c) Co. Litt. 123 a.

(d) Inst. 1, 10, 12.

[1] Patterson *v.* Gaines, 6 How. U. S 550, 589. Van Aernam *v.* Van Aernam, 1 Barb. Ch. R. 375. In the first of these cases the rule is laid down more strictly than in the second. Where a child was born of a woman living separate from her husband, it was held, on the question of the legitimacy of the child, that the husband was inadmissible as a witness to prove access. Patchett *v.* Holgate, 3 Eng. L. & Eq. R. 100. Nor is the mother a competent witness to prove non-access of the husband. People *v.* Overseers, &c. 15 Barb. 286. Parker *v.* Way, 15 N. H. 45. Dennison *v.* Page, 29 Penn. State R. 420.

[2] Wright *v.* Hicks, 15 Geo. 160. State *v.* Herman, 13 Ired. 502. The legal presumption, that the husband of the mother is the father of all children conceived during the marriage, can only be rebutted in the mode and within the time prescribed by law. Dejol *v.* Johnson, 12 La. An. 853.

inheritable blood, and is incapable of inheriting as heir, either to his putative father, or his mother, or to any one else, nor can he have heirs but of his own body. (*a*)[1] This rule of the common law, so far at least as it excludes him from inheriting as heir to his mother, is supposed to be founded partly in policy, to discourage illicit commerce between the sexes. Selden said, (*b*) that not only the laws of England, but those of all other civil states, excluded bastards from inheritance, unless there was a subsequent legitimation. Bastards are incapable of taking in New York, under the law of descents, and under the statute of distribution of intestates' effects; and they are equally incapable in several of the other United States, which follow, in this respect, the rule of the English law. But in Vermont, Connecticut, Virginia, Kentucky,[2] Ohio,[3] Indiana, Missouri, Illinois, Tennessee, North Carolina, Alabama, and Georgia, bastards can inherit from, and transmit to their mothers, real and personal estate, under some modifications, which prevail particularly in the states of Connecticut, Illinois, North Carolina, and Tennessee; and in New York, the estate of an illegitimate intestate descends to the mother, *and the relatives on the part of the mother. (*c*) In North Carolina, the legislature (*d*) enabled bastards to be legitimated, on the intermar-

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(*a*) 1 Blacks. Com. 459.

(*b*) Note C. to Fortescue De Laud. Leg. Ang. ch. 40.

(*c*) Griffith's Law Register, h. t. New York Revised Statutes, vol. i. p. 753, sec. 14. Ibid. p. 754, sec. 19. See, also, vol iv. p. 413. In Georgia, bastards dying intestate, without issue, the brothers and sisters of the same mother take by descent. Prince's Dig. 202. In Alabama, the kindred of a bastard on the part of his mother is entitled to the distribution of his personal estate. Aikin's Dig. 2d edit. 129.[4]

(*d*) Revised Statutes of North Carolina, vol. i. 92.

[1] For the rules of construction of legacies and devises, in respect to illegitimate children, see *post*, vol. iv. p. 438, n.

[2] In Kentucky, the bastard child of a negro woman, both having been emancipated, may inherit as heir at law of her mother. Jackson *v.* Collins, 16 B. Mon. (Ky.) 214.

[3] And in Ohio, under an Act passed March 14, 1853, the property of an intestate bastard, who survives his mother, will go in distribution to the children of his mother by a subsequent marriage. Lewis *v.* Eutsler, 4 Ohio, (N. S.) 354.

[4] In Maryland, an illegitimate child shares equally with the other children in his mother's estate. Earle *v.* Dawes, 3 Maryl. Ch. 230. Neither the mother nor her legitimate children shall inherit the estate of her bastard son, unless she have married his father. Miller *v.* Stewart, 8 Gill, 128.

riage of the putative father with the mother, or, if she be dead, or reside out of the state, or married to another, on his petition, so far as to enable the child to inherit, as if he was lawfully born, the real and personal estate of the father. In Louisiana, bastards, (being defined to be children whose father is unknown,) and adulterous or incestuous children, have no right of inheritance to the estates of their natural father or mother. But other natural or illegitimate children succeed to the estate of the mother in default of lawful children or descendants, and to the estate of the father who has acknowledged them, if he dies without lineal or collateral relations, or without a surviving wife. (*a*)[1]

This relaxation in the laws of so many of the states, of the severity of the common law, rests upon the principle that the relation of parent and child, which exists in this unhappy case, in all its native and binding force, ought to produce the ordinary legal consequences of that consanguinity. The ordinance of Justinian, to a certain extent, and with exceptions, allowed a bastard to inherit to his mother; (*b*) and, *in *214 several cases in the English law, the obligations of consanguinity between the mother and her illegitimate offspring have been recognized. The rule that a bastard is *nullius filius*, applies only to the case of inheritances. (*c*) It has been held

(*a*) Civil Code of Louisiana, art. 220, 912, 913, 914. By a statute in Louisiana, in 1831, white fathers or mothers may legitimate their natural children by an act made before a notary and two witnesses, provided they be not colored children; and free people of color may legitimate their colored offspring; but the natural children must be the issue of parents who might have lawfully contracted marriage, and the parents must have no ascendants or legitimate descendants. A *putative* marriage is one contracted in good faith, on the part, at least, of one of the parties, and in ignorance of any unlawful impediment; and, in some parts of Europe, the children of such a connection are held to be legitimate. Burge's Com. on Colonial and Foreign Laws, vol. i. p. 152.

(*b*) Code, lib. 6, 57, 5.

(*c*) Buller, J., 1 Term Rep. 101. Bow *v.* Nottingham, 1 N. H. Rep. 260.

[1] By the laws of Maine, 1852, ch. 260, the mother of an illegitimate child can inherit. In Massachusetts, the illegitimate is an heir to his mother. Laws of 1851, ch. 211. In New York, in default of lawful issue of the mother, her illegitimate children may inherit her real and personal estate. (Laws, 1855, April 18.) By a law enacted in Pennsylvania, April 27, 1855, bastards shall bear the name of the mother, and she and they shall inherit from each other.

to be unlawful for him to marry within the Levitical degrees; (*a*) and a bastard has been considered to be within the Marriage Act of 26 Geo. II., which required the consent of the father, guardian, or mother, to the validity of the marriage of a minor. (*b*) He also takes and follows the settlement of his mother. (*c*) With the exception of the right of inheritance and succession, bastards, by the English law, as well as by the law of France, Spain, and Italy, are put upon an equal footing with their fellow-subjects; (*d*) and in this country we have made very considerable advances towards giving them also the capacity to inherit, by admitting them to possess inheritable blood. We have, in this respect, followed the spirit of the laws of some of the ancient nations, who denied to bastards an equal share of their father's estate, (for that would be giving too much countenance to the indulgence of criminal desire,) but admitted them to a certain portion, and would not suffer them to be cast naked and destitute upon the world. (*e*)

*215 * The mother, or reputed father, is generally in this country chargeable by law with the maintenance of the bastard child; and in New York it is in such way as any two justices of the peace of the county shall think meet; and the goods, chattels, and real estate of the parents are seizable for

(*a*) Hains *v.* Jeffel, 1 Lord Raym. 68.

(*b*) King *v.* Inhabitants of Hodnett, 1 Term Rep 96. Horner *v.* Liddiard, 1 Hagg. Consist. Rep. 337. But the consent of the natural parents of illegitimate minors is not sufficient, and there must be a guardian appointed by chancery. Ibid. The prohibition of marriage between relatives in the ascending and descending lines, and between brothers and sisters, applies equally to illegitimate children and relatives. N. Y. Revised Statutes, vol. ii. p. 139, sec. 3.

(*c*) 3 Johns. Rep. 15. 17 Johns. Rep. 41. 12 Mass. Rep. 429. 5 Conn. Rep 584.[1]

(*d*) Oeuvres D'Aguesseau, tom. vii. pp. 384, 385. Butler's note, No 176 to lib. 3. Co. Litt. 1 Blacks. Com. 459.

(*e*) Potter's Greek Antiq. vol. ii. p. 340. Gentoo Code, by Halhed, p. 73. The protection and tenderness which the goddess Fortune is supposed to bestow upon foundlings is, says Mr. Gifford, one of the most amusing and animated pictures that the keen and vigorous fancy of Juvenal ever drew: —

Stat fortuna improba noctu,
Arridens nudis infantibus. Hos fovet omnes,
Involvitque, sinu. Sat. 6, v. 603–605.

[1] But see Bethlem *v.* Roxbury, 20 Conn. 298.

the support of such children, if the parents have absconded.[1] The reputed father is liable to arrest and imprisonment until he gives security to indemnify the town chargeable with the maintenance of the child. (*a*) These provisions are intended for the public indemnity, and were borrowed from the several English statutes on the subject; and similar regulations to coerce the putative father to maintain the child, and indemnify the town or parish, have been adopted in the several states.

The father of a bastard child is liable, upon his implied contract, for its necessary maintenance, without any compulsory order being made upon him, provided he has adopted the child as his own, and acquiesced in any particular disposition of it. (*b*) The adoption must be voluntary, and with the consent of the mother, for the putative father has no legal right to the custody of a bastard child, in opposition to the claim of the mother;[2] and except the cases of the intervention of the town officers, under the statute of provisions, or under the implied contract founded on the adoption of the child, the mother has no power to compel the putative father to support the child. (*c*) She has a right to the custody and control of it as against the pu-

(*a*) N. Y. Revised Statutes, vol. i. pp. 646–656. In Ohio, the courts of common pleas ascertain and enforce the duty of the putative father to maintain his bastard child. Statutes of Ohio, 1831.

(*b*) Hesketh *v.* Gowing, 5 Esp. N. P. Rep. 131. But except in such a special case, the putative father is not liable except upon an express promise, or upon an order of filiation under the statute. Cameron *v.* Baker, 3 Carr. & Payne, 36. Furillio *v.* Crowther, 7 Dowl. & Ryl. 612. Moncrief *v.* Ely, 19 Wendell, 405.[3]

(*c*) In England, under the statute of 4 & 5 Wm. IV. ch. 76, the mother of a bastard child had no remedy against the father for its maintenance. But by the statute of 7 & 8 Vict. ch. 101, the mother has relief, and the father may be summoned before the petty sessions, and ordered to pay 5*s*. for each of the first six weeks after birth, 12*s*. 6*d*. for every subsequent week until the child is thirteen years of age. The money is to be paid to the mother, and may be recovered from the father by distress and imprisonment. This is a just and wise improvement in the law.

[1] If the father offers to maintain the child, and the authorities decline to deliver it to the parent for that purpose, they cannot charge the father for its subsequent maintenance. Bownes *v.* Marsh, 10 Ad. & El. N. S. 787.

[2] The People *v.* Kling, 6 Barb. S. C. Rep. 366. The court, in such cases, is authorized to exercise a sound discretion as to the custody of the child. The right of the mother was sustained in Robalina *v.* Armstrong, (15 Barb. 247,) in opposition to the claim of the putative father.

[3] Wiggins *v.* Keizer, 6 Porter, (Ind.) 252.

*216 tative father, and is bound to maintain it as *its natural guardian; (a) though perhaps the putative father might assert a right to the custody of the child as against a stranger. (b)

There are cases in which the courts of equity have regarded bastards as having strong claims to equitable protection, and have decreed a specific performance of voluntary settlements made by the father in favor of the mother of his natural child. (c) On the other hand, there are cases in which the courts of equity have withheld from the illegitimate child every favorable intendment which the lawful heir would have been entitled to as of course. Thus, in *Fursaker* v. *Robinson*, (d) a natural daughter brought her bill against the heir at law, to supply a defective conveyance from her father to her, but the chancellor refused to assist her, on the ground that she was a mere stranger, being *nullius filia*, and not taken notice of by the law as a daughter, and that the father was not under any legal obligation to provide for her as a child, though he might be obliged by the law of nature, and so the conveyance was voluntary, and without any consideration. This hard decision was made by Lord Cowper, in 1717; but the language of Lord Ch. J. King, in a subsequent case, to which I have just alluded, (e) is certainly much more conformable to justice and humanity. "If a *217 man," says he, *"does mislead an innocent woman, it is both reason and justice that he should make her reparation. The case is stronger in respect to the innocent child, whom the father has occasioned to be brought into the world

(a) The King v. Soper, 5 Term Rep. 278. *Ex parte* Ann Knee, 4 Bos. & Pull. 148. The People v. Landt, 2 Johns. Rep. 375. Carpenter v. Whitman, 15 Johns. Rep. 208. Wright v. Wright, 2 Mass. Rep. 109. Mass. Revised Statutes, 1836. Acosta v. Robin, 19 Martin's L'a Rep. 387. The power of the putative father over the illegitimate child was denied in the Roman law, and it is equally so in the Spanish law. Ibid.

(b) Rex v. Cornforth, Str. Rep. 1162. A person standing *in loco parentis* has been allowed to maintain an action on the case *per quod servitium amisit*, for the abduction of his daughter's illegitimate offspring. Moritz v. Garnhart, 7 Watts, 302.

(c) Marchioness of Annandale v. Harris, 2 P. Wms. Rep. 432. Harten v. Gibson, 4 Desaus. Rep. 139. Bunn v. Winthrop, 1 Johns. Ch. Rep. 338.

(d) Prec. in Ch. 475. 1 Eq. Cas. Abr. 123, pl. 9. Gilb. Eq. Rep. 139, 256.

(e) Marchioness of Annandale v. Harris, 2 P. Wms. Rep. 432.

in this shameful manner, and for whom, in justice, he ought to provide." In *Knye* v. *Moore*, (a) the vice-chancellor, in pursuance of the doctrine of Lord King, assisted to uphold and enforce a deed by the father, making provision for the mother and his illegitimate children after his death. So, in *Pratt* v. *Flamer*, (b) a devise by the father to an unborn illegitimate child, in which the mother was described, was held valid; and there are other cases in which bequests by will, in favor of illegitimate children, have been liberally sustained. (c)

(a) 1 Simons's & Stuart's Rep. 61.

(b) 5 Harr. & Johns. Rep. 10.

(c) Beachcroft v. Beachcroft, 1 Madd. Rep. 234, Phil. ed. 430, London ed. Gardner v. Heyer, 2 Paige's Rep. 11. But in Wilkinson v. Wilkinson, before Vice Ch. Bruce, 1842, a provision in favor of future illegitimate children was held to be clearly void. N. Y. Legal Observer, vol. i. 191. 1 Younge & Coll. Cas. in Ch. 657.

LECTURE XXX.

OF GUARDIAN AND WARD.

The relation of guardian and ward is nearly allied to that of parent and child. It applies to children during their minority, and may exist during the lives of the parents, if the infant becomes vested with property; but it usually takes place on the death of the father, and the guardian is intended to supply his place.

There are two kinds of guardianship; one by the common law, and the other by statute; and there were three kinds of guardians at common law, viz: guardian by nature, guardian by nurture, and guardian in socage. (*a*)

(1.) Guardian *by nature* is the father, and, on his death, the mother;[1] and this guardianship extends to the age of twenty-one years of the child, and it extends only to the custody of his person,[2] and it yielded to guardianship in socage. (*b*) It was doubted for some time in the books, whether the guardian by nature was entitled to the possession of the personal estate of the infant, and could give a competent discharge to an executor on the payment of a legacy belonging to the child; and it was finally understood that he could not. (*c*) It would seem, there-

(*a*) Co. Litt. 88 b. 3 Co. 37 b.

(*b*) Litt. sec. 123. Co. Litt. 87 b, 88. Hargrave's note, 12, No. 66. The King *v.* Thorp, 5 Mod. Rep. 221. Jackson *v.* Combs, 7 Cowen's Rep. 36. 2 Wendell's Rep. 153, S. C.

(*c*) Dagley *v.* Talferry, 1 P. Wms. 285. Cunningham *v.* Harris, cited in 3 Bro. 186. Genet *v.* Tallmadge, 1 Johns. Ch. Rep. 3. Miles *v.* Boyden, 3 Pick. Rep. 213.

1 At common law, the mother, as guardian by nature or for nurture, has no control over the estate of the minor. Perkins *v.* Dyer, 6 Georgia R. 401.

2 In Texas, the father's power is extended by statute to his child's estate. Byrne *v.* Love, 14 Tex. 81.

fore, that if a child becomes vested with personal property only, in the lifetime of the father, there is no person strictly entitled to take it as guardian, until a guardian has been duly appointed by some public authority; though if real estate vests in the infant, the guardian in socage, or a substitute for such a guardian provided by statute, will be authorized to take charge of the whole estate, real and personal. The father has the first title to guardianship by nature, and the mother the second; and, according to the strict language of our law, says Mr. Hargrave,(*a*) only the heir apparent can be the subject of guardianship by nature and therefore it is doubted whether such a guardianship can be of a daughter, whose heirship is presumptive, and not apparent. But as all the children, male and female, equally inherit with us, the guardianship by nature would seem to extend to all the children, and this may be said to be a natural and inherent right in the father, as to all his children, during their minority. (*b*) The Court of Chancery, for just cause, may interpose and control that authority and discretion which the father has in general in the education and management of his child. (*c*)[1] In *De Manneville* v. *De Manneville*, (*d*) Lord Eldon

(*a*) Note 66 to lib. 2 Co. Litt. (*b*) Macpherson on Infants, p. 61.

(*c*) 2 Fonb. Tr. of Equity, 235, note. Creuze *v.* Hunter, 2 Cox's Rep. 242.

(*d*) 10 Vesey, 52. The principle recognized and enforced by the cases of Creuze *v.* Hunter, Rex *v.* De Manneville, 5 East, 221, and De Manneville *v.* De Manneville, and by the case of The People, *ex relat.* Barry *v.* Mercein, decided upon *habeas corpus* by the chancellor of the state of New York, in August, 1839, 8 Paige's Rep. 47, and afterwards by Judge Inglis, in New York, in 1840, is, that the Court of Chancery will not permit *an infant too young to choose for itself, and being a natural-born citizen, to be taken from its mother against her consent, to be delivered to an alien father, to be carried abroad, out of the country*, whatever may be the merits of the difficulties causing a separation between husband and wife, and notwithstanding the domicil of the wife be that of her husband. The child born in the United States owes natural allegiance and has independent rights, and one is to reside where he was born, when the mother, born here also, and lawfully and actually a resident here, will not consent to his removal, and he is too young to choose for himself.

[1] Such conduct on the part of a parent as shows him destitute of parental affection, has been declared sufficient to authorize a court of chancery to place his children in the custody of a guardian. Cowls *v.* Cowls, 3 Gilm. R. 435. See a case "Anonymous," 11 E. L. & Eq. 282.

In the matter of Flyn, 12 English Jurist (Chy.) Rep. 713, (1848,) the paramount right of the father was maintained in a striking case. See Regina *v.* Smith, 16 E. L. & Eq. 221.

restrained a father from doing any act towards removal of his infant child out of the kingdom, and he said that the jurisdiction of the Court of Chancery to control the right of the father *primâ facie* to the person of his child, was unquestionably established. He admitted, however, that the jurisdiction was questioned by Mr. Hargrave; (*a*) but it was, on the other hand, supported with equal ability by Mr. Fonblanque. In the case of *Wellesley* v. *Duke of Beaufort*, (*b*) the lord chancellor, after a very able and thorough investigation, refused to restore *221 to a father the custody of his infant *children, on the ground that his character and immoral conduct rendered him unfit to be their guardian; and the decision was, in 1828, affirmed by the House of Lords. The jurisdiction of chancery, and the fitness of its exercise in that instance, were finally established. (*c*)

(2.) Guardianship *by nurture* occurs only when the infant is without any other guardian, and it belongs exclusively to the parents, first to the father, and then to the mother. It extends

(*a*) Note 70 to Co. Litt. 89 a.

(*b*) 2 Russell's Rep. 1. Wood *v* Wood, 5 Paige, 605, S. P.

(*c*) Wellesley *v.* Wellesley, 1 Dow. N. S. 152. 2 Bligh's Parl. R. N. S. 124, S. C. That case was accompanied and followed by very profound discussion. In a pamphlet, attributed to the pen of Mr. Beames, entitled "Observations upon the power exercised by the Court of Chancery, of depriving a father of the custody of his children," the power was deemed very questionable in point of authority as well as policy. On the other hand, in a treatise published by Mr. Ram, a barrister, and in an article in the Quarterly Review, No. 77, the policy and wisdom of the jurisdiction, as asserted in the Court of Chancery and confirmed in the House of Lords, were ably vindicated, and shown to be connected with the great moral considerations arising out of the nearest ties of social life. Attempts have been made to control the father's right to the custody of his infant children, by a legacy given by a stranger to an infant, and the appointment by him of a guardian in consequence thereof. But it is settled that a legacy or gift to a child confers no right to control the father's care of the child, and no person can defeat the father's right of guardianship by such means. If, however, the father accedes to the conditions of the gift, and surrenders up his control of the child's education, the Court of Chancery will not suffer him to retract it. Lord Thurlow, in Powel *v.* Cleaver, 2 Bro. 500. Colston *v.* Morris, 6 Madd. 89. Lyons *v.* Blenkin, Jac. 245.[1] See, also, The Etna, Ware's Rep. 464, and Story's Com. on Eq. Jurisprudence, vol. ii. 574-581, (or, 1341-1351,) where the jurisdiction of the Court of Chancery on this subject is fully examined and sustained.

[1] Vanartsdalen *v.* Vanartsdalen, 14 Penn. 384.

only to the person, and determines when the infant arrives at the age of fourteen, in the case both of males and females. As it is concurrent with guardianship by nature, it is in effect merged in the higher and more durable title of guardian by nature. (a) This guardianship is said to apply only to the younger children, who are not heirs apparent; and as all the children inherit equally under our laws, it would seem that this species of guardianship has become obsolete.

(3.) Guardian *in socage* has the custody of the in- *fant's lands, as well as of his person. (b) It applies *222 only to lands which the infant acquires by descent; (c) and the common law gave this guardianship to the next of blood to the child, to whom the inheritance could not *possibly* descend; and therefore, if the land descended to the heir on the part of the father, the mother, or other next relation on the part of the mother, had the wardship; and so if the land descended to the heir on the part of the mother, the father, or his next of blood, had the wardship. (d) These guardians in socage cease when the child arrives at the age of fourteen years, for he is then entitled to elect his own guardian, and oust the guardian in socage, and they are then accountable to the heir for the rents and profits of the estate. (e) If the infant, at that age, does not elect a guardian, the guardian in socage continues. (f) The common law, like the law of Solon, (g) was strenuous in rejecting all persons to whom the inheritance might possibly arrive, and its advocates triumph in this respect over the civil law, (h) which committed the burden of the guardianship to the person who was entitled to the emolument of the succession. As we have admitted the half blood to inherit

(a) 3 Co. 38 b. Harg. note 67 to lib. 2 Co. Litt. Com. Dig. tit. Guardian, D.

(b) Com. Dig. tit. Guardian, B.

(c) Quadring v. Downs, 2 Mod. Rep. 176.

(d) Litt. sec. 123. Quadring v. Downs, 2 Mod. Rep. 176.

(e) Litt. Ibid.

(f) The King v. Pierson, Andrew's Rep. 313. The guardian in socage has lawful possession of the lands, and he may maintain actions of trespass or ejectment in respect to the lands of the ward. Byrne v. Van Hoesen, 5 Johns. Rep. 66. Jackson v. De Walts, 1 Idem, 157.

(g) Potter's Greek Antiq. vol. i. 574.

(h) Co. Litt. 88 b. 1 Blacks. Com. 462.

equally with the whole blood, this jealous rule would, still more extensively with us, prevent relations by blood from being guardians in socage. The law of Scotland and the ancient law of France took a middle course, and may be supposed, in that respect, to have been founded in more wisdom than either the civil or the common law. They committed the pupil's estate to the person entitled to the legal succession, because he is most interested in preserving it from waste; but excluded *223 him from the custody of the pupil's person, because *his interest is placed in opposition to the life of the pupil. (*a*) And yet, perhaps, the English, the Scotch, and the French laws equally proceed on too great a distrust of the ordinary integrity of mankind. They might, with equal propriety, have deprived children of the custody and maintenance of their aged and impotent parents. It is equally a mistake in politics and in law, to consider mankind degraded to the lowest depths of vice, or to suppose them acting under the uniform government of virtue. Man has a mixed character, and practical wisdom does not admit of such extreme conclusions. The old rule against committing the custody of the person and estate of a lunatic to the heir at law, has been overruled as unreasonable. (*b*) If a presumption must be indulged, as was observed in one of the cases, it would be in favor of kinder treatment, and more patient fortitude, from a daughter as committee of the person and estate of an aged and afflicted mother, than from the collateral kindred. The fears and precautions of the lawgiver on this subject imply, according to Montesquieu, a melancholy consciousness of the corruption of public morals. (*c*)

This guardianship is a personal trust, and is not transmissible by succession, nor devisable, nor assignable. It extends, not only to the person and all the socage estate, but to hereditaments which do not lie in tenure, and to the personal estate. This is the opinion of Mr. Hargrave, and he supports it by strong reasons; (*d*) notwithstanding, it is admitted, that the

(*a*) Erskine's Inst. p. 79. Hallam on the Middle Ages, vol. i. p. 106.

(*b*) Dormer's case, 2 P. Wms. 262. In the matter of Livingston, 1 Johns. Ch. Rep. 436. Lord Hardwicke, in 2 Atk. Rep. 14.

(*c*) Esprit des Lois, liv. 19, ch. 24.

(*d*) Note 67 to lib. 2 Co. Litt.

title to guardianship in socage cannot arise unless the infant be seised of lands held in socage. This guardianship in socage may be considered as gone into disuse, and it can hardly be said to exist in this country, for the guardian * must *224 be some relation by blood, who cannot possibly inherit, and such a case can rarely exist. By the New York Revised Statutes, (a) where an estate in lands becomes vested in an infant, the guardianship of such infant, with the rights, powers, and duties of a guardian in socage, belong to the father of the infant; and if there be no father, to the mother; and if there be neither, then to the nearest and eldest relative of full age, not being under any legal incapacity; and as between relatives of the same degree of consanguinity, males are preferred. But the rights and authority of every such guardian are superseded in all cases where a guardian is appointed by the deed or last will of the father of the infant, or in default thereof, by the surrogate of the county where the minor resides. (b) Surrogates have the same power to allow and appoint guardians as is possessed by the chancellor; and as the powers and jurisdiction of the Court of Chancery are declared (c) to be coextensive with the same powers and jurisdiction in England, with the exceptions, additions, and limitations created and imposed by the constitution and laws, it is to be inferred that the chancellor of New York retains the jurisdiction over infants, which belongs to the chancellor in England, and which belonged to the chancellor of New York prior to the first of January, 1830, when the Revised Statutes took effect.

(4.) *Testamentary guardianships*, to which I have already alluded, are founded on the deed or last will of the father, and they supersede the claims of any other guardian, and extend to the person and real and personal estate of the child, and continue until the child arrives at full age. This power in the father to constitute a guardian by deed or will, was given by the statute of 12 Charles II., and it has been pretty extensively * adopted in this country. It is a personal *225

(a) Vol. ii. 3d. edit. p. 2.

(b) N. Y. Revised Statutes, vol. i. p. 719, sec. 7. Vol. ii. p. 151, sec. 4, 5, 6.

(c) Ibid. vol. ii. p. 173, sec. 36.

trust, and is not assignable. (*a*) A will merely appointing a testamentary guardian need not be proved; and though the statute speaks of appointment *by deed*, as well as by will, yet such a disposition by deed may be revoked by will; and it is evident, from the language of the English statute, and from the reason of the thing, that the deed there mentioned is only a testamentary instrument in the form of a deed, and to operate only in the event of the father's death. (*b*) Though the statute laws in this country, which have adopted or followed the provisions in the English statute, may have abridged its explanatory and verbose phraseology, it is not to be presumed that they intended to vary the construction of it. These parental guardians may be appointed by the father, whether he be of full age or a minor, and to any child being a minor, and unmarried. (*c*)

(*a*) Eyre *v.* Countess of Shaftesbury, 2 P. Wms. 121. Gilchrist, J., in Balch *v.* Smith, 12 N. H. Rep. 441.

(*b*) Lord Shaftesbury *v.* Hannam, Finch's Rep. 323. Lord Eldon, in *Ex parte* The Earl of Ilchester, 7 Vesey, 367. The statute of Ohio, in 1831, very properly drops the word deed, and gives the father the power of appointing, *by will*, a testamentary guardian to his infant and unmarried child. But the statute in North Carolina, Georgia, and Tennessee, says expressly, that the father may by deed, executed in his lifetime, or by his last will and testament, in writing, dispose of the custody and tuition of his children during their minority. N. C. R. S. 1837, vol i. p. 306. Statute Laws of Tennessee, 1836, p. 366. Hotchkiss, Code of Georgia, 1845, p. 333.[1]

(*c*) N. Y. Revised Statutes, vol. ii. p. 150, sec. 1, 2, 3; Statutes of New Jersey of 1795; Elmer's Digest, 598; Act of Virginia, 1792; V. R. C. vol. i. p. 240; Statute of Pennsylvania, 1833, Purdon's Dig. 971; Chase's Statutes of Ohio, vol. iii. 1788. Statute of Alabama, of 1822, all allow a father, being a minor, to appoint a testamentary guardian, who should have the powers of a guardian in common socage. This testamentary power was copied from the statute 12 Car. II. c. 24. The statute of 1 Vict. c. 26, has taken away from an infant father the power to appoint a testamentary guardian. But it is said that the power given by the statute of 12 Car. II., to the infant father, to appoint a guardian by *deed*, is still retained. The Massachusetts Revised Statutes of 1836, part 2, tit. 4, ch. 79. Ibid. tit. 7, ch. 79, requires security from every testamentary guardian or trustee, appointed by will, for minors or others, unless the will directs otherwise, and the trustee's powers and duties are prescribed with considerable minuteness. It was declared by statute in Massachusetts, in 1837, that the marriage of a female guardian operated as an extinguishment of her authority as guardian, and that the husband did not succeed as guardian in her right. The statute of Illinois, of 1835, gives the power by deed or last will, to the

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[1] In Texas, a father cannot, as guardian by nature over the person and estate of his minor child, assign his power by deed. Byrne *v.* Love, 14 Texas, 81.

The better opinion is, that such a testamentary guardian will continue till the age of twenty-one, though the infant be a female, and marry in the mean time, if the will be explicit as to the duration of the trust; for the statute gives that authority to the father. It has been held, that the marriage of a daughter will determine the guardianship as to her, though not so as to a son until he comes of age; and Lord Hardwicke said, in *Mendes* v. *Mendes*, (*a*) that it had been so adjudged in *Lord Shaftesbury's case.* But, in the subsequent case of *Roach* v. *Garvan*, (*b*) the language of the chancellor was, that the marriage would not, of itself, determine a guardianship, though the court would never appoint a guardian to a married female infant. The latter cases lead to the conclusion that the marriage of a female infant does not absolutely determine the guardianship, and that it would require a special *order in chancery to do it. (*c*) The cases are not very clear and consistent on this point. It would be quite reasonable that *226

mother as well as to the father, if she be sole, and the father has made no such disposition. Though a testator by will directs his executors, out of the proceeds of a specified bequest to his infant son, to educate him, that provision does not of itself make the executors testamentary *guardians* for it is only instruction or direction as to the education of the infant, and does not imply *the custody* or charge of the person. Kevan *v.* Walker, 11 Leigh's Rep. 414.

(*a*) 1 Ves. 89. 3 Atk. Rep. 619.

(*b*) 1 Ves. 160.

(*c*) In the matter of Whitaker, 4 Johns. Ch. Rep. 380. It was decided in Jones *v.* Ward, 10 Yerger, 160, that guardianship as to a female ward ceases upon her marriage under age. In England it is quite of course to appoint a new guardian in such a case. 8 Simons, 346.[1] The Court of Chancery rarely removes a testamentary guardian duly appointed, though it will interfere and impose such restrictions as will prevent an abuse of the trust. Goodall *v.* Harris, 2 P. Wms. 560. Roach *v.* Garvan, 1 Vesey, 160, and the note of Mr. Bell, Ibid. There seems to be no sufficient ground for the doubt in some of the books, that a testamentary guardian cannot be removed. Story's Com. on Eq. Jurisprudence, vol. ii. p. 572, sec. 1339, note. When a *feme sole*, appointed guardian of her infant, married, the court directed an inquiry whether she had not thereby deprived herself of the guardianship, as she was no longer *sui juris;* though it seems she might be reappointed under new sureties.[2] Gornall, matter of. Rolls Court at Westminster, May, 1839. 1 Beav 347.

[1] Nicholson *v.* Wilborn, 13 Geo. 467.

[2] A married woman may be made a guardian with the assent of her husband, but not otherwise. Palmer *v.* Oakley, 2 Doug. Mich. R. 433. Farrer *v.* Clark, 29 Mississippi, (7 Cush.) 195.

the marriage of a female ward should determine the guardianship, both as to her person and her estate, if she married an adult. It ought to be so as to her person, but not as to her estate, if she married a minor. Upon the marriage of a male ward, the guardianship continues as to his estate, though it has been thought otherwise as to his person. (*a*) [1]

(5.) The distinction of guardians by nature, and by socage, seems now to be lost or gone into oblivion, and those several kinds of guardian have become essentially superseded in practice by the *chancery guardians*, or guardians appointed by the Court of Chancery, or by the surrogates in the respective counties of New York, and by courts of similar character, and having jurisdiction of testamentary matters, in the other states of the Union. (*b*) Testamentary guardians are not very common, and all other guardians are now appointed by the one or the other of those jurisdictions. The power of the chancellor to appoint guardians for infants who have no testamentary or statute guardian, is a branch of his general jurisdiction over minors and their estates, and that jurisdiction has been long and unquestionably settled. (*c*) The chancery guardian con-

(*a*) Reeve's Domestic Relations, p. 328. By the civil law, marriage did not confer on a minor the privileges of majority. Dig. 4, 4, 2. Code, 5, 37, 12. But the laws of modern nations are very diverse on the effect of marriage upon minors. Marriage is an emancipation of the minor to full rights by the French and Dutch laws. Code Civil, art 476 Voet, ad Pand. 4, 4, 6. Van Der Linden's Inst. b. 1, ch. 5, sec. 7.

(*b*) In Pennsylvania, the Orphans' Court has plenary power to appoint and control guardians, and regulate the maintenance of infants; and in Ohio the courts of common pleas; and in New Jersey the ordinary or orphans' court, or the surrogate, as the case may be; and in Massachusetts, Connecticut, and other states, the court of probate of the county have the power. In North Carolina the superior and county courts and the court of chancery, seem to have concurrent jurisdiction over orphans and their estates. N. C. R. S. 1837, pp. 307, 313.[2]

(*c*) Harg. n. 16 to Co. Litt. 88 b, No. 70. 2 Fonb. Tr. Eq. 288, n. 10 Vesey, 63. Sir J. Jekyll, in Eyre *v.* Countess of Shaftesbury, 2 P. Wms. 118, 119. The usual order in the appointment of a guardian for a minor under fourteen, the father being

[1] Where there are two guardians, one of them can maintain an action against the other for removing the ward from the custody of the former without her consent. Gilbert *v.* Schwenck, 14 Mees. & Wels. R. 488.

[2] In California, the district courts have, by the constitution of that state, the same control over the persons of minors and their estates, that the Court of Chancery in England possesses. Wilson *v.* Roach, 4 Cal. 362.

tinues until the majority of the infant, and is not controlled by the election of the infant when he arrives at the age of fourteen. (*a*) If there be no testamentary * guardian, the *227 surrogate or judge of probate is authorized to allow of guardians who shall be chosen by infants of the age of fourteen years, and to appoint guardians for such as shall be within that age, in as full and ample a manner as the chancellor may appoint or allow the same, upon the guardian giving adequate security for the faithful discharge of his trust; and upon due cause shown, and due inquiry made, the surrogate, who appointed a guardian, may remove him from his trust, and appoint another in his stead. (*b*) [1] Guardians are liable to be cited and compelled to account before the surrogate, but his powers in these respects are not exclusive. The general jurisdiction over every guardian, however appointed, still resides in chancery; and a guardian appointed by the surrogate, or by will, is as much under the superintendence and control of the Court of Chancery, and of the power of removal by it, as if he were appointed by the court. (*c*) [2]

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dead, is, (1.) to the mother, if unmarried; (2.) the paternal, and (3.) the maternal grandfather; (4.) to one or more uncles on the father's side; (5.) to the one or more uncles on the mother's side; (6.) to any other proper person.

(*a*) In the matter of Nicoll, 1 Johns. Ch. Rep. 25. N. Y. Revised Statutes, vol. ii. p. 151, sec. 10. In Maryland, it is provided by statute that infant females, at the age of sixteen, shall be entitled to demand and receive from their guardians, possession of their real and personal estate, and at the age of eighteen they have a capacity to devise real estate. But these are exceptions to the general rule of the common law, and in other respects the legal minority and disability of infancy of females as well as of males, continues until the age of twenty-one. Davis *v.* Jacquin, 5 Harr. & Johns. Rep. 100. She cannot execute a release to her guardian under the age of twenty-one. Fridge *v.* The State, 3 Gill & Johns. Rep. 103.[3]

(*b*) N. Y. Revised Statutes, vol. ii. pp. 150–152, sec. 4, 5, 6, 10–13. Mass. Revised Statutes, 1836. The competent age of the infant for choosing a guardian is usually fixed at fourteen in males, and when a difference is made between the age of the sexes in this case, it is twelve in females. This was the ancient statute rule in Connecticut, and it was declared by statute in 1821, and in Ohio by statute in 1824.

(*c*) In the matter of Andrews, 1 Johns. Ch. Rep. 99. *Ex parte* Crumb, 2 Johns.

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1 A surrogate in New York has no jurisdiction over the appointment of a guardian, unless the minor resides in his county. Brown *v.* Lynch, 2 Bradf. (N. Y.) 214.

2 Wilcox *v.* Wilcox, 4 Kernan, (14 N. Y.) 575.

3 She may at the age of eighteen execute a valid release to one who *has been* her guardian. McClellan *v.* Kennedy, 8 Maryl. 230. S. C. 3 Maryl. Ch. 234.

The practice in chancery, on the appointment of a guardian, is to require a master's report approving of the person and security offered. The court may, in its discretion, appoint one person guardian of the person, and another guardian of the estate; in like manner as in the cases of idiots and lunatics, there may be one committee of the person, and another of the estate. The guardian or committee of the estate always is required to give

Ch. Rep. 439. Duke of Beaufort *v* Berty, 1 P. Wms. 703. N. Y. Revised Statutes, vol. ii. pp. 152, 153, 220. The rights and powers of the guardians over the person and property of their wards are, like the rights and authorities of executors and administrators, strictly local, and cannot be exercised in other states, for they come within the same reasoning and authority. Morrell *v.* Dickey, 1 Johns. Ch. Rep. 156. Sabin *v.* Gilman, 1 N. H. Rep. 193. Armstrong *v.* Lear, 12 Wheaton, 169. Story's Com. on the Conflict of Laws, § 494 *et seq.* 594.[1] Nor have they any authority over the real property of their wards, situated in other countries, for such property is governed by the law *rei sitæ.* Story, Ibid. § 504. But a guardian may change the domicil of his ward, so as to affect the right of succession to personal property, if it be done in good faith. Ibid. 505. See Potinger *v.* Wightman, 3 Merivale's Rep. 67, where the question as to the power of *the guardian, being also a widow and mother of the minor,* to transfer the domicil of the minor, is discussed by counsel with great learning, and the competency of the surviving parent as a guardian to do it, is shown to rest not only upon principle, but upon the soundest foreign authority; and J. Voet, Rodenburgh, Bynkershoek, and Pothier, are cited for the purpose. The same principle is adopted in this country. Holyoke *v.* Haskins, 5 Pick. Rep. 20. The case decided by Sir William Grant was one in which the guardian was also the *mother* of the infant, and the continental authorities referred to, speak of the power of the surviving *parent* to change the domicil of the child, if not done fraudulently, with a view to change the succession. Pothier agrees to that, but denies that a guardian only in that character can do it. The French and Louisiana civil codes declare that the minor has his domicil at that of his father, mother, *or tutor.* Code Civil of France, n. 108; of Louisiana, art. 48. A contrary decision was made in School Directors *v.* James, 2 Watts & Serg. 568; and it was held, that though the domicil of the *parent* was the domicil of the child, it was not necessarily so in the case of a *guardian.* The parent's influence in this case springs from the institution of marriage and families; and the learned Ch. J. Gibson followed the doubt of Mr. Justice Story, and confined the power of changing the infant's domicil to the parent *qua* parent. It would rather seem to me, that if there be no competent parent living, and the guardian be duly appointed, that he may and ought, when acting in good faith and reasonably in his character of guardian, to be able to shift the infant's domicil with his own, and that the foreign authorities to that point have the best reason on their side. The objection against the guardian's power in such a case appears to me to be too refined and speculative.

[1] Where a guardian removed from the state in which he received his appointment, carrying with him a part of the infant's property, the court, without notice to him, appointed another in his place. Cooke *v.* Beale, 11 Ired. 36. Loskey *v.* Reid, 4 Bradf. (N. Y.) 334.

adequate security, but the guardian or committee of the person gives none.

* The guardian of the estate has no further concern *228 with, or control over, the real estate, than what relates to the leasing of it, and the reception of the rents and profits, and it is his duty to place the ward's land upon lease. (a) He has such an interest in the estate of his ward as to enable him to avow for *damage feasant*, and to bring trespass or ejectment in his own name. These were common-law rights belonging to the guardian in socage, and they apply to the general guardian at the present day. (b) He may lease during the minority of the ward, and no longer; (c) but he cannot sell without the authority of the Court of Chancery. He may sell the personal estate for the purposes of the trust, without a previous order of the court. (d) [1] Whenever it becomes necessary to have the real estate of an infant sold, there must be a guardian specially appointed for that purpose; and the sale is made under the direction of the Court of Chancery, and the application and disposition of the proceeds are to be under its order; for in respect to such proceedings, the infant is considered a ward of the court. (e) The

(a) Genet v. Tallmadge, 1 Johns. Ch. Rep. 561. Jones v. Ward, 10 Yerger, 160.

(b) Shopland v. Ryoler, Cro. J. 98. Byrne v. Van Hoesen, 5 Johns. Rep. 66. The King v. Inhabitants of Oakley, 10 East, 491. But the guardian or committee of a *lunatic* cannot make leases and bring ejectments in his own name without special statute authority. This was the rule at common law. Knipe v. Palmer, 2 Wilson, 130; and it is the rule in North Carolina, (3 Iredell, 389,) whose courts follow more strictly the English law, and are less influenced by American state decisions than perhaps any state in the Union.[2]

(c) Roe v. Hodgson, 2 Wils. 129, 135. Field v. Schieffelin, 7 Johns. Ch. Rep. 154. But the guardian's lease of the infant's lands for a term of years, extending beyond the infant's age of 14 years, is voidable, provided the infant be then entitled to choose his own guardian, and it may be avoided by the subsequent guardian chosen by the infant. Snook v. Sutton, 5 Halsted, 133.

(d) Field v. Schieffelin, 7 Johns. Ch. Rep. 150. Ellis v. Essex M. Bridge, 2 Pick. Rep. 243. The sale of personal estate of the infant *cestui que trust*, without a previous order in chancery, if fair, would undoubtedly be good as to the purchaser; but the safer course for the guardian is, to have a previous order in chancery.

(e) N. Y. Revised Statutes, vol. ii. p. 194, sec. 170–180. Act of Congress of March 3d, 1843, c. 87, as to the chancery sale of the real estate of infants within the District

[1] Hunter v. Lawrence, 11 Gratt. 111. Woodward v. Donally, 27 Ala. 198.

[2] Patton v. Thompson, 2 Jones, Eq. (N. C.) 411.

only material restriction in New York on the power and discretion of the Court of Chancery in this case is, that no estate of an infant can be sold against the provisions of any last will, or of any conveyance by which the estate was vested in the infant. But the provisions of the law have been held not to apply ordinarily to the case of a female infant who is married. *229 The power given to the court to order a *sale of the real estate of infants, was intended for their better maintenance and education, and not that the proceeds should be placed at the disposition of the husband. (a)

In addition to these general guardians, every court has the incidental power to appoint a guardian *ad litem;* and in many cases the general guardian will not be received as of course, without a special order for the purpose. (b) [1]

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of Columbia. In Maryland, the chancellor, by a statute provision, may order the real estate descending to infants to be sold for the payment of debts. And in Ohio, the courts of common pleas appoint guardians, and may authorize them to sell the real and personal estate of the ward in any county of the state; and all guardians, whether appointed by the courts or testamentary, must account before the court every two years; but the ward may open the accounts within two years after he comes of age. Act of Maryland, 1785. Statute of Ohio, February 6, 1824. Lessee of Maxsom *v.* Sawyer, 12 Ohio R. 195.[2]

(a) Matter of Whitaker, 4 Johns. Ch. Rep. 378. The Revised Statutes of New York have not altered, essentially, the phraseology of the law as it stood when the decision in the case of Whitaker was made. The language of the statute is sufficiently comprehensive to embrace the case, and there may be instances in which it would be necessary that the estate of a female married infant should be sold, as where the husband absconds and leaves her destitute. The case referred to presumed that the power to direct a sale still resided in the Court of Chancery, to be exercised in special cases. In Connecticut, the courts of probate, on due application and for reasonable cause, may order the sale of the real estate of any minor. Statutes of Connecticut, 1838, p. 331; and this power is generally conferred by statute in the several states, in the courts of consistorial jurisdiction.

(b) Harg. note 70, and note 220 to lib. 2 Co. Litt. Huckle *v.* Wye, Carth. 255. Whoever enters upon the estate of an infant, is considered in equity as entering in the character of guardian; and after the infant comes of age, he may, by a bill in chancery, recover the mesne profits. Morgan *v.* Morgan, 1 Atk. 489. Drury *v.* Conner, 1 Harris & Gill, 220.

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[1] Mathewson *v.* Sprague, 1 Curtis, C. C. 457. The court will not appoint a person, who is not interested in the infant or in the suit. Foster *v.* Cautley, 19 E. L. & Eq. 437. So a guardian *ad litem*, appointed without the consent or knowledge of the infant defendants, was removed, and one of their own choice substituted. Matter of the Water Commissioners, 4 Edw. Ch. 546.

[2] In Mississippi, a guardian is bound by law to render an annual account, and oftener, if required. Reynolds *v.* Walker, 29 Mississippi, (7 Cush.) 250.

The guardian's trust is one of obligation and duty, and not one of speculation and profit. He cannot reap any benefit from the use of the ward's money. He cannot act for his own benefit in any contract, or purchase, or sale, as to the subject of the trust.[1] If he settles a debt upon beneficial terms, or purchases it at a discount, the advantage is to accrue entirely to the infant's benefit. He is liable to an action of account at common law by the infant, after he comes of age; and the infant, while under age, may, by his next friend, call the guardian to account by a bill in chancery. (*a*)[2] Every guardian in socage, and every general guardian, whether testamentary or appointed, is bound to keep safely the real and personal estate of his ward, and to account for the personal estate, and the issues and profits of the real estate; and if he makes or suffers any waste, sale, or destruction of the inheritance, * he is liable to be removed, and to answer in treble damages. (*b*) *230

(*a*) By the practice in chancery, an infant is allowed one year after he arrives of age to investigate the guardian's accounts, and to surcharge and falsify if they be found wrong; and the guardian is not entitled to an absolute discharge until the expiration of that time. In the matter of Van Horne, 7 Paige, 46. The courts of equity throw a vigilant and jealous care over the dealings of guardians with infants on their coming of age. If there be a pecuniary transaction between guardian and child just after the latter becomes of age, and without any benefit moving to the child, as in the case of gifts, the presumption is, that undue influence has been employed, and that presumption must be rebutted by adequate proof. Archer *v.* Hudson, 7 Beavan, 551. The courts set aside such transactions on the ground of public utility and policy, though there be no actual unfairness in the case. Hylton *v.* Hylton, 2 Vesey, 547. See Gale *v.* Wells, 12 Barb. R. 84.[3] A settlement out of court, between a guardian and his former ward, is a release to the guardian, but has been held not to be a compliance with the guardian's bond to render an account when required by the court. Kittredge *v.* Betton, 14 N. Hamp. R. 401. Gregg *v.* Gregg, 15 N. Hamp. R. 190.

(*b*) N. Y. Revised Statutes, vol. ii. p. 153, sec. 20, 21. The statute law of Tennes-

[1] Dietterich *v.* Heft, 5 Barr's R. 87. Clowes *v.* Van Antwerp, 4 Barb. S C. Rep. 416. Lefevre *v.* Laraway, 22 Barb. 168. Kennard *v.* Adams, 11 B. Mon. 102. Sparhawk *v.* Allen, 1 Foster, (N. H.) 9. A guardian's purchase of his ward's lands cannot be avoided by the latter as against the guardian's mortgagee, who paid a valuable consideration and had no notice of the circumstances of the sale. Wyman *v.* Hooper, 2 Gray, 141. The guardian of an infant has not the power to enter into marriage articles with her intended husband, which shall be obligatory on her. Healy *v.* Rowan, 5 Gratt. 414. Lefevre *v.* Laraway, 22 Barb. (N. Y.) 167.

[2] So, if the guardian be removed during the infant's minority. Richards *v.* Swan, 7 Gill, 366. Swan *v.* Dent, 2 Maryl. Ch. 111.

[3] Wright *v.* Arnold, 14 B. Mon. (Ky.) 638.

If the guardian has been guilty of negligence in the keeping or disposition of the infant's money, whereby the estate has incurred loss, the guardian will be obliged to sustain that loss. (*a*)[1] The guardian must not convert the personal estate of the infant into real, or buy land with the infant's money, without the direction of the Court of Chancery. The power resides in that court to change the property of infants from real into personal,

see is very strict and monitory respecting the fidelity of executors, administrators, and guardians. The Act of 1837, ch. 125, requires them to settle their accounts with the clerk of the county court once a year;[2] and if they neglect to do so for thirty days after being called upon by the clerk, they are liable to indictment, and the attorney-general is bound *ex officio* to prefer the indictment. The Supreme Court thinks the laws to be admirably adapted to preserve the property of *cestui que trusts*, and the fidelity of these trustees. State *v.* Parrish, Nashville, Dec. 1843, 4 Humph. 285. Guardians are allowed for their reasonable expenses, and the same rates of compensation (N. Y. Revised Statutes, vol. ii. p. 153, sec. 22; Mass. Revised Statutes, part 2, tit. 7, ch. 79) for their services, as provided by law for executors; and for that, see *infra*, p. 420.

(*a*) Guardians and trustees of the moneyed concerns of others are answerable for any misapplication or unauthorized dealings with the trust moneys or stock. The rule on this subject is very strict.[3] All persons acting in a fiduciary character are bound to use the same care and management that a prudent man would exercise over his own affairs. What is the requisite diligence, will depend on the attendant circumstances. Glover *v.* Glover, 1 McMullan's S. C. Rep. 153. A receiver in chancery is answerable for the loss of moneys by the failure of a banker with whom they were deposited for security, if the receiver parts with the *absolute* control over the fund, and lets a stranger in to control his absolute discretion in the case. Salway *v.* Salway, 2 Russell & Mylne, 215.[4] So, Lord Eldon, in Ware *v.* Polhill, 11 Vesey, 278, and in Phillips, *ex parte*, 19 Vesey, 122, was very guarded in laying down the power of the court in changing infant's property so as not to affect the infant's power over it when he comes of age, or to change its descendible character. But as a general rule, in respect to stocks held in trust, such trustees are not to look beyond the legal title, or to take notice *aliunde* of trusts chargeable upon the stock. Hartga *v.* Bank of England, 3 Vesey, 55. Bank *v.* Parson, 5 Ibid. 665. Franklin *v.* The Bank of England, 1 Russell, 575.

[1] Wills's Appeal, 22 Penn. 325. McLean *v.* Hosea, 14 Ala. 194.

[2] So Laws of Connecticut, 1853, c. 62.

[3] The receiver of an insolvent corporation cannot impeach or disaffirm the lawful acts of the company. Hyde *v.* Lynde, 4 Comst. R. 387.

[4] Collins *v.* Champ, 15 B. Mon. 118. When an infant's lands are sold by order of the court, the proceeds are, with respect to descents, impressed with the character of realty during the infant's minority. Shumway *v.* Cooper, 16 Barb. 556. Forman *v.* Marsh, 1 Kern. 544. Sweezy *v.* Thayer, 1 Duer, 286. March *v.* Berrier, 6 Ired. Eq. 524. This fictitious character ceases when the party attains his majority and receives possession of the property. Forman *v.* Marsh, *ubi supra*.

and from personal into real, whenever it appears to be manifestly for the infant's benefit. (*a*)[1] It is said that the latter

(*a*) Earl of Winchelsea *v.* Norcliffe, 1 Vern. Rep. 434. Inwood *v.* Twyne, Amb. Rep. 417. 2 Eden's Rep. *148, *153, S. C. Ashburton *v.* Ashburton, 6 Vesey, 6. Huger *v.* Huger, 3 Desau. S. C. Eq. Rep. 18. Dorsey *v.* Gilbert, 11 Gill & Johnson, 87. 3 Johns. Ch. Rep. 348, 370. Hedges *v.* Riker, 5 Id. 163. By the English statute of 8 & 9 Vict. ch. 97, trustees of stock belonging to an infant or lunatic may give power to receive dividends. Equity will not interfere *in adversum* to change real into personal estate by a sale, without requiring it to retain throughout the character of the original fund. Foster *v.* Hilliard, 1 Story's Rep. 77.[2] And it is a well-settled rule in chancery, that when land is directed to be sold and turned into money, or money is directed to be employed in the purchase of lands, courts of equity, in dealing with the subject, will consider it that species of property into which it is directed to be converted. What is legally agreed to be done, is considered as done. Wheldale *v.* Partridge, 5 Vesey, 396. Craig *v.* Leslie, 3 Wheaton, 563, 577–588. Peter *v.* Beverley, 10 Peters's U. S. Rep. 533. Hawley *v.* James, 5 Paige's R. 320. Walworth, Chancellor, in Gott *v.* Cook, 7 Paige's Rep. 534. Cowen, J., in Kane *v.* Gott, 24 Wendell, 660. Rutherford *v.* Green, 2 Iredell's N. C. Eq. Rep. 122. Reading *v.* Blackwell, Baldwin's C. C. U. S. Rep. 166. Rhinehart *v.* Harrison, Ibid. 177. See, also, *infra*, p. 476, n. The English authorities on this subject are collected in Fonblanque's Eq. vol. i. b. 1, ch. 6, sec. 9, notes *s. t.* Newland on Contracts, ch. 3, pp. 48–64. 2 Story on Equity, 99, 585–587. Burge's Com. on Colonial and Foreign Laws, vol. ii. 53–57. 2 Jarman's Powell on Devises, ch. 4, p. 60. Leigh & Dalzell on Eq. Conversion, 48, &c.[3] The constitution of New Jersey, in 1844, art. 4, sec. 7, prohibits the passing of any private or special *law* for the sale of lands belonging to any minor, or other persons under no legal disability to act for themselves. Before this constitutional provision, the legislature had the authority in its discretion, and the Court of Chancery had that authority in the case of infants and lunatics; and I presume it has it still. Snowhill *v.* Snowhill, 2 Green's N. J. Ch. R. 20. If, under a power to sell real estate for certain purposes, a sale be made, and if there be a surplus undisposed of, it goes to the heir at law as real estate. Leigh & Dalz. on Conversion, 92. Estate of Tilghman, 5 Wharton, 44. Snowhill *v.* Ex'r of S., 1 Green's N. J. Ch. Rep. 30. The doctrine of equitable conversion, as applied to the change of real into personal estate, seems to rest upon the question, whether the testator meant to give to the produce of real estate the quality of personalty *to all intents*, or only *so far* as respected the particular purposes of the will. Unless the first purpose be clearly declared, then so much of the real estate, or the produce thereof, as is not effectually disposed of by the will, or wanted for the purpose of it, results to the heir at law.[4] Cruse *v.* Barley, 3 P. Wms. 20, Mr. Cox's note thereto. Digby *v.* Legard, cited in the note of Mr. Cox. Ackroyd *v.* Smithson, 1 Bro. Ch. Rep. 503, and Lord Eldon's

[1] Stanley's Appeal, 8 Barr's R. 431. Worrell's Appeal, 9 Id. 508. S. C. 23 Penn. 44.

[2] *Ex parte* Jewett, 16 Ala. 409. Troy *v.* Troy, 1 Busbee, Eq. 85. This power is not inherent in the original jurisdiction of chancery, but is wholly derived from statutes. Baker *v.* Lorillard, 4 Comst. 257. Forman *v.* Marsh, 1 Kern. 544.

[3] Meakings *v.* Cromwell, 1 Selden, R. 136.

[4] Lands devised to executors, to be sold at their discretion as to time, are not converted until sold. Christler *v.* Meddis, 6 B. Mon. R. 35. Haggard *v.* Rout's Heirs, Ibid. 247.

power may be exercised by a guardian or trustee, in a clear and strong case, without the previous order of a court of equity; but the infant, when he arrives at full age, will be entitled, at his election, to take the land or the money, with interest; and if he elects the latter, chancery will take care that justice be done, by considering the ward as trustee for the guardian of the lands standing in his name, and will direct the ward to convey. (*a*)[1] And if the guardian puts the ward's money in trade,

argument in that case. Amphlett *v.* Parke, 2 Russell & Mylne, 221. Wright *v.* Trustees of Meth. Ep. Church, 1 Hoffman's Ch. Rep. 218-222. In this last case the authorities are all collected and examined with ability and learning. So, on the other hand, in Cogan *v.* Stevens, decided by Sir Christopher Pepys, the master of the rolls, in November, 1835, and reported in Appendix No. 7 to Lewin on Trusts. It seems to be equally settled by the powerful decision in that case, that where the testator directs money to be invested in land for certain purposes, some of which are lawful and take effect, and others fail and become void, the property so given, after satisfying the lawful purposes, belongs to the next of kin and not to the heir. This whole doctrine of constructive conversion is fully discussed, and the cases well examined and digested in Jarman on Wills, vol. i. ch. 19, Boston edit. 1845, edited by J. C. Perkins, Esq.

(*a*) Caplinger *v.* Stokes, Meig's Tenn. Rep. 175. Eckford *v.* De Kay, 8 Paige's Rep. 89. That such a power might be exercised without a previous authority was intimated in 2 Eden's Rep. 143, 152, and Amb. Rep. 419; and it was allowed and sustained afterwards by the Supreme Court of Pennsylvania, in 1 Rawle's Rep. 266. But it is an extremely perilous act in a trustee, and cannot be recommended. The Court of Chancery itself has no inherent original jurisdiction to direct the sale of the real estate of an infant. The power is derived entirely from statute. Taylor *v.* Phillips, 2 Vesey, 23. Russell *v.* Russell, 1 Molloy, 525. Rogers *v.* Dill, 6 Hill, (N. Y.) R. 415. In Virginia, the guardian cannot apply any part of the *principal* of the infant's estate to his education or support, without the previous consent of the court appointing him. Myers *v.* Wade, 6 Randolph's Rep. 444.[2] A court of chancery may, in its discretion, appropriate the *capital* of the ward, and apply it for maintenance; but the guardian does it, without such order, at his peril. Long *v.* Norcom, 2 Iredell's N. C. Eq. Rep. 354. *In re* Lane, 17 E. L. & Eq. 162. *Vide supra,* p. 193, n. *c*. If a mother has maintained her infant child without the order of the court, she will be entitled only to a liberal indemnity for what she has expended, without reference to the amount of his fortune, though if the court be applied to for a prospective allowance, regard may be had to his fortune. Bruin *v.* Knott, in Ch., by Lord Lyndhurst, 1845. It is the general statute law throughout the United States that the lands of infants may be sold, when their interest or that of others requires it, in the opinion of the courts having jurisdiction of the subject. The guardian is the proper

[1] If a guardian advances his own money to erect buildings on his ward's land, without the order of a court, he cannot recover the amount from his ward. Hassard *v.* Rowe, 11 Barb. R. 24. See White *v.* Parker, 8 Barb. R. 48; Sherry *v.* Sansberry, 3 Ind. 320.

[2] Austin *v.* Lamar, 23 Miss. 189. Brown *v.* Mullins, 24 Miss. 204.

the ward will be equally entitled to elect to take the profits of the trade, or the principal with compound interest, to meet those profits when the guardian will not disclose them. (*a*) So, if he neglects to put the ward's money at interest, but negligently, and for an unreasonable *time, suffers it to *231 lie idle, or mingles it with his own, the court will charge him with simple interest, and in cases of gross delinquency, with compound interest. These principles are understood to be well established in the English equity system, and they apply to trustees of every kind; (*b*) and the principal authorities upon which they rest, were collected and reviewed in the chancery decisions in New York, to which it will be sufficient to refer, as they have recognized the same doctrine. (*c*) Those doctrines, with some exceptions, pervade the jurisprudence of the United States. (*d*) [1]

person to apply for the authority, and to exercise it. Statute Law of Kentucky of 1813. R. L. of N. Y. vol. ii. 194. Prince's Dig. of Laws of Georgia, 1837, pp. 243, 248, 250. Massachusetts Revised Statutes of 1836, part 2, tit 5, ch. 71, 72. Ibid. ch. 79.

(*a*) Docker *v.* Somes, 2 Mylne & Keene, 665, and notes *d* and *e* below.

(*b*) They have been applied to a sheriff who kept money in the hands of his banker for years, without color of right The King *v.* Villers, 11 Price's Rep. 575.

(*c*) Green *v.* Winter, 1 Johns. Ch. Rep. 26. Dunscomb *v.* Dunscomb, Ibid. 508. Schieffelin *v.* Stewart, Ibid. 620. Holridge *v.* Gillespie, 2 Johns. Ch. Rep. 30. Davoue *v.* Fanning, Ibid. 252. Smith *v.* Smith, 4 Johns. Ch. Rep. 281. Evertson *v.* Tappen, 5 Johns. Ch Rep. 497. Clarkson *v.* De Peyster, Hopkins's Rep. 424. Rogers *v.* Rogers, Ibid. 515. The principle on which interest is charged, as against trustees who neglect to invest trust moneys, or unduly misapply them, and the authorities, both in England and in the Roman jurisprudence, in which the justice and policy of the rule are explained and enforced, are referred to and discussed by the district judge of the U. S. in Maine, in the matter of Thorp, N. Y. Legal Observer for October, 1846, (vol. 4, p. 377.)

(*d*) Reeve's Domestic Relations, 325, 326. 2 N. H. Rep. 218. 1 Mason's Rep. 345. 5 Conn. Rep. 475. Fox *v.* Wilcocks, 1 Binney's Rep. 194. 3 Desaus. Rep. 241. 4 Desaus. Rep. 702–705. Ringgold *v.* Ringgold, 1 Harris & Gill, Rep. 11. Edmonds *v.* Crenshaw, State Eq. Rep. S. C. 224. Turney *v.* Williams, 7 Yerger, 172. Karr *v.* Karr, 6 Dana's Kentucky Rep. 3. In this last case, compound interest, by means of periodical rests biennially, was allowed, as the guardian had suffered interest to lie idle. A *guardian* settled his account with an infant within a month after he came of age, and when the latter had no friend or adviser on his part. Account ordered to be opened, notwithstanding the vouchers had been delivered up.

[1] Kyle *v.* Barnett, 17 Ala. 306; Kerr *v.* Laird, 27 Miss. 544; Light's Appeal, 24 Penn. 180; Biles's Appeal, Ib. 335; Lane's Appeal, Ib. 487. Six months is held a reasonable time in Worrell's Appeal, 23 Penn. 44.

In the French law, when children are orphans, and have no guardian appointed by the parents, nor by the judge within the

Revett v. Harvey, 1 Simons & Stuart, 502.[1] The practice, as to allowing interest, and in strong cases compound interest against trustees, is fully discussed in Wright v. Wright, 2 M'Cord's S. C. Ch. Rep. 185. In New Jersey, guardians who omit to put the ward's money at interest, by reason of fault or negligence, are chargeable with ten per cent. interest. Revised Laws, 779, sec. 11.

The doctrine laid down in the text, that in cases of gross delinquency as to trust-moneys, an executor or other trustee will be charged with compound interest, though just and reasonable in the cases in which it has been applied, has in some instances been rather unsparingly condemned.[2] Let us for a moment examine its foundations. In Raphael v. Boehm, 11 Vesey, 92, 13 Ibid. 407, 590, it was applied to a case where the executor was directed, from time to time, to convert the interest into principal, and he disregarded the direction to accumulate. In Schieffelin v. Stewart, 1 Johns. Ch. Rep. 620, the administrator did much worse. He employed the trust moneys in trade for his own benefit, and refused to give an account of the profits. In the first case, the doctrine received the sanction of Lord Rosslyn, Lord Eldon, and Lord Erskine, before all of whom the cause was successively brought. The same doctrine was afterwards recognized by Lord Eldon, in *Ex parte* Baker, 18 Vesey, 246, and enforced by the House of Lords on appeal, in the opinion delivered by Lord Redesdale, in Stacpoole v. Stacpoole, 4 Dow's Rep. 209. The only case in the English courts in which the doctrine has been directly questioned and condemned, is that of Tebbs v. Carpenter, 1 Madd. Ch. Rep. 290. The vice-chancellor in that case only refused to apply it to the fact of negligence in the executor, and he admitted that a distinction ought to be taken between negligence and misfeasance, or corruption. In this country, I may only allude to the case already mentioned in the New York chancery, and I would then observe that the rule was very well discussed so late as 1820, in South Carolina, by Judge Nott, in giving the opinion of the Court of Appeals in Wright v. Wright, 2 M'Cord's Ch. Rep. 185. He admitted, and Chancellor Desaussure declared, that the general rule in South Carolina was against allowing rests and compound interests against trustees. He said, however, that some cases would require it, though it might be difficult to draw with precision a line of distinction between those cases in which the rule should and should not apply. He approved of its application as just and proper, in the two cases of Raphael v. Boehm, and Schieffelin v. Stewart, and he thought that the cases in which compound interest was to be charged against trustees for abuse of trust, were rather exceptions to a general rule, than parts of one. So, in Ringgold v. Ringgold, 1 Harr. & Gill, 11, and Diffenderffer v. Winder, 3 G. & J. 311, (S. C. Raymond's Digested Chancery Cases, 363,) compound interest was allowed in the Court of Appeals in Maryland, where a trustee speculated with the trust funds, and endeavored to stifle inquiry; and in another case, where he was directed to invest funds, and receive dividends, and accumulate the fund, and when

[1] McClellan v. Kennedy, 8 Md. 230. Sullivan v. Blackwell, 28 Mississippi, (6 Cush.) 737.

[2] Ker's Adm. v. Snead, (Circuit C. of Virginia,) Law Reporter, Sept. 1848, vol. 11, p. 217. In the learned opinion of Mr. Justice Scarburgh in this case, the authorities are very fully examined, and he concludes that a trustee cannot be charged compound interest, merely because he has mingled the trust funds with and used them as his own.

limitations prescribed, there is to be a meeting of the family (*conseil de famille*) for the nomination of a guardian. The

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he had disregarded that duty, and applied the funds to his own use. It has also received the sanction of the Court of Appeals in Kentucky, of the Supreme Court of Massachusetts, and of the Supreme Court of North Carolina, sitting in equity, as proper in certain cases. Fay *v.* Howe, 1 Pick. Rep. 527. Boynton *v.* Dyer, 18 Pick. 1. Hughes *v.* Smith, 2 Dana's Ken. Rep. 253. Hodge *v.* Hawkins, 1 Dev. & Batt. Eq. 566. Karr *v.* Karr, 6 Dana's Ken. Rep. 3. The principle on which the allowance of compound interest has been made, even in cases in which it has been allowed, would seem to be condemned in Pennsylvania, in the recent case of English *v.* Harvey, 2 Rawle's Rep. 309, and especially in the elaborate review of the doctrine in the case of Peter M'Call, 1 Ashmead's Rep. 357.[1] Compound interest, in any case of the kind, is regarded as too severe and penal upon defaulting trustees, and as being only imperfectly sustained by authority. It appears to me, on the other hand, that authority, both foreign and domestic, and the reason of the thing, preponderate alike in favor of the allowance under the limitations stated, and that the total abandonment of the rule would operate, in many cases, most unjustly, as respects the right of the *cestui que trust*, and would introduce a lax discipline that would be dangerous to the vigilant and faithful administration of trust estates. It would be tempting trustees to keep in hand, for their own speculation and profit, the interest moneys of others without interest, contrary to their duty. If a trustee might go and trade with trust moneys, and make no account of the profits, and without any other penalty than the payment of simple interest, without annual rests, on the capital so corruptly perverted, the temptation to abuse would be irresistible. Such men ought to be dealt with by the plain but wholesome rules of Lord Eldon; and the legal responsibilities of trustees, as laid down in the text, is correctly stated. This doctrine has recently received the powerful sanction of the Supreme Court of Pennsylvania, in the opinion delivered by the chief justice, in the case of Harland's Accounts, 5 Rawle's Rep. 329. The cases, both foreign and domestic, are, in this opinion, examined, and the argument in favor of the allowance of annual rests, or compound interest, when the trustee, be he executor, administrator, guardian, or other trustee, grossly disregards his duty, is conclusively stated, and it applies to those cases in which such an allowance becomes necessary to place the *cestui que trust* in the condition in which a conscientious discharge of the trust would have placed him. See *infra*, p. 630, note. In the English equity court it seems to be unsettled what shall be the mode and extent of the responsibility of trustees, where they are directed to invest trust moneys in the public stocks

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[1] So in Dietterich *v.* Heft, 5 Barr's R. 87. Bryant *v.* Craig, 12 Ala. R. 354. Compound interest is well charged against a trustee who has grossly and wilfully neglected his trust, used the trust money in his own business, or omitted fraudulently to give account of profits. Barney *v.* Saunders, 16 How. U. S. 535, 542. Swindall *v.* Swindall, 8 Ired. Eq. 285. Jones *v.* Foxall, 13 E. L. & Eq. 140. In Knott *v.* Cottee, 13 E. L. & Eq. 304, an executor was charged with annual rests, because by the terms of the trust, which he had neglected to perform, he was distinctly required to accumulate the fund at compound interest. For a mere neglect to invest, simple interest only is generaly imposed. Barney *v.* Saunders, 16 How. U. S. 535. Light's Appeal, 24 Penn. 180. And see Kenan *v.* Carter, 8 Geo. 417; Greening *v.* Fox, 12 B. Mon. 187; Bentley *v.* Shreve, 2 Maryl. Ch. 215; Pettus *v.* Clawson, 4 Rich. Eq. 92.

family council is composed of six relations, half from the paternal and half from the maternal line, and the provision is very specific in its details. This provision has been incorporated, with some small variations, into the civil code of Louisiana. (*a*)

or in real security, and they do neither. Sir John Leach, the vice-chancellor, in Marsh *v.* Hunter, Madd. & Gel. 295, held, that they should be answerable for the principal money only, and not for the amount of stock which might have been purchased. But in Hockley *v.* Bantock, 1 Russ. 141, Lord Gifford, the master of the rolls, held differently, and that the trustees were answerable in a way the most beneficial to the *cestui que trust*, and at his option, either for the money or the stock which might have been purchased. Lord Langdale, the master of the rolls, in Watts *v.* Girdlestone, 6 Beav. 188, adopted the same principle of compensation. But, again, in Shepherd *v.* Mouls, 4 Hare, 500, Sir James Wigram, the vice-chancellor, adopted the precedent established by Sir John Leach, in Marsh *v.* Hunter.[1]

(*a*) Code Civil, book 1, tit. 10. Civil Code of Louisiana, art. 288, &c.

[1] That precedent was also adopted in Rees *v.* Williams, 1 De G. & Sm. 314; while Ames *v.* Parkinson, 7 Beav. 379, and Ouseley *v.* Anstruther, 10 Beav. 453, followed the rule in Hockley *v.* Bantock. In a late case in the Court of Chancery, upon a review of the former decisions, Lord Cranworth held, that inasmuch as in such cases the *cestui que trust* has not the right to *compel* the purchase of the stocks, he shall not be permitted to elect between these and the principal money, but that the trustees shall be charged only with the money and interest. Robinson *v.* Robinson, 9 E. L. & Eq. 69.

LECTURE XXXI.

OF INFANTS.

(1.) *When of age.*

The necessity of guardians results from the inability of infants to take care of themselves; and this inability continues, in contemplation of law, until the infant has attained the age of twenty-one years. The age of twenty-one is the period of majority for both sexes, according to the English common law, and that age is completed on the beginning of the day preceding the anniversary of the person's birth. (*a*) The age of twenty-one is probably the period of absolute majority throughout the United States, though female infants, in some of them, have enlarged capacity to act at the age of eighteen. In Vermont and Ohio, females are deemed of age at the age of eighteen. (*b*)[1] Louisiana follows, in this respect, the common-law period of limitation, though entire majority by the civil law, as to females as well as males, was not until the age of twenty-five; and Spain and Holland follow, as to males, the rule of the civil law. (*c*) By the French Civil Code, the age of full capacity is

(*a*) Anon. 1 Salk. 44. 1 Ld. Raym. 480. Sir Robert Howard's case, 2 Salk. Rep. 625. Hamlin *v.* Stevenson, 4 Dana's Kentucky Rep. 597. State *v.* Clarke, 3 Harr. Del. R. 557.

(*b*) 9 Vermont Rep. 42, 79.

(*c*) Inst. 1, 23. Partidas on Obligations, 5, 11, 5. Institutes of the Civil Law of Spain, b. 1, tit. 1, ch. 1, sec. 3. Institutes of the Laws of Holland, by Vanderlinden, b. 1, ch. 5, sec. 7. Code Civil, art. 388, 488. 1 Toullier, p. 153. Civil Code of Louisiana, art. 41, 93. The law of the domicil of birth governs the state and condition of the minor, into whatever country he removes, and his minority ceases at the period fixed by those laws for his majority. Barrera *v.* Alpuente, 18 Martin's Louisiana Rep. 69. This is the rule, as understood by many continental civilians. A person being a minor, or of majority by the law of his native domicil, carries that condition

[1] And in Illinois. Stevenson *v.* Westfall, 18 Ill. 209.

twenty-one years, except that twenty-five years is the majority for contracting marriage without paternal consent by the male, and twenty-one by the female. Code Civil, sec. 145, 488. Nor can infants do any act to the injury of their property, which they may not avoid or rescind when they arrive at full age.

The responsibility of infants for crimes by them committed depends less on their * age than on the extent of their discretion and capacity to discern right and wrong.

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(2.) *Acts void or voidable.*

Most of the acts of infants are voidable only, and not absolutely void; and it is deemed sufficient if the infant be allowed, when he attains maturity, the privilege to affirm or avoid, in his discretion, his acts done and contracts made in infancy. But when we attempt to ascertain from the books the precise line of distinction between void and voidable acts, and between the cases which require some act to affirm a contract, in order to make it good, and some act to disaffirm it, in order to get rid of its operation, we meet with much contradiction and confusion. A late writer, who has compiled a professed treatise on the law of infancy, concludes, from a review of the cases, that the only safe criterion by which we can ascertain whether the act of an infant be void or voidable is, "that acts which are capable of being legally ratified are voidable only; and acts which are in-

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with him wherever he goes. Huberus, lib. 1, tit. 3, sec. 12. See, also, Boullenois and others, cited in Story on the Conflict of Laws, § 76, *et seq.* But this rule is to be taken with very important qualifications. The state and condition of the person, according to the law of his domicil, will generally, though not universally, be regarded in other countries as to acts done, or rights acquired, or contracts made, in the place of his native domicil; but as to acts, rights, and contracts done, acquired, or made, out of his native domicil, the *lex loci* will generally govern in respect to his capacity and condition. If, for instance, a person be a minor by the law of his domicil until the age of twenty-five, yet, in another country, where twenty-one is the age of majority, he may, on attaining that age, make in such other country a valid contract. Male *v.* Roberts, 3 Esp. Rep. 163. Thompson *v.* Ketcham, 8 Johns. Rep. 189. Story on the Conflict of Laws, pp. 96, 97, 364. Saul *v.* His Creditors, 17 Martin's Louisiana Rep. 597. Burge's Com. on Colonial and Foreign Laws, vol. i. 103–134. In respect to the control of real property, the law of the domicil yields to the *lex rei sitæ.* This is an acknowledged and universal principle. The continental authorities are cited numerously and at large in the last work above mentioned, on the subject of minors and the law of majority.

capable of being legally ratified are absolutely void." (a) But the criterion here given does not appear to free the question from its embarrassment, or afford a clear and definite test. All the books are said to agree in one result, that whenever the act done *may be* for the benefit of the infant, it shall not be considered void, but he shall have his election, when he comes of age, to affirm or avoid it; and this, says Ch. J. Parker, (b) is the only clear and definite proposition which can be extracted from the authorities. But we are involved in difficulty, as that learned judge admits, when we come to the application of this principle. In *Zouch* v. *Parsons*, (c) it was held by the K. B., after a full discussion and great consideration of the case, that an infant's conveyance by lease and release was voidable only; and yet Mr. Preston (d) condemns that decision in the * most peremptory terms, as confounding all distinctions and authorities on the point; and he says that Lord Eldon repeatedly questioned its accuracy. On the other hand, Mr. Bingham (e) undertakes to show, from reason and authority, that the decision in Burrow is well founded; and he insists (f) that all the deeds, acts, and contracts of an infant, except an account stated, a warrant of attorney, a will of lands, a release as executor, and a conveyance to his guardian, are, in judgment of law, voidable only, and not absolutely void. (g) But the modern as well as ancient cases are much broader in their exception. Thus, it is held that a negotiable note, given by an infant, even for necessaries, is void; (h) [1] and he is not

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(a) Bingham on Infancy, 5.

(b) Whitney v. Dutch, 14 Mass. Rep. 457.

(c) 3 Burr. 1794.

(d) Treatise on Conveyancing, vol. ii. p. 249. Treatise on Abstracts of Title, vol. i, p. 324.

(e) Law of Infancy, ch. 2.

(f) See his work, p. 46; and also his preface.

(g) In Williams v. Moor, 11 Meeson & Welsby, 256, it was held that an *account stated* by an infant was not to be distinguished in principle from goods sold, and was voidable only. The old authorities were overruled.

(h) Swasey v. Administrator of Vanderheyden, 10 Johns. Rep. 33. Trueman v.

[1] But it was held, in Gavin v. Burton, 8 Ind. 69, that a note given by the infant father of a bastard child, on a settlement with the mother, is valid.

liable for money borrowed, though applied to necessaries; (*a*) and his acceptance of a bill of exchange is void; (*b*) and his contract as security for another is absolutely void; (*c*) and a bond with a penalty, though given for necessaries, is void. (*d*) It must be admitted, however, that the tendency of the modern decisions is in favor of the reasonableness and policy of a very liberal extension of the rule, that the acts and contracts of infants should be deemed voidable only, and subject to their election when they became of age, either to affirm or disavow them. (*e*)[1] If their contracts were absolutely void, it would follow * as a consequence, that the contract could have no effect, and the party contracting with the infant would be equally discharged. (*f*) The doctrine of the case of *Zouch* v. *Parsons* has

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Hurst, 1 Term Rep. 40. M'Crillis *v.* How, 3 N. Hamp. Rep. 348. M'Minn *v.* Richmonds, 6 Yerger, 1. *Contra,* Dubose *v* Wheddon, 4 M'Cord's Rep. 221. In Everson *v.* Carpenter, 17 Wendell, 419, and in Reed *v.* Batchellor, 1 Metcalf's Rep. 559, it was adjudged that the promissory note of an infant was merely voidable, and could be made available by a new promise after he was of age. See, also, to the same point, 1 Berton's N. B. Rep. 23, and that it is now the better doctrine.

(*a*) Randall *v.* Sweet, 1 Denio, 460.

(*b*) Williamson *v.* Watts, 1 Camph. N. P. 552.

(*c*) Curtin *v.* Patton, 11 Serg. & Rawle, 305.

(*d*) Co. Litt. 172 a, recognized as being still the law by Bayley, J., in 3 Maule & Selw. 482.

(*e*) Wamsley *v.* Lindenberger, 2 Randolph's Rep. 478. Lord Mansfield, in Zouch *v.* Parsons, 3 Burr. Rep. 1804, held the law to have been truly laid down by Perkins, sec. 12, that "all such gifts, grants, or deeds, made by an infant, which do not take effect by delivery of his hand, are void. But such gifts, grants, or deeds, made by an infant by matter of deed, or in writing, which takes effect by delivery of his own hand, are voidable. Chancellor Jones, in Stafford *v.* Roof, 9 Cowen's Rep. 626, adhered to this distinction, and held, that manual delivery was requisite to render the infant's deed of land or chattels voidable only. I apprehend that the modern rule, as now understood, is not quite so precise.

(*f*) 1 Fonb. Tr. of Eq. 74. In Goodsell *v.* Myers, 3 Wendell's Rep. 479, and Du-

[1] Scott *v.* Buchanan, 11 Humph. 468. Cummings *v.* Powell, 8 Tex. 80. Cole *v.* Pennoyer, 14 Ill. 158. Courts have regarded as voidable an infant's appeal from a justice's decision, Robbins *v.* Cutler, 6 Fost. 173; his deed of gift to a trustee, Slaughter *v.* Cunningham, 24 Ala. 260; his bond for title, Weaver *v.* Jones, Id. 420; his exchange of property, Williams *v.* Brown, 34 Maine, 594; his covenant to carry and deliver money, West *v.* Penny, 16 Ala. 186; his indorsement of a note, Hardy *v.* Waters, 38 Maine, 450. The infant's release of a legacy has been held void, Langford *v.* Frey, 8 Humph. 443; so a mortgage by an infant *feme covert* of her reversionary interests, to secure the debts of a firm of which her husband is a member, is absolutely void, Cronise *v.* Clark, 4 Md. Ch. 403. See McCarty *v.* Murray, 3 Gray, 578.

been recognized as law in this country, and it is not now to be shaken. (a) On the authority of that case, even the bond of an infant has been held to be voidable only at his election. (b) It is an equitable rule, and most for the infant's benefit, that his conveyances to and from himself, and his contracts, in most cases, should be considered to be voidable only. (c) Lord Ch. J. Eyre, in *Keane* v. *Boycott*, (d) undertook to reconcile the doctrine of void and voidable contracts, on the ground that when the court could pronounce the contract to be to the infant's prejudice, it was void, and when to his benefit, as for necessaries, it was good; and when the contract was of an uncertain nature as to benefit or prejudice, it was voidable only at the election of the infant.[1] Judge Story declared these distinctions to be founded in solid reason, (e) and they are considered to be so, and the point is not susceptible of greater precision.

(3.) *Acts avoided or confirmed.*

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bose v. Wheddon, 4 M'Cord's Rep. 221, it was held that the note of an infant was voidable, and not void.

(a) Ch. J. Ruffin, in Hoyle v. Stowe, 2 Dev. & Battle, 324, 325, expresses his disapprobation of the decision in Zouch v. Parsons, with much force of reasoning, and he says it is not received as settled law. But in Bool v. Mix, 17 Wendell's Rep. 119, it was adjudged that a deed of bargain and sale made by an infant, was like a feoffment with livery of seisin, voidable only, and not absolutely void. The rule was even admitted to be universal, that all deeds and instruments under seal executed by an infant, were voidable only, with the single exception of those which delegated a naked authority. See, also, Mr. Justice Story, in 10 Peters's Rep. 71, and the Eagle Fire Company v. Lent, 6 Paige's Rep. 635, S. P.; and this I regard as the general American law on the subject.

(b) Conroe v. Birdsall, 1 Johns. Cas. 127. A deed of bargain and sale of lands by an infant is voidable only. Wheaton v. East, 5 Yerger's Tenn. Rep. 41.

(c) Jackson v. Carpenter, 11 Johns. Rep. 539. Oliver v. Houdlet, 13 Mass. Rep. 237. Roberts v. Wiggin, 1 N. H. Rep. 73. Wright v. Steele, 2 N. H. Rep. 55. Kline v. Beebe, 6 Conn. Rep. 494.[2]

(d) 2 H. Blacks. Rep. 511.

(e) 1 Mason's Rep. 82. Wheaton v. East, 5 Yerger's Rep. 41. M'Minn v. Richmonds, 6 Ibid. 1, S. P.

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[1] McGan v. Marshall, 7 Humph. R. 121. But see Tupper v. Cadwell, 12 Met. R. 559. The beneficial contracts of infants are voidable only. N. H. M. F. Ins. Co. v. Noyes, 32 N. H. 345.

[2] Van Nostrand v. Wright, Hill & Denio, (N. Y.) 260. Pitcher v. Laycock, 7 Ind. 398. Babcock v. Doe, 8 Ind. 110.

If the deed or contract of an infant be voidable only, it is nevertheless binding on the adult with whom he dealt, so long as it remains executory, and is not rescinded by the infant. (*a*)

It is also a general rule, that no one but the infant *237 *himself, or his legal representatives, can avoid his voidable deed or contract; for while living, he ought to be the exclusive judge of the propriety of the exercise of a personal privilege intended for his benefit; and when dead, they alone should interfere who legally represent him. (*b*) [1] The infant's privilege of avoiding acts which are matters of record, as fines, recoveries, and recognizances, is much more limited, in point of time, than his privilege of avoiding matters *en pais*. The former must be avoided by him by writ of error, or *audita querela*, during his minority, when his nonage can be tried by the court by inspection; but deeds, writings, and parol contracts may be avoided during infancy, or after he is of age, by his dissent, entry, suit, or plea, as the case may require. (*c*) If any act of confirmation be requisite after he comes of age, to give binding force to a voidable act of his infancy, slight acts and circumstances will be a ground from which to infer the assent; but the books appear to leave the question in some obscurity, when and to what extent a positive act of confirmation on the part *238 of the infant is requisite.[2] In *Holmes* * v. *Blogg*, (*d*) the

(*a*) Smith *v.* Bowin, 1 Mod Rep. 25. Holt *v.* Ward, Str. Rep. 937. Warwick *v.* Bruce, 2 Maule & Selw. 205. Brown *v.* Caldwell, 10 Serg. & Rawle, 114.

(*b*) 8 Co. 42 b. Keane *v.* Boycott, 2 H. Blacks. Rep. 511. Van Bramer *v.* Cooper, 2 Johns. Rep. 279 Jackson *v.* Todd, 6 Ibid. 257. Oliver *v.* Houdlet, 13 Mass. Rep. 237. Roberts *v.* Wiggin, 1 N. H. Rep. 73. Privies in estate cannot avoid the infant's deed. Hoyle *v.* Stowe, 2 Dev. & Battle, 323.

(*c*) Co. Litt. 380 b. Com. Dig. tit. Enfant, C. 3, 5, 9, 11. Cro. Car. 303, 306. In Roof *v.* Stafford, 7 Cowen's Rep. 179, it was held by the Supreme Court of New York, that a sale of chattels by an infant was not any more than a conveyance of land, voidable till he came of age. This was settled as to conveyances of land by the case of Zouch *v.* Parsons. But in the same case, on error, 9 Cowen's Rep. 626,

(*d*) 8 Taunt. Rep. 35.

[1] Slocum *v.* Hooker, 13 Barb. R. 536.

[2] Harris *v.* Wall, 1 Wels. Hurl & Gor. R. 122, 128. Ferguson *v.* Bell, 17 Mis. 347. Dunlap *v.* Hales, 2 Jones, 381. Baxter *v.* Bush, 3 Wms. (29 Vt.) 465. Reed *v.* Boshears, 4 Sneed, (Tenn.) 118.

chief justice observed, that in every instance of a contract, voidable only by an infant on coming of age, he was bound to give notice of disaffirmance of the contract in a reasonable time. The inference from that doctrine is, that without some act of dissent, all the voidable contracts of the infant would become binding. But there are other cases which assume that a voidable contract becomes binding upon an infant after he comes of age, only by reason of acts or circumstances, amounting to an affirmance of the contract. (a) In the

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Chancellor Jones held, that the infant might avoid a sale of chattels while an infant, but not a sale of land. In the latter case he could enter and take the profits until of age; but where the possession was changed, and he had no legal means to regain it, he might exercise the power of rescission immediately. The act of avoidance is allowed only during infancy, when necessary, inasmuch as the infant lacks discretion to exercise it. The case in 9 Cowen is an authority that an infant may avoid, during infancy, a sale of chattels, and bring trover by his guardian to recover them.[1] So it was afterwards held in Bool v. Mix, 17 Wendell, 119, that a sale and delivery of chattels by an infant might be avoided while under age, but that a deed of lands executed by an infant could not, until he came of age, though he might enter and take the profits in the mean time.[2]

(a) Evelyn v. Chichester, 3 Burr. Rep. 1717. 1 Rol. Abr. tit. Enfants, K. Co. Litt. 51 b. Hubbard v. Cummings, 1 Greenleaf's Rep. 11. Aldrich v. Grimes, 10 N. H. Rep. 194. In Holmes v. Blogg, 8 Taunt. Rep. 508, it is remarkable that the distinguished counsel in that case, one of whom is now (1827) lord chancellor, and the other chief justice of the C. B., treat this as an open and debatable point. Sergeant Copely insisted, that the infant's contract was binding on him when he became adult, because there had been no disaffirmance of it; and Sergeant Best contended that disaffirmance was not necessary, and that infants were not bound by any contract, unless the same was affirmed by them after arriving at full age; and this is the decision in 4 Pick. Rep. 48. It has been held that an infant's conveyance may be disaffirmed at any time, so long as an action of ejectment is not barred by the statute of limitations. Lessee of Drake v. Ramsay, 5 Hammond's O. Rep. 251. Jackson v. Carpenter, 11 Johns. Rep. 539 to S. P. And in South Carolina, it is held that a simple declaration of the infant, on his coming of age, is not a sufficient confirmation of his voidable contract, unless it be accompanied by some act which recognizes the validity of the obligation. Ordinary v. Wherry, 1 Bailey's Rep. 28. In Wheaton v. East, 5 Yerger's Tenn. Rep. 41, the decision was, that a deed of confirmation of the minor's deed was not requisite, but that any act of the minor from which his assent of the deed executed during his minority might be inferred, would operate as a confirmation, and conclude him.[3]

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[1] Shipman v. Horton, 17 Conn. R. 481. Carr v. Clough, 6 Fost. 280.

[2] Cummings v. Powell, 8 Texas, 80.

[3] The sales of lands received during infancy, in exchange for other lands, is a confirmation of the original deed of conveyance. Williams v. Mabee, 3 Halst. Ch. 500.

cases of *Jackson* v. *Carpenter*, and *Jackson* v. *Burchin*, (*a*) the infant had disaffirmed the voidable deed of his infancy, which was by deed of bargain and sale, by an act equally solemn, after he became of age. (*b*) This is the usual and suitable course when the infant does not mean to stand by his contract; and his confirmation of the act or deed of his infancy may be justly inferred against him after he has been of age for a reasonable time, either from his positive acts in favor of the contract,[1] or from his tacit assent under circumstances not to excuse his silence. In *Curtin* v. *Patton*, (*c*) the court re-

(*a*) 11 Johns. Rep. 539. 14 Ibid. 124. In Tucker *v.* Moreland, 10 Peters's U. S. Rep. 73, it was observed by Mr. Justice Story, that those two cases in Johnson proceeded upon principles which were in perfect coincidence with the common law. In the case in Peters, the question arising on the void and voidable acts of infants, and when they were to be deemed confirmed or disaffirmed, are fully and learnedly discussed in the opinion pronounced by the court.

(*b*) A conveyance by an infant of the same land to another person after he comes of age, effectually avoids a deed of bargain and sale made in infancy. Hoyle *v.* Stowe, 2 Dev. & Battle, 320. The New York case of Bool *v.* Mix, 17 Wendell, 119, seems to require from the infant some positive act of disaffirmance after he comes of age, of a sale of lands. If it be a feoffment with livery, it may be avoided by entry, or by writ *dum fuit infra ætatem.* If by deed of bargain and sale, it might be avoided by another deed of bargain and sale made to a third person without entry, if the land be vacant. And in all other cases, if there be no conveyance to a third person, there must be an actual entry for the express purpose of disaffirming the deed, or he must do some other act of equal notoriety and efficiency.[2]

(*c*) 11 Serg. & Rawle, 305. In Kline *v.* Beebe, 6 Conn. Rep. 494, this subject was very fully discussed and considered, and it was held that there were three modes of affirming the voidable contracts of infants when they arrived at full age. 1. By an express ratification. 2. By acts which reasonably imply an affirmance. 3. By the omission to disaffirm within a reasonable time.[3] This is the rule also declared in

[1] Acts of confirmation by an infant are required to be made with a knowledge that he is not liable on the contract. Hinely *v.* Margaritz, 3 Barr's R. 428. Norris *v.* Vance, 3 Rich. R. 164. See, also, Smith *v.* Kelley, 13 Met. R. 309. Alsworth *v.* Cordtz, 31 Mississippi, (2 George,) 32.

[2] Dominick *v.* Michael, 4 Sandf. 374. In Pitcher *v.* Laycock, 7 Porter, (Ind.) 398, it is held, that an infant's conveyance by bargain and sale may be disaffirmed after his arrival at full age by a conveyance without entry, though the lands be not vacant. In Georgia, by virtue of the statute 32 Hen. VIII. the execution of the later deed of conveyance does not of itself avoid the former, if the lands be held adversely. Harrison *v.* Adcock, 8 Geo. 68. In Illinois, proceedings to revoke a conveyance must be commenced within three years after the infant becomes of age. Cole *v.* Pennoyer, 14 Ill. 158.

[3] Moore *v.* Abernathy, 7 Blackf. R. 442. Cresinger *v.* Welch, 15 Ohio R. 156. Dublin and Wicklow R. Co. *v.* Black, 16 Eng. L. & Eq. 556. The American editors, in a learned note to this case, have collected the authorities on this contested question. The English

quired some distinct *act by which the infant either *239 received a benefit from the contract after he arrived at full age, or did some act of express and direct assent and ratification; but that was the case of a contract considered to be absolutely void. In the case of voidable contracts, it will depend upon circumstances, such as the nature of the contract, and the situation of the infant, whether any overt act of assent or dissent on his part be requisite to determine the fact of his future responsibility. (a)

(4.) *Acts binding on the infant.*

Infants are capable, for their own benefit and for the safety of the public, of doing many binding acts. Contracts for necessaries are binding upon an infant; and he may be sued and charged in execution on such a contract, provided the articles

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Richardson *v.* Borght, 9 Vermont Rep. 368, and essentially in Hoit *v.* Underhill, 9 N. H. Rep. 439; and it may here be observed generally, that to give validity to a voidable contract by the ratification of the party, the party must be fully apprised of his rights, and do the act deliberately and upon examination. By the English statute of May 9, 1828, entitled "An Act for rendering a written memorandum necessary to the validity of certain promises and engagements," an infant is not chargeable upon any promise or ratification after full age, of any promise or simple contract made during infancy, unless such promise or ratification be made by writing, signed by the party to be charged. See Hartley *v.* Wharton, 11 Adolph. & Ellis, p. 934, on the construction of this statute of May, 1828, (9 Geo. IV. c. 14,) in which the energy of the statute is very much weakened.[1]

(*a*) In Hoyle *v* Stowe, 2 Dev & Battle, 320, it was decided, upon a full consideration of the subject, that to ratify an infant's bargain and sale, after full age, some act must be done denoting that the estate created by the deed was subsisting, as the receipt of the purchase-money, &c. Declaration must be very clear, and with a view to ratification, to be sufficient.

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cases seem to place the exemption of the infant on his repudiation of the contract within a reasonable time after attaining majority. But the editors conclude, after reviewing the American cases, that the infant's contract is not binding, unless there be some act on his part, after arriving at the age of twenty-one years, showing an intention to ratify. See, also, Wallace *v.* Lewis, 4 Harring. R. 75. Harris *v.* Cannon, 6 Geo. R. 382. Scott *v.* Buchanan, 11 Humph. R. 468. Tibbets *v.* Gerrish, 5 Fost. (N. H.) 41. Edgerly *v.* Shaw, Id. 514. N. H. F. Ins. Co. *v.* Noyes, 32 N. H. 345. Taft *v.* Sergeant, 18 Barb. 320. Stokes *v.* Brown, 4 Chand. 39. Jones *v.* Phœnix Bank, 4 Seld. 228. Forsyth *v.* Hastings, 1 Wms. (Vt.) 646. Thurlow *v.* Gilmore, 40 Maine, 378. Voorhies *v.* Voorhies, 24 Barb. (N. Y.) 150. Little *v.* Duncan, 9 Rich. Law, (S. C.) 55.

[1] See Mawson *v.* Blane, 26 E. L. & Eq. 560. There is a similar statute in Maine. Acts of 1845, ch. 166. Thurlow *v.* Gilmore, 40 Maine, 378.

were necessary for him under the circumstances and condition in which he was placed. (*a*) The question of necessaries is governed by the real circumstances of the infant, and not by his ostensible situation; and, therefore, the tradesman who trusts him is bound to make due inquiry; and if the infant has been properly supplied by his friends, the tradesman cannot recover. (*b*) Lord Coke considers the necessaries of the infant to include clothing, victuals, medical aid, and "good teaching or instruction, whereby he may profit himself afterwards." (*c*) [1] If the infant lives with his father or guardian, and their care and protection are duly exercised, he cannot bind himself even

(*a*) Ive *v.* Chester, Cro. J. 560. Clarke *v.* Leslie, 5 Esp. N. P. 28. Coates *v.* Wilson, Ibid. 152. Berolles *v.* Ramsay, 1 Holt's Rep. N. P. 77. Though the negotiable note which an infant gives for necessaries be void, yet he is liable for the reasonable value of the necessaries. M'Minn *v.* Richmonds, 6 Yerger's Tenn. Rep. 1. What are *necessaries* for an infant depends on his relative situation, and are not always to be taken in the strictest sense, but with a reasonable qualification under the circumstances. The Queen's Bench, in Wharton *v.* Mackenzie, and Cripps *v.* Hills, 5 Adol. & Ellis, N. S. 606, where the cases were much discussed, adopted the rule laid down by Baron Parke, in Peters *v.* Fleming, 6 M & W. 46.[2]

(*b*) Ford *v.* Fothergill, Peake's N. P. 229. Story *v.* Pery, 4 Carr. & Payne, 526. Steedman *v.* Rose, 1 Carr. & Marshman, 422. It is a tradesman's duty to acquaint himself with the infant's circumstances and necessities, and to take notice of supplies by other tradesmen. Johnson *v.* Lines, 6 Watts & Serg. 80. But though an infant has a sufficient income allowed him to supply him with necessaries suitable to his condition, yet his contract for necessaries is nevertheless binding. Burghart *v.* Hall, 4 Meeson & Welsby, 727.

(*c*) Co. Litt. 172 a.

1 It has been held that an infant is not liable on his contract for repairs made upon his house, though such repairs were needed to prevent the immediate and serious decay of the house. Tupper *v.* Cadwell, 12 Met. R. 559. See an analogous case, Mason *v.* Wright, 13 Ib. 306. Money lent an infant for the purchase of necessaries, and applied by him for that purpose, under the direction of the lender, may be recovered. Smith *v.* Oliphant, 2 Sandf. (Law) R. 306. An infant may bind himself, as for necessaries, for the price of his board, Bradley *v.* Pratt, 23 Verm. 378; but not by his contract for the insurance of his property, M. F. Ins. Co. *v.* Noyes, 32 N. H. 345; nor for the board of the horses, which he uses in his business, as hackman, Merriam *v.* Cunningham, 11 Cush. 40. See Swift *v.* Bennett, 10 Cush. 436; Hussey *v.* Roundtree, Busbee, 110; Sams *v.* Stockton, 14 B. Mon. (Ky.) 232; Freeman *v.* Bridger, 4 Jones, Law, (N. C.) 1.

2 What *subjects* of expenditure are *necessaries*, has been declared to be a question for the court; but whether any and how much were required by the infant are questions for the jury. Tupper *v.* Cadwell, 12 Metc. 559. Peters *v.* Fleming, 6 Mees. & Wels. 46. The rule laid down in the latter case by Baron Parke is, "that articles purely ornamental are not necessaries; but if they are strictly of this description, it is a question for the jury, whether they were bought for the necessary use of the party in order to support himself properly in the degree, state, and station of life in which he moved."

for necessaries. (*a*) It is also understood * "that necessaries for the infant's wife and children are necessaries for him; (*b*) and in all cases of contracts for necessaries, the real consideration may be inquired into. (*c*) The infant is not bound to pay for the articles furnished, more than they were really worth to him as articles of necessity, and, consequently, he may not be bound to the extent of his contract; nor can he be precluded, by the form of the contract, from inquiring into the real value of the necessaries furnished. (*d*) *240

Infancy is not permitted to protect fraudulent acts; and, therefore, if an infant takes an estate, and agrees to pay rent, he cannot protect himself from the rent by pretence of infancy, after enjoying the estate, when of age. If he receives rents, he cannot demand them again when of age, according to the doctrine as now understood. If an infant pays money on his contract, and enjoys the benefit of it, and then avoids it when he comes of age, he cannot recover back the consideration paid. (*e*) On the other hand, if he avoids an executed contract

(*a*) Bainbridge *v.* Pickering, 2 Black. Rep. 1325. Wailing *v.* Toll, 9 Johns. Rep. 141. Hull *v.* Connolly, 3 M'Cord's L. R. 6. Kline *v.* L'Amoureux, 2 Paige's Rep. 419. But if the infant lives apart from his father with his assent, and labors for his own use, he is liable for necessaries furnished him. Maddox *v.* Miller, 1 Maule & Sel. 738. Smith *v.* Young, 2 Dev. & Batt. 26. He is liable for interest on such contracts. Bradley *v.* Pratt, 23 Vermont R. 378.

(*b*) Turner *v.* Trisby, Str. Rep. 168. Though the husband be an infant, there are cases in which he has been held liable to pay the debts of his wife of full age, contracted by her before marriage; such liability being an incident to the marriage contract, which an infant is competent to enter into. Paris *v.* Stroud, Barnes's Notes, 95. Roach *v.* Quick, 9 Wendell's Rep. 238. Butler *v.* Breck, 7 Metcalf, 164.

(*c*) In Chapple *v.* Cooper, 13 Meeson & Welsby, 252, it was held, on the maxim of Lord Bacon, *persona conjuncta equiparatur interesse proprio*, that an infant widow was liable for the expenses of the funeral of a deceased husband who died poor, as being an expense for her personal benefit.

(*d*) Makarell *v.* Bachelor, Cro. Eliz. 583.

(*e*) Kirton *v.* Elliott, 2 Bulst. Rep 69. Lord Mansfield, in Earl of Buckinghamshire *v.* Drury, 2 Eden's Rep. 72. Holmes *v.* Blogg, 8 Taunt. Rep. 35. M'Coy *v.* Huffman, 8 Cowen's Rep. 84. Harney *v.* Owen, 4 Blackf. Ind. Rep. 337. The case of M'Coy *v.* Huffman was overruled in Medbury *v.* Watrous, 7 Hill, (N. Y.) R. 110, on the principle that when an infant avoids his contract on coming of age, he may recover for work done, or money paid in part performance, *provided he has not received any benefit under the contract.*[1]

1 Whitmarsh *v.* Hall, 3 Denio's R. 375. Corpe *v.* Overton, 10 Bing. 252. Aldrich *v.*

when he comes of age, on the ground of infancy, he must restore the consideration which he had received. The privilege of infancy is to be used as a shield, and not as a sword.[1] He cannot have the benefit of the contract on one side, without returning the equivalent on the other. (a)[2] But there are many hard cases in which the infant cannot be held bound by his contracts, though made in fraud; for infants would lose all protection, if they were to be bound by their contracts made *241 by improper artifices, in the heedlessness *of youth, before they had learned the value of character, and the just obligation of moral duties. When an infant had fraudulently represented himself to be of age when he gave a bond, it was held that the bond was void at law. (b) But where he obtained goods upon his false and fraudulent affirmation that he was of age, though he avoided payment of the price of the goods, on the plea of infancy, the vendor was held entitled to reclaim the goods, as having never parted with his property in them; (c)[3] and it has been suggested, in another

(a) Badger v. Phinney, 15 Mass. Rep. 359. Roberts v. Wiggin, 1 N. H. Rep. 73. Roof v. Stafford, 7 Cowen's Rep. 179. Parker, J., in Hamblett v. Hamblett, 6 N. H. Rep. 339. Smith v. Evans, 5 Humphrey's Tenn. R. 70. Kitchen v. Lee, N. Y. Ch. 3 N. Y. Legal Observer, 160.

(b) Conroe v. Birdsall, 1 Johns. Cas. 127. Burley v. Russell, 10 N. H. Rep. 184.

(c) Badger v Phinney, 15 Mass. Rep. 359. Fitts v. Hall, 9 N. H. Rep. 441. Com. Dig. Action on the case for Deceit, A. 10. In this last case, Lord Ch. B. Comyns

Abrahams, Hill & Denio, 423. Breed v. Judd, 1 Gray, 455. When an infant avoids his contract for service, he may recover in *quantum meruit* the value of the services rendered. Hoxie v. Lincoln, 25 Verm. 206. Wheatly v. Miscal, 5 Porter, (Ind.) 142. Lufkin v. Mayall, 5 Fost. 82.

[1] See Carr v. Clough, 6 Fost. 280; Bartholomew v. Finnemore, 17 Barb. 428; Strain v. Wright, 7 Geo. 568; but the infant shall not be deprived of his privilege of avoidance, if he has disposed of the consideration during his minority, and so cannot restore it. Price v. Furman, 1 Wms. (Vt.) 268; and see Manning v. Johnson, 26 Ala. 446. *It seems* that if an infant suffers another to purchase his property, without informing such person of his ownership, he cannot recover the property of the purchaser. Hall v. Timmons, 2 Rich. Eq. R. 120. But see Norris v. Wait, 2 Rich (Law) R. 148. If he purchase land, and gives notes or a mortgage therefor, he cannot disaffirm the notes or mortgage, and claim the land. Weed v. Beebe, 21 Vermont R. 495. Bailey v. Barnberger, 11 B. Mon. R. 113. See Heath v. West, 8 Fost. 101; Carr v. Clough, 6 Fost. 280.

[2] Kitchen v. Lee, 11 Paige, R. 107.

[3] A defendant is not estopped from setting up infancy as a defence to a contract, by his fraudulent representations that he was of age. Merriam v. Cunningham, 11 Cush. (Mass.) R. 40. And it is not a legal fraud if one repudiate an agreement made by him

case, (*a*) that there might be an instance of such gross and palpable fraud committed by an infant arrived at the age of discretion, as would render a release of his right to land binding upon him. Infants are liable in actions arising *ex delicto*, whether founded on positive wrongs, as trespass or assault, or constructive torts or frauds. (*b*)[1] But the fraudulent act, to charge him, must be wholly tortious; and a matter arising *ex contractu*, though infected with fraud, cannot be changed into a tort in order to charge the infant in trover, or case, by a change in the form of the action. (*c*)[2] He is liable in trover for tortiously converting goods intrusted to him, or for fraudulently obtaining goods with an intention not to pay for them; (*d*) and in detinue, for goods delivered upon a special contract for a specific pur-

held an infant liable for deceit in obtaining a loan of money on the fraudulent affirmation that he was of age. Burley v. Russell, *sup.* S. P.[3]

(*a*) Stoolfoos *v.* Jenkins, 12 Serg. & Rawle, 399.

(*b*) Fitts *v.* Hall, 9 N. H. Rep. 441, 448. They are liable for trespasses committed by them, even though acting by command of the father. Humphrey *v.* Douglass, 10 Vermont Rep. 71.

(*c*) Jennings *v.* Rundall, 8 Term Rep. 335. Johnson *v.* Pie, 1 Lev. 169. Vasse *v.* Smith, 6 Cranch, 226. West *v.* Moore, 14 Vermont R. 447. Wilt *v.* Welsh, 6 Watts, 1. In this last case, the decisions were elaborately considered; and it was held, that whenever the substantive ground of an action against an infant is contract, as well as where the contract is stated as an inducement to a supposed tort, he is not liable; and the case of Campbell *v.* Stakes, 2 Wendell, 137, was considered as opposed equally to principle and authority. This last case was one of wilful and positive fraud and tort on the part of the infant, and subsequent to the contract, and was a wilful and distinct wrong; and the infant was held liable in trespass, and I think justly; and the judgment was affirmed on error, and cited and approved in Fitts *v.* Hall, 9 N. H. Rep. 445. See, further, Price *v.* Hewett, 18 E. L. & Eq. 522; Grove *v.* Nevill, 1 Keble, R. 778; Green *v.* Greenbank, 2 Marshall, 485; Towne *v.* Wiley, 23 Vermont R. 361.

(*d*) Homer *v.* Thwing, 3 Pick. Rep. 492. Peigne *v.* Sutcliffe, 4 M'Cord, 387. Wallace *v.* Morss, 5 Hill's N. Y. Rep. 391. His property is liable for fines and costs on conviction of a public offence. Beasley *v.* The State, 2 Yerger's Tenn. Rep. 481.

during infancy, even though he may have enjoyed the fruits of such agreement. Burns *v.* Hill, 19 Geo. 22.

[1] Baxter *v.* Bush, 3 Wms. (29 Vt.) 465.

[2] Infancy is a good bar to an action founded on a false and fraudulent warranty. Morrill *v.* Aden, 19 Vt. R. 505. Prescott *v.* Norris, 32 N. H. 101.

[3] See Price *v.* Hewett, 18 E. L. & Eq. 522, and editor's note; Merriam *v.* Cunningham, 11 Cush. 40; Walker *v.* Davis, 1 Gray, 506.

pose; (*a*) and in *assumpsit*, for money which he has fraudulently embezzled. (*b*)

*242 * An infant has a capacity to do many other acts valid in law. He may bind himself as an apprentice, or make a contract for service and wages, it being an act manifestly for his benefit; but, when bound, he cannot dissolve the relation. (*c*) The weight of opinion is, that an infant may make a testament of chattels, if a male, at the age of fourteen, and if a female, at the age of twelve years. (*d*) He may convey real estate, held as a naked trustee, under an order in chancery. The equity jurisdiction in this case is grounded on the statute of 7 Anne, c. 19, which has been reenacted in this country, (*e*) and extends only to plain and express trusts. Whatever an infant is bound to do by law, the general rule is, that the same will bind him if he does it without suit at law. (*f*)[1] If, therefore, he be a tenant in common, he may make a reasonable partition. (*g*) He may discharge a mortgage, on due payment of the mortgage debt. His acts as executor, at the age of seventeen, will bind him,

(*a*) Mills *v.* Graham, 4 Bos. & Pull. 140. In New York, the action of detinue is abolished, and an action of *trespass on the case* may be brought to recover damages, even for a wilful injury, accompanied with force. By this innovation, all nice questions concerning direct and consequential injuries are avoided. But the want of such an action as detinue to recover a favorite or necessary specific chattel in specie, may be seriously felt. N. Y Revised Statutes, vol. ii. p 553, sec. 15, 16.

(*b*) Bristow *v.* Eastman, 1 Esp Rep. 172. By the N. Y. Revised Statutes, vol. ii. p. 34[illegible], sec 12, no action relating to real property is to be delayed by reason of the infancy of any defendant, and a guardian is to be appointed to defend his rights.

(*c*) Rex *v.* Inhabitants of Wigston, 3 Barnew. & Cress. 484. Wood *v.* Fenwick, 10 Meeson & Welsby, 195.

(*d*) Harg. n 83 to lib. 2 Co. Litt. Mr. Hargrave has collected all the contradictory opinions on this point. The civil law gives this power to the infant at the age of seventeen years; and this period has been adopted by statute of Connecticut. In New York, the period fixed by statute for an infant to make a will of chattels, is the age of eighteen in males and sixteen in females. N. Y. Revised Statutes, vol. ii. p. 60.

(*e*) N. Y. Revised Statutes, vol. ii. p. 194, sec. 167. The N. Y. statute declares, that whenever the infant is seised or possessed of any lands by way of mortgage, or in trust only for others, the Court of Chancery, on the petition of the guardian of the infant, or of any person interested, may compel the infant to convey the same.

(*f*) Co. Litt. 172 a.

(*g*) Bavington *v.* Clarke, 2 Penn. Rep. 115.

[1] The People *v.* Moores, 4 Denio's R. 518.

unless they be acts which would amount to *devastavit.* (a) There was no occasion, * said Lord Mansfield, (b) to enumerate instances. The authorities are express, that if an infant does a right act, which he ought to do, and which he was compellable to do, it shall bind him. We have already seen that an infant of fourteen, if a male, and twelve if a female, may enter into a valid contract of marriage; but he is not liable to an action, on his executory contract, to marry, though the infant may sue an adult on such a promise. (c)[1]

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(5.) *Their marriage settlements.*

In consequence of the capacity of infants, at the age of consent, to contract marriage, their marriage settlements, when reasonable, have been held valid in chancery; but it has long been an unsettled question, whether a female infant could bind her real estate by a settlement upon marriage. In *Drury* v. *Drury*, (d) Lord Ch. Northington decided that the statute of 27 Hen. VIII., which introduced jointures, extended to adult women only, and that notwithstanding a jointure on an infant, she might waive the jointure, and elect to take her dower; and that a female infant could not, by any contract previous to her marriage, bar herself of a distributive share of her husband's personal estate, in case of his dying intestate. This decree was reversed in the House of Lords, upon the strength of the opinions of Lord Hardwicke, Lord Mansfield, and the majority of the judges; (e) and the great question finally settled in favor of the

(a) In New York he is declared to be incompetent, and I think very properly, to act as an executor or administrator. N. Y. Revised Statutes, vol. ii. p. 69. Ibid. 75.

(b) 3 Burr. Rep. 1801

(c) Hunt v. Peake, 5 Cowen's Rep. 475. In New York, the Court of Chancery is authorized to decree and compel the specific performance of contracts by the infant who is a representative of the party making them. N. Y. Revised Statutes, vol. ii. p. 194, sec. 169. As to the sale, under the direction of the Court of Chancery, of the real estates of infants, see preceding lecture.

(d) 2 Eden's Rep. 39. (e) 2 Ibid. 60–75. Wilmot's Opinions, p. 177.

1 An infant may be deputed by the sheriff to serve a particular writ; Barrett v. Seward, 22 Verm. 176; but not by the authority who signs the writ. Harvey v. Hall, Id. 211. He may execute a mere power. Sheldon v. Newton, 3 Ohio St. 494. Thompson v. Lyon, 20 Mis. 155. Hamilton v. Lomax, 26 Barb. (N. Y.) 615.

capacity of the female infant to bar herself, by her contract before marriage, of her right of dower in the husband's land, and to her distributive share of her husband's personal estate.

*244 In New York, *in a late case in chancery, (a) the question whether an infant could bind herself by an antenuptial contract, was discussed at large, and it was held that a legal jointure, settled upon an infant before marriage, was a bar of her dower; and that an equitable provision settled upon an infant in bar of dower, and to take effect immediately on the death of the husband, and to continue during the life of the widow, and being a reasonable and competent livelihood for the wife under the circumstances, was also a bar. The question still remains, whether she has the capacity to bind *her own real estate* by a marriage settlement. Mr. Atherly, (b) after reviewing the cases, concludes that the weight of the conflicting authorities was in favor of her capacity so to bind herself. But in *Milner* v. *Lord Harewood*, (c) Lord Eldon has subsequently held that a female infant was not bound by agreement to settle her real estate upon marriage, if she did not, when of age, choose to ratify it; and that nothing but her own act, after the period of majority, could fetter or affect it; and in *Temple* v. *Hawley*, 1 Sandford's Ch. R. 153, the assistant vice-chancellor, in a very elaborate and able judgment, held that a female infant was not so bound by a marriage settlement of her real estate, but that she might disaffirm it when she became of age, and was sole.[1] The assistant vice-chancellor said, the preponderance of opinion was, that the infant could not elect after she became of age *during coverture* to affirm it, though she might undoubtedly, in that case, disaffirm it. The case of *Slocombe* v. *Glubb*, (d) admitted that a male infant may bar himself by agreement before marriage, either of his estate by the courtesy, or of his right to his wife's personal property; and both the male and female infant can settle their *personal* estate upon marriage. The cases

(a) M'Cartee v. Teller, 2 Paige's Rep. 511.
(b) Treatise on Marriage Settlements, pp. 28-41.
(c) 18 Vesey, 259.
(d) 2 Bro. 545.

[1] Levering v. Levering, 3 Maryl. Ch. 365. Levering v. Heighe, 2 Maryl. Ch. 81.

of *Strickland* v. *Coker*, (*a*) and *Warburton* v. *Lytton*, (*b*) are considered by Mr. Atherly (*c*) as favorable to the power of a male infant to settle his real estate upon marriage; and that seems to be decidedly his opinion. But since the decision of Lord Eldon, in *Milner* v. Lord *Harewood*, this conclusion * becomes questionable; for if a female infant cannot settle her real estate without leaving with her the option, when twenty-one, to revoke it, why should not the male infant have the same option?[1] *245

(6.) *Suits in equity against them.*

The law is so careful of the rights of infants, that if they be made defendants at the suit of creditors, the answer of the guardian *ad litem*, does not bind or conclude them. (*d*)[2] Such an answer in chancery, *pro forma*, leaves the plaintiff to prove his case, and throws the infant upon the protection of the court.[3] It was the maxim of the Roman law, that an infant was never presumed to have done an act to his prejudice, *pupillus pati posse non intelligitur.* (*e*) In decrees of foreclosure against an infant, there is, according to the old and settled rule of practice in chancery, a day given him when he comes of age, usually six months, to show cause against the decree, and make a better defence; and he is entitled to be called in for that purpose by process of *subpœna.* (*f*) The decree in ordinary cases would be

(*a*) 2 Cas. in Ch. 211. (*b*) Cited in 4 Bro. 447.

(*c*) Treatise on Marriage Settlements, pp. 42–45.

(*d*) Eccleton *v.* Petty, Carthew's Rep. 79.

(*e*) Dig. 50, 17, 110.

(*f*) Thomas *v.* Gyles, 2 Vern. Rep. 232. Lord Ch. in Cary *v.* Bertie, Ibid. 342. Sir Joseph Jekyll, in Eyre *v.* Countess of Shaftesbury, 2 P. Wms. 120. Napier *v.* Effingham, Ibid. 401. Bennet *v.* Lee, 2 Atk. 529. Jackson *v.* Turner, 5 Leigh, 119.

[1] By 18 & 19 Vict. c. 43, male infants at the age of 20 and female infants at the age of 17 years may, with the approbation of the Court of Chancery, make valid settlements, or contracts for the settlements of all their property, real or personal, and whether in possession, reversion, remainder, or expectancy. Upon a petition under this Act, to make a settlement on marriage, the court will not direct an inquiry as to the propriety of the proposed marriage. *In re* Dalton, 39 Eng. Law & Eq. 145.

[2] Crain *v.* Parker, 1 Carter, (Ind.) 374; they are not bound by the guardian's waiver, of service of process. Robbins *v.* Robbins, 2 Carter, 74. Lenox *v.* Netrebe, 1 Hemp. 251.

[3] The court will exercise its protective jurisdiction in behalf of infant parties to a suit, without waiting to be specially invoked so to do. Lefevre *v.* Laraway, 22 Barb. (N. Y.) 167.

bad *on the face of it*, and ground for a bill of review, if it omitted to give the infant a day to show cause after he came of age; though Lord Redesdale held, in *Bennett* v. *Hamill*, (*a*) that such an error in the decree would not affect a *bonâ fide* purchase at a sale under it. (*b*) But in the case of decrees for the foreclosure *and sale* of mortgaged premises, or for the sale of lands under a devise to pay debts, the infant has no day, and the sale is absolute. (*c*) In the case of a strict foreclosure of the mortgagor's right without a sale, the infant has his day after he comes of age, but then he is confined to showing errors in the decree, and cannot unravel the accounts nor redeem. (*d*)

Mills *v.* Dennis, 3 Johns. Ch. Rep. 367. Kelsall *v.* Kelsall, 2 Mylne & Keen, 409. In England, since the demurrer of the parol has been abolished by the statutes of 11 Geo. IV. and 1 Wm. IV. c. 47, an infant defendant is not entitled to have six months given to him, after attaining the age of 21, to show cause against a decree. Powys *v.* Mansfield, 6 Simons, 637. The distinction seems to be, that if the decree directs the estate to be sold, the infant has not his six months, but on a simple decree of foreclosure, he is allowed the six months. Scholefield *v.* Heafield, 7 Simons, 667. Unless statutory regulations dispense with the rule in specific instances, as in partition and foreclosure, it is the rule in New York, that an infant is to have six months after coming of age, to show cause against a decree. This must be done whenever the inheritance is bound. The right of the parol to demur is abolished by statute in New York, in all cases of descent or devise. Harris *v.* Youman, 1 Hoffman's Ch. Rep. 178.

(*a*) 2 Sch. & Lef. 566.

(*b*) Lord Eldon, in 17 Vesey, 173, 178.

(*c*) Booth *v.* Rich, 1 Vern. Rep. 295. Cooke *v.* Parsons, 2 Vern. Rep. 429. Prec. in Ch. 184, S. C. Mills *v.* Dennis, 3 Johns. Ch. Rep. 367.

(*d*) Mallack *v.* Galton, 3 P. Wms. 352. Bishop of Winchester *v.* Beavor, 3 Vesey, 317. Williamson *v.* Gordon, 19 Vesey, 114.

LECTURE XXXII.

OF MASTER AND SERVANT.

THE last relation in domestic life which remains to be examined, is that of master and servant. The several kinds of persons who come within the description of servants may be subdivided into (1) slaves, (2) hired servants, and (3) apprentices.

1. *Of Slaves.*

Slavery, according to Mr. Paley, (*a*) may, consistently with the law of nature, arise from three causes, namely, from crimes, captivity, and debt. In the Institutes of Justinian, (*b*) slaves are said to become such in three ways, namely, by birth, when the mother was a slave; by captivity in war; and by the voluntary sale of himself as a slave, by a freeman above the age of twenty, for the sake of sharing the price. Sir William Blackstone (*c*) examines these causes of slavery by the civil law, and shows them all to rest on unsound foundations; and he insists that a state of slavery is repugnant to reason and the principles of natural law. The civil law (*d*) admitted it to be contrary to natural right, though it was conformable to the usage of nations. The law of England will not endure the existence of slavery within the realm of England. The instant the slave touches the soil, he becomes free, so as to be entitled to be protected in the enjoyment of his person and property, though he may still continue bound to service as a servant. (*e*) There has been much dispute in the English books, whether trover would lie for a negro slave; and the better opinion is, that it will not lie, because the owner has not an absolute property in the negro;

(*a*) Principles of Moral Philosophy, pp. 158, 159.
(*b*) Inst. 1, 3, 4.
(*c*) Com. vol. i. p. 423.
(*d*) Inst. 1, 3, 2.
(*e*) 1 Blacks. Com. 424.

and by the common law, it was said, one man could not have a property in another, for men were not the subject of property. (*a*) In the case of Somerset, in 1772, who was a negro slave, carried by his master from America to England; and there confined, in order to be sent to the West Indies, he was discharged by the K. B. upon *habeas corpus*, after a very elaborate discussion, and upon the ground that slavery did not and could not exist in England, under the English law. (*b*) The Scotch lawyers (*c*) mention the case of *Knight*, a negro slave, brought from the West Indies to Scotland by his master in 1773; and as the slave refused to continue in his service, he applied to the courts in Scotland for assistance, to compel his slave to return. It was held that slavery was not recognized by the law of Scotland, and that the claim of the master to the perpetual service of the negro was inadmissible, for the law of Jamaica did not apply to Scotland; and the master's claim was consequently repelled by the sheriff's court, and by the court of session.

But though personal slavery be unknown in England, so that

(*a*) Smith *v.* Gould 2 Salk. Rep. 666. 2 Lord Raym. 1274. *Contra*, Butts *v.* Penny, 2 Lev. Rep. 201, and Lord Hardwicke, in Pearne *v.* Lisle, Amb. Rep. 75. Mr. Justice Best, in Forbes *v* Cochrane, 2 Barnew. & Cress. 448, 3 Dowl. & Ryl. 679, S C., said, that the judges were above the age in which they lived, and stood upon the high ground of natural right, when they declared that in England human beings could not be the subject-matter of property. He insisted that the moment a slave put his foot on board a British man-of-war, out of the waters of colonial jurisdiction, he became free. This is the law now in France; and as soon as the slave lands on the French soil, he is free. The decision in the case last mentioned was, that if a slave from a slave-holding state or country gets out of the territory, and under the protection of British jurisdiction, without any wrongful act done by the party giving that protection, he becomes free, and the English law protects him from being reclaimed. The doctrine of the Supreme Court of the United States, in Prigg *v.* The Commonwealth of Pennsylvania, 16 Peters's Rep. 539, was to the same effect, for it was declared that a state of slavery was a mere municipal regulation, and no nation was bound to recognize the state of slavery as to foreign slaves within its territory.[1]

(*b*) Loft's Reports, 1. Harg. State Trials, vol. xi. p. 339.

(*c*) 1 Ersk. Inst. 159. Kames's Principles of Equity, vol. ii. p. 134.

[1] No action lies at common law for harboring runaway slaves, or for aiding them in escaping from their owners; and the states have no jurisdiction under the Act of Congress. Kauffman *v.* Oliver, 10 Barr's (Penn.) R. 514. Jones *v.* Vanzandt, 2 McLean's R. 596. The whole subject belongs to Congress and the Courts of the United States. Prigg *v.* The Commonwealth of Penn., 16 Peters's R. 539.

one man cannot sell, nor confine and export another, as his property, yet the claim of imported slaves for wages, * without a special promise, does not seem to receive the *249 same protection and support as that of a freeman. (*a*) Mr. Barrington, who has given a very strong picture of the degradation and oppression of the tenants, under the English tenure of pure villenage, (*b*) is of opinion that predial servitude really existed in England, so late as the reign of Elizabeth; and that the observation of Lilburn, that the air of England was, at that time, too pure for a slave to breathe in, was not true in point of fact. Be that as it may, there is no such thing now as the admission of slaves or slavery in the sense of the civil law, or of the laws and usages in the West Indies, either in England, or in any part of Europe; and it is very generally agreed that the African slave-trade is unjust and cruel. (*c*)

It is no less true than singular, that personal slavery prevailed with uncommon rigor in the free states of antiquity; and it cannot but diminish very considerably our sympathy with their spirit and our reverence for their institutions. A vast majority of the people of ancient Greece were in a state of absolute and severe slavery. The disproportion between freemen and slaves was nearly in the ratio of thirty thousand to four hundred thousand. (*d*) At Athens, they were treated with more humanity

(*a*) Alfred *v*. Marquis of Fitzjames, 3 Esp. Cas. 3. The King *v*. The Inhabitants of Thames Ditton, 4 Doug. Rep. 300. Where a West India slave accompanied her master to England, and voluntarily returned back to the West Indies, it was held that the residence in England did not finally emancipate her, and she became a slave on her return, though no coercion could be exercised over her while in England. The Slave Grace, 2 Hagg. Adm. Rep. 94.

(*b*) Observations on the Statutes, chiefly the more Ancient, pp. 232–241.

(*c*) See *infra*, p. 254, n. (*a*).

(*d*) 1 Mitf. Hist. 355. A small aristocracy governed Attica, while the soil was cultivated by a working class of 400,000 slaves, and a similar disproportion existed throughout Greece. The Island of Ægina is stated to have held, at one time, 470,000 slaves, a large proportion of whom were agricultural serfs. The slave population of Corinth, in her greatest prosperity, was rated at 460,000 slaves. According to a learned article on "the democracy of Athens," in the New York Review for July, 1840, the whole number of slaves in Attica was about 365,000 to 95,000 citizens, and 45,000 resident foreigners. Even Aristotle considered the relation of master and slave just as indispensable, in every well-ordered state, as that of husband and wife. Arist. Pol. b. 1, ch. 1.

than in Thessaly, Crete, Argos, or Sparta; for at Athens the philosophers taught and recommended humanity to slaves as a sure test of virtue. They were entitled to sue their master for excessive ill-usage, and compel him to sell them; and they had also the privilege of purchasing their freedom. (a) In the Roman republic, the practice of predial and domestic slavery was equally *countenanced, and still more abused. There were instances of private persons owning singly no less than four thousand slaves; (b) and by the Roman law, slaves were considered in the light of goods and chattels, and could be sold or pawned. They could be tortured, and even put to death, at the discretion of their masters. (c) By a succession of edicts, which humanity, reason, and policy dictated, and which were enacted by Claudius, Hadrian, and Antoninus Pius, the jurisdiction of life and death over slaves was taken from their masters, and referred to the magistrate; and the *Ergastula*, or dungeons of cruelty, were abolished. (d)

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(a) Potter's Antiq. of Greece, 57–72. 3 St. John, on the Manners and Customs of Ancient Greece, 18, 19, 22.

(b) 1 Gibbon's Hist. pp. 66–68. Hume, in his Essay on the Populousness of Ancient Nations, says, that some great men among the Romans possessed to the number of 10,000 slaves. In the Augustan age, one half of the population of the Roman world (and the whole population was estimated at 120,000,000 of souls) were slaves. 1 Gibbon's Hist 68. Mr. Blair, in his Inquiry into the State of Slavery among the Romans, (1833.) assigns as many as three slaves to every free person in Italy in the time of the Emperor Claudius. Almost all the agricultural, as well as domestic labor, was performed by slaves, even from the time of Tiberius Gracchus. Plutarch's Life of T. Gracchus. Hooke's Roman History, b. 6, ch. 7. Barbarian captives taken in war were considered slaves, and purchased by slave-merchants for the Italian market.

(c) Inst. 1, 8, 1. Taylor's Elem. of the Civil Law, p. 429. By the *lex Aquilla*, passed soon after the era of the twelve tables, the killing of a slave by a third person was put upon the same ground as the killing of a quadruped, and a pecuniary recompense was to be made to the owner. When a master was murdered by one of his domestic slaves, all the slaves of his household at the time were to be put to death; and Tacitus gives a horrible instance, in the time of Nero, of the application of this atrocious law in the case of the murder of Pedanius Secundus, a man of consular rank, and who possessed 400 domestic slaves, who were all put to death, and with the approbation of the senate. Tacit. Ann. lib. 14, sec. 42–45. For the Roman law, see Ibid 13, 32.

(d) 1 Gibbon, *ubi supra*, p. 65. Inst. 1, 8. 2. Taylor's Elem of the Civil Law, 433–435 The horrible cruelties inflicted upon the slaves in ancient times, and particularly by the Romans, and the barbarous manners and loss of moral taste and just

The personal servitude which grew out of the abuses of the feudal system, and to which the Germans had been accustomed, even in their primitive settlements, was exceedingly grievous; (*a*) but it is not supposed to have equalled, in severity or degradation, the domestic slavery of the ancients, or among the European colonies on this side of the Atlantic. The feudal villein of the lowest order was unprotected in his property, as against seizure by his master, and was subjected to the most ignoble services; but his circumstances distinguished him materially from the Greek, Roman, or West Indian slave. No person in England was a villein in the eye of the law, except in relation to his master. As to him *quicquid acquiritur servo acquiritur domino.* In villenage in gross, all acquisitions of property, real and personal, made by the villein, belonged to his lord. To all other persons *he was a freeman, and as against *251 them he had rights of property; and his master, for excessive injuries committed upon the vassal, was answerable at the king's suit. (*b*) So, also, the life and chastity of the female vassal, even of the lowest degree, were protected, (feebly, prob-

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feeling, which were the consequence, are strikingly shown and illustrated from passages in the classics, by Mr. Hume, in his very learned Essay on the Populousness of Ancient Nations.

(*a*) See a picture of the degradation and rigors of personal servitude among the Gothic barbarians of Gaul. Gibbon's Hist. vol. vi. pp. 359–362, 8vo. edit. Robertson's Charles V. vol. i. note 9.

(*b*) Co. Litt. 116, 117, 119. Villeins, says Lord Coke, 2 Inst. 45, are free against all men, saving their lord. The lord was indictable for maiming his villein, but the latter was not entitled to his appeal of mayhem, for he could not hold his damages if he received any; and for a similar reason, the villein could not have an appeal of robbery, for all his goods belonged to his lord. Litt. sec. 194. Co. Litt. 123 b. In the Anglo-Saxon period, the power of lords over their slaves was not quite absolute. If the master beat out a slave's eye or tooth, the slave recovered his liberty. If he killed him, he paid a fine to the king. Lamb. Arch. de Leg. Auf. p. 17. At the time of the Norman conquest, the greater part of the land in England was cultivated by slaves, and the free tenants were extremely few in comparison. Turner's Hist. of England during the Middle Ages, vol. i. p. 135. The code of the Visigoths in Spain was honorably distinguished from the Salic law and other codes of the barbarians, in the moderation of its provisions respecting slaves. By the Visigothic code, the slave was allowed to acquire property and purchase his freedom, and it provided for his personal security against the extreme violence of his master. See the Fuero Juzgo, as cited by Mr Prescott, in his History of the Reign of Ferdinand and Isabella, vol. i. Int. p. 35, note.

ably, in point of fact, but effectually in point of law,) by the right of prosecution of the lord, through appeal by or on behalf of the injured vassel. (*a*)

Las Casas, the Spanish bishop of Chiapa, with the view of relieving the oppressed Indians from the most cruel and fatal slavery, and after all other expedients had failed, proposed to the Spanish government to substitute the hardy Africans for the feeble Indians. This was in 1517; and the Emperor Charles V. granted a patent to certain persons to supply the Spanish Islands with slaves. The importation of negro slaves into the Spanish colonies had commenced as early as 1501, and was continued under the sanction of the Spanish monarchs. (*b*) Las Casas is said, therefore, to have chosen between two existing evils. He wished to eradicate the greater by resorting to the lesser. (*c*) Soto, the dominican and confessor of Charles V., and professor in the University of Salamanca, was a more consistent, if not a more illustrious, opponent of slavery. He boldly attacked the African slave-trade from the very beginning of it, as iniquitous; and by his influence with his master, he procured an edict, in 1543, tending to mitigate slavery in the colonies. (*d*)

*252 * Sir John Hawkins was the first Englishman who,

(*a*) Littleton's Ten sec. 189, 190, 194. Hallam's View of the Middle Ages, vol. i. pp. 122, 124, vol. ii. p 199.

(*b*) Bancroft's History of the United States, vol. i. pp. 182, 183. The Spaniards and Portuguese dealt in the traffic of African negroes, as slaves, even before the discovery of America. Ibid. vol. i. pp. 178, 179.

(*c*) Irving's Life of Columbus, vol. iii. App. No. 26. Our learned and ingenious countryman endeavors to relieve the memory of this excellent man from reproach for this most reprehensible act, by showing the general benevolence of his motives. Bryan Edwards, in his History of the British Indies, vol. ii. ch. 2, spiritedly undertook the same task.

(*d*) Dominic Soto's Treatise, De Justitia et Jure, and which very scarce book the author of a learned article in the Edinburgh Review, vol. xxvii. p. 230, had seen and read, is said to contain a strong condemnation of the African slave-trade. Slavery existed in a very mild form among the Mexicans prior to the conquest of their country by Cortez. The slave was allowed to have his own family, to hold property, and even other slaves. Intermarriage was allowed between slaves and freemen. His children were free, for no one could be born to slavery in Mexico; an honorable distinction, says Mr. Prescott, (Hist. of the Conquest of Mexico, vol. i. p. 37,) not known, he believes, in any civilized community where slavery has been sanctioned.

in 1562, introduced the practice of buying or kidnapping negroes in Africa, and transporting and selling them for slaves in the West Indies. In 1620, a Dutch vessel carried a cargo of slaves from Africa to Virginia; and this, says Chalmers, (*a*) was the sad epoch of the introduction of African slaves into the English colonies on this continent. The Dutch records of New-Netherlands allude to the existence of slaves in their settlements on the Hudson, as early as 1626; (*b*) and slavery is mentioned in the Massachusetts laws between 1630 and 1641. (*c*) Domestic slavery having thus inauspiciously commenced, it continued and increased throughout the United States when they were colonies of Great Britain. It exists to this day in all the southern states of the Union; but it has become extinct in New York and the eastern states, and probably it is in the course of abatement and extinction in some others. In Pennsylvania, by an Act of March 1st, 1780, and in New Jersey, by Acts of February 14th, 1784, and of the 24th February, 1820, passed for the gradual extinction of slavery, this great evil has been removed from them, and all children born of a slave after the 4th day of July, 1804, were declared free. In Massachusetts it was judicially declared, soon after the Revolution, that slavery was virtually abolished by their constitution, and that the issue of a female slave, though born prior to their constitution, and as early as 1773, was born free. (*d*) But though this be the case, yet the effect of the former legal distinctions is still perceived, for by statute, a marriage in Massachusetts between a white person and a negro, Indian, or mulatto, is absolutely void. (*e*) In Connecticut, statutes were passed in 1784 and

(*a*) Political Annals, p. 49.

(*b*) Moulton's History of New York, vol. i. p. 373.

(*c*) Massachusetts Historical Collections, vol. iv. p. 194. The government and people of Massachusetts, in 1645 and 1646, resented the first importation of African slaves into the colony as a heinous crime. Winthrop's History, vol. ii. pp. 245, 379, 380. Bancroft's History, vol. i. p. 187.

(*d*) See Winchendon *v.* Hatfield, 4 Mass. Rep. 128, and Littleton *v.* Tuttle, Ibid. note.

(*e*) Dane's Abr. ch. 46, art. 2, sec. 3. Mass. Revised Statutes, 1836. This prohibition was repealed since 1836. In Virginia, it is an indictable offence. 1 R. C. of Virginia, 275.

1797, which have, in their gentle and gradual operation, nearly, if not totally, extinguished slavery in that state. (*a*)

*253 I shall not attempt, nor have I at *hand the means to collect and review the laws of all the southern states on the subject of domestic slavery. They are, doubtless, as just and mild as is deemed, by those governments, to be compatible with the public safety, or with the existence and preservation of that species of property; and yet, in contemplation of their laws, slaves are considered in some respects, though not in criminal prosecutions, as things or property, rather than persons, and are vendible as personal estate. They cannot take property by descent or purchase, and all they find, and all they hold, belongs to the master. They cannot make lawful contracts, and they are deprived of civil rights. They are assets in the hands of executors, for the payment of debts, and cannot be emancipated by will or otherwise, to the prejudice of creditors. (*b*)

(*a*) Reeve's Domestic Relations, p. 340. Statutes of Connecticut, 1821, p. 428. There were twenty-five slaves remaining in Connecticut in 1830. In 1774 the importation of slaves into that state was prohibited. In Rhode Island no person could be born a slave on or after the first of March, 1774. In New Hampshire and Vermont, slavery was abolished by their respective constitutions; and it was a fundamental, and declared to be an unalterable provision in the ordinance of Congress, of July 13th, 1787, for *the government of the territory of the United States northwest of the river Ohio*, that there should be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes. This provision effectually prevented the introduction of slavery into any of the states north of the Ohio, and included in what was then called the Northwestern Territory of the United States [1]

(*b*) Executors of Walker *v.* Bostwick, 4 Desau. S. C. Rep. 266. Brandon *v.* Huntsville Bank, 1 Stewart's Ala. Rep. 320. Pleasants *v* Pleasants, 2 Call's Rep. 319. The State *v.* Philpot, Dudley's Geo. Rep. 46. Nancy *v.* Snell, 6 Dana's Ken. Rep. 149. Briscoe *v.* Wickliffe, Ibid. 165. Warner *v.* Swearingen, Ibid. 195. Fable *v.*

[1] By the constitution of Illinois of 1848, the general assembly was required, at the first session, to pass such laws as would *effectually prohibit* free persons of color emigrating to, or settling in the state, and to *effectually* prevent the owners of slaves from bringing them into the state for the purpose of setting them free.

In Strader *v.* Graham, Dec. 1850, (Western Law Journal, Feb. 1851, p. 232,) it was held, that each state had the right to determine the personal status of all persons domiciled within it, and that the ordinance of 1787 did not restrict the power of states formed out of the Northwestern Territory, it having ceased to be in force on their becoming states. See, also, Pollard *v.* Hagan, 3 How. U. S. 212.

The ordinance of 1787, held to be superseded by the adoption of the U. S. Constitution, in Strader *v.* Graham, 10 How. U. S. 82.

Their condition is more analogous to that of the slaves of the ancients, than to that of the villeins of feudal times, both in respect to the degradation of the slaves and the full dominion and power of the master. The statute regulations follow the principles of the civil law in relation to slaves, and are extremely severe, but the master has no power over life or limb; slaves are still regarded as human beings under moral responsibility as to crimes, and the severe letter of the law is softened and corrected by the humanity of the age and the spirit of Christianity. (*a*) The laws of some of the southern states manifest, likewise, great jealousy in respect to any external influence or communications calculated to render the slave population discontented with their condition. (*b*) These severe penal

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Brown, 2 Hill's S. C. Ch. Rep. 396. Gregg *v.* Thompson, 2 Mill's Const. Rep. 331. Bland & W. *v.* Negro Dowling, 9 Gill & Johnson, 19. Revised Statutes. N. C. ch. 89. sec. 24. View of the Laws of Virginia relative to Slavery, Am. Jur. No. 13. Civil Code of Louisiana, art. 35, 173. Act of Maryland, 1798, ch. 101. Laws of South Carolina, Brevard's Digest, 229. In Louisiana, slaves are considered as real estate, and descend as such; whereas in Maryland, Virginia, S. Carolina, and Missouri, they are regarded as personal property. In Kentucky, the law on this subject is anomalous. Slaves are for most purposes regarded as personal property, and yet, so far as respects wills, they are by statute declared to be real estate, and they descend *sub modo* to the heir. In Massachusetts, under the colony administration, slaves were property, transferable like chattels, and were assets in the hands of executors and administrators, and the issue of female slaves followed the condition of the mother. Parsons, Ch. J., 4 Mass. Rep. 127. In Tennessee, Georgia, and Arkansas, property in slaves is protected specially by the constitution, which declares that the legislature shall have no power to pass laws for the emancipation of slaves, without the consent of the owner. But as the chief justice observed, in the case of the Commonwealth *v.* Aves, 18 Pick. 216, the laws that regard slaves as property are local, and only apply so far as such laws *proprio vigore* can operate. Such local laws do not make them personal property generally; and in Williams *v.* Ash, 1 How. U. S. 1, it was held that a bequest of a slave by will, with a conditional limitation of freedom to the slave, if sold by the legatee, took effect on the sale. The limitation over in favor of the slave, if sold, was valid.

(*a*) Stroud's Sketch of the Laws relating to Slavery, Phil. 1827, *passim*. Ruffin, J., in the case of The State *v.* Mann, 2 Dev. N. C. Rep. 263. The State *v.* Jones, Walker's Miss. Rep. 83. The State *v.* Philpot, Dudley's Geo. Rep 46.

(*b*) In Georgia, by an Act in 1829, no person is permitted to teach a slave, a negro, or free person of color, to read or write. So, in Virginia, by statute, in 1830, meetings of free negroes, to learn reading or writing, are unlawful, and subject them to corporal punishment: and it is unlawful for white persons to assemble with free negroes or slaves, to teach them to read or write. The prohibitory Act of the legislature of Alabama, passed in the session of 1831-2, relative to instruction to be given to the slave, or free colored population, or exhortation, or preaching to them, or any

restrictions must have proceeded from the strong and fearful apprehension that the kind of knowledge and instruction which were interdicted, would greatly increase the means, capacity, and tendency of slaves to combine for purposes of mischief and insurrection. The great principle of self-preservation doubtless demands, on the part of the white population dwelling in the midst of such combustible materials, unceasing vigilance and firmness, as well as uniform kindness and humanity. The evils of domestic slavery are inevitable, but the responsibility does not rest upon the present generation, to whom the institution descended by inheritance, provided they have endeavored by all reasonable means to arrest or mitigate the evil. (a) We will close this division of the subject with a brief historical detail of the laws of New York concerning the origin, progress, and final extinction of domestic slavery. Our domestic annals afford sufficient matter of alternate humiliation and pride, for painful and for exulting contemplation.

The system of domestic slavery, under the colony laws of New York, was as firmly and rigorously established as in any part of the country; and, as it would seem, with more severity

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mischievous influence attempted to be exerted over them, is sufficiently penal. Laws of similar import are presumed to exist in the other slave-holding states; but in Louisiana the law on the subject is armed with tenfold severity. It not only forbids any person teaching slaves to read or write, but it declares that any person using language, in any public discourse, from the bar, bench, stage, or pulpit, or any other place, or in any private conversation, or making use of any signs or actions, having a tendency to produce discontent among the free colored population, or insubordination among the slaves, or who shall be knowingly instrumental in bringing into the state any paper, book, or pamphlet, having the like tendency, shall, on conviction, be punishable with imprisonment or death, at the discretion of the court.

(a) By the statute of 3 and 4 William IV. ch. 73, slavery ceased throughout the British colonies, in the West Indies and elsewhere, on the 1st of August, 1834. The then existing slaves were to become apprenticed laborers. The term of their apprenticeship was to cease partly on the 1st of August, 1838, and totally on the 1st of August, 1840, when the black and colored population would become altogether free. The sum of twenty millions sterling was to be distributed, in certain proportions and on certain conditions, to the West India planters, as a compensation for the loss of their property in the slaves, by the force and operation of the statutes. This statute will remain forever a memorable event in the annals of British legislation. It is entitled, an *Act for the abolition of slavery throughout the British colonies; for promoting the industry of the manumitted slaves; and for compensating the persons hitherto entitled to the services of such slaves.* The title itself is declaratory of the boldness of the design, and the sense of justice and benevolence which accompanied its latter provisions.

than in either Massachusetts or Connecticut. In the year 1706, it was declared by statute (*a*) that no slave should be a witness for or against any freeman, in any matter, civil or criminal. (*b*) The consequence of this was, that a slave found alone, could be beaten with impunity by any freeman, without cause. It was shortly after enacted, (*c*) that if any slave talked impudently to any Christian, he should be publicly whipped, at the discretion of any justice of the peace, not exceeding forty stripes. By successive Acts of the colonial assembly, passed in 1702, 1712, and 1730, (*d*) the debasement *of *255 the civil condition of slaves was greatly augmented. The master and mistress were authorized to punish their slaves at discretion, not extending to life or limb, and each town was authorized to appoint a common whipper for their slaves, to whom a salary was to be allowed. If guilty of any of the numerous capital offences of that day, they were to be tried by three justices of the peace, and five freeholders, and were denied the benefit of the testimony of their associates, if in their favor, though it might be used against them; and they were to be put to death in such a manner as this formidable tribunal thought proper. (*e*)

In the year 1740, it was observed by the legislature, that all due encouragement ought to be given to the direct importation of slaves, and all smuggling of slaves condemned as "an eminent discouragement to the fair trade." (*f*)

(*a*) Colony Laws, Smith's edit. vol. i. p. 69.

(*b*) This disability was applied to slaves by the other colonies. In Kentucky, by a statute as late as 1798, no negro, mulatto, or Indian, can be a witness, except in cases in which negroes, mulattoes, or Indians alone should be *parties*. But this restriction is understood to apply only to testimony in suits pending between the parties, and does not disqualify *freemen of color* to take an oath and swear to facts in every case in which a white man may be concerned. 1 Dana's Ken. Rep. 467.

(*c*) Colony Laws, vol. i. p. 72.

(*d*) Ibid. vol. i. pp. 193–199. Bradford's edit. of the Colony Laws, 1719.

(*e*) They were occasionally adjudged to the stake; and an execution of this kind, and probably the last of this kind, was witnessed at Poughkeepsie, shortly before the commencement of the revolutionary war.

(*f*) Colony Laws, vol. i. pp. 283, 284. It ought, however, to be noted, in honor of the laws promulgated under the early administration of the colony by the Duke of York, and known as the Duke's Laws, and which continued in force from 1665 to 1683, that it was forbidden to a "Christian to keep a slave, except persons adjudged

Such were the tone and policy of the statute law of New York on the subject of domestic slavery, during the whole period of the colony history; but after the era of our independence, the principles of natural right and civil liberty were better known and obeyed, and domestic slavery speedily and sensibly felt the genial influence of the Revolution. The first Act that went to relax the system was passed in 1781, and it gave freedom to all slaves who should serve in the American army for the term of three years, or until regularly discharged. (*a*) A more liberal provision was made in 1786, by which all slaves, becoming public property by attainder, or confiscation of their master's estates, were immediately set free; and if unable to maintain themselves, they were to be supported by the state. (*b*) These were *256 only partial alleviations * of a great public evil. In 1788, a more extensive and effectual stroke was aimed at the practice of domestic slavery. It put an absolute stop to all further importation of slaves after the first of June, 1785, by prohibiting future sales of such slaves. Facilities were also given to the manumission of slaves. The penal code was greatly meliorated in respect to slaves. In capital cases, they were to be tried by jury, according to the course of the common law, and the testimony of slaves was made admissible for, as well as against each other, in criminal cases. (*c*) In one single case, the punishment of slaves was made different from that of whites. If convicted of crimes under capital, and the court should certify transportation to be a proper punishment, they might be transported to foreign parts by the master. (*d*) In 1799, the legislature took a step towards the final removal, as well as the intermediate mitigation of this evil. They commenced a system of laws for the gradual abolition of slavery. (*e*) It was declared

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thereto by authority, or such as have willingly sold or shall sell themselves." See an analysis of the Duke's Laws in Thompson's History of Long Island, New York, 1839, p. 102, and which contained many wise and just provisions.

(*a*) Act of N. Y., March 20, 1781, ch. 32, sec. 6.

(*b*) Act of May 1, 1786, ch. 58, sec. 29, 30.

(*c*) Act of February 22, 1788, ch. 40. This Act was hostile to the importation of slaves as an article of trade, and not to the existence of slavery itself, for it reënacted the rule of the civil law that the children of female slaves should follow the state and condition of the mother.

(*d*) Act of March 22, 1790, ch. 28.

(*e*) Act of March 29, 1799, ch. 62.

that every child born of a slave within the state, after the 4th of July, 1799, should be born free, though liable to be held as the servant of the proprietor of the mother, until the age of twenty-eight years in a male, and twenty-five in a female, in like manner as if such person had been bound by the overseers of the poor to service for that period. This law was further enlarged and improved in 1810, and it was then ordained (*a*) that the importation of slaves, except by the owner, coming into the state for a residence short of nine months, should be absolutely prohibited; and every slave imported contrary to the Act was declared free. All contracts for personal service, by any person held or possessed as a slave out of the state, were declared to be void; and to entitle a person to claim the services of a person born of a slave, * after the 4th of July, 1799, he must have used all reasonable means to teach the child to read, or, in default, the child would be released from servitude after the age of twenty-one. *257

These provisions were all incorporated into the Act of the 9th of April, 1813, which contained a digest of the existing laws on the subject of slavery. Under the operation of those provisions, slavery very rapidly diminished, and appearances indicated, that in the course of the present generation, it would be totally extinguished. Those that were slaves on the 4th of July, 1799, and not manumitted, were the only persons that were slaves for life, except those that were imported prior to the 1st of May, 1810, and remained with their former owners unsold. No slave imported since the 1st of June, 1785, could be sold; and no slave imported since the 1st of May, 1810, could be held as a slave; and no person born within the state since the 4th of July, 1799, was born a slave. At last, by the Act of 31st of March, 1817, (*b*) which digested anew all the former laws on the subject, provision was made for the complete annihilation of slavery in about ten years thereafter, by the section which declared "that every negro, mulatto, or mustee, within the state, born before the 4th of July, 1799, should, from and after the 4th day of July, 1827, be free." After the arrival of that period, domestic

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(*a*) Act of March 30, 1810, ch. 115.

(*b*) Laws of New York, sess. 40, ch. 137.

slavery became extinguished in the state, and unknown to the law, except in the case of slaves brought within the state by persons as travellers, and who do not reside or continue therein more than nine months. (*a*) In the language of the New York

(*a*) Act, *supra*, sec. 15, and Act, sess. 42, ch. 141, sec. 3. N. York R. S. vol. i. 657. This latter provision does not appear in the edition of the new R. S. of N. Y. in 1846.[1] This exception in favor of the master *voluntarily* bringing his slave into the state temporarily as a traveller, prevails, also, by statute, in Rhode Island, New Jersey, Illinois, and Pennsylvania; and it is an act of comity on the part of the state, and was not required by the constitution of the United States, (art. 4, sec. 2,) nor by the Act of Congress of Feb. 12, 1793, ch. 7, made in pursuance thereof, for they only apply to persons *escaping*, or being *fugitives* from service or labor. The law of Illinois enforces the comity due to travellers in passing over the state by protecting his property, and especially his slave whom he brings with him for his temporary use, and the slave does not thereby constitutionally become free; and the law makes it penal to harbor or conceal a slave so temporarily brought into the state for his master's service. They consider the protection of the property in such cases to be required by a liberal international comity. Willard *v.* The People. 4 Scammon, 461. Again, in Eells *v.* The People, 4 Scammon, 498, the state laws providing for punishing persons who secrete or harbor slaves who are in the state by the consent and in the service of the master as a traveller, is vindicated as constitutional under the constitution of the United States and of the state. The constitutions of the state of Georgia, of 1798, and of Florida, of 1839, for the better protection of the slave property in that state, denies to the legislature the power to pass laws for the emancipation of slaves, without the consent of the owners, or to prevent emigrants to that state from bringing with them such persons as are slaves by the laws of any of the United States. On the other hand, the constitution of the latter state confers upon the legislature the power to pass laws to prevent free persons of color from emigrating to that state, or from being discharged from any vessel in any of the ports of Florida.

The legislature of New York has gone as far as it was doubtless deemed competent for them to do, to protect "free citizens or inhabitants of the state" from being imprisoned or reduced to slavery in any other state. It makes it the duty of the governor, if any such person be kidnapped or transported out of the state to be held in slavery, or be wrongfully imprisoned or held in slavery, "by color of any usage or rule of law prevailing in such state," to procure his liberty, and to employ an agent for that purpose to take the legal measures to effect his restoration. 1 N. York R. S. 3d edit. 172.

In Massachusetts, where no such state statute exists, it was held, in August, 1836, in the case of the slave child Med, before the Supreme Court, that if a slave be voluntarily brought into Massachusetts by his master, or comes there with his consent, the

[1] The sections of the statute allowing the exception were expressly repealed by an Act passed in 1841. See Law of New York of 1841, ch. 247. And in Lemmon *v.* The People, it was decided that all slaves, brought into New York by their masters, under any circumstances whatever, even for a moment, become free. And this decision has been affirmed by the Court of Appeals, but not yet reported. *Vide* vol. i. p. 651.

Revised Statutes, (*a*) "every person born within the state is free; every person hereafter born within the state shall be free; and every person brought into the state as a slave, (with the exception in favor of travellers,) *shall be free." But *258 though slavery be practically abolished in New York, the amended constitution of 1821, art 2, placed people of color, who were the former victims of the slave laws, under permanent disabilities as electors, by requiring a special qualification as to property, peculiar to their case, to entitle them to vote. (*b*)

slave becomes free, and cannot be coerced to return. The court, on *habeas corpus*, discharged the child from the custody of its mistress. See, also, to the same point, the case of Commonwealth *v.* Aves, 18 Pickering, 193. Commonwealth *v.* Taylor, 3 Metcalf's Rep. 72. On the other hand, it was held, in the case of Johnson *v.* Tompkins, Baldwin's C. C. U. S. 571, that the master from another state may pursue and take his fugitive slave without warrant. He may arrest him anywhere and at any time, and no person has a right to oppose the master in the act, or to demand proof of property. The constitution and laws of the United States secure this right to reclaim fugitive slaves against state legislation. In some of the slaveholding states it is held, that if a slave from such a state goes lawfully into a non-slaveholding state, and acquires a domicil there with his master, or is emancipated there by his master, he becomes emancipated, and ceases to be a slave on his return. But if he be carried there by his master for a temporary purpose, and returns, his state of slavery is resumed. Lunsford *v.* Coquillon, 14 Martin's L'a Rep 405 2 A. K. Marshall's Ken. Rep. 467. Graham *v.* Strader, 5 B. Monroe, 173. Blackmore *v.* Phill, 7 Yerger, 452. See, also, the case of the slave Grace, in 2 Hagg. Adm. R. 94. In the case of Marie Louise *v.* Marot, 9 L'a Rep. 473, and of Smith *v.* Smith, 13 L'a Rep. 441, the doctrine of emancipation would seem to be carried further than in the above cases; for where a slave was carried by the owner to France, where slavery was not tolerated, and under the operation of whose laws the slave became immediately free, and was brought back to Louisiana, it was held that the slave being free for one moment in France, could not be reduced again to slavery in Louisiana. Thomas *v.* Generis, 16 L'a Rep. 483, S. P. In Connecticut, a similar decision to that in Massachusetts was made by its Supreme Court, in June, 1837. It was the case of a female slave, brought by her master from Georgia for a temporary residence; and the court held that the master having *left* the slave in Connecticut, on a temporary absence from the state, she became forthwith free. Jackson *v.* Bulloch, 12 Conn. Rep. 38.[1]

(*a*) Vol. i. p. 659, sec. 16.

(*b*) This disability was continued in the revised constitution of New York of 1846,

[1] A person residing in Kentucky, who takes his slave to a free state for a temporary purpose, or sends him there for such purpose, does not, by the laws of that state, forfeit his right to him on his return. Graham *v.* Strader, 5 B. Monroe's Rep. 173. But if the owner of a slave remove into a free state with his slave, with the intention of residing there, the slave is thereby emancipated. Josephine *v.* Poultney, 1 L'a Ann. R. 329. Matter of Ralph, 1 Morris's (Iowa) R. 1. Barclay *v.* Sewell, 12 L'a Ann. 262. Smith *v.* Adam, 18 B. Mon. (Ky.) 685.

II. *Of hired servants.*

The next class of servants which I mentioned are hired servants, and this relation of master and servant rests altogether

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though the convention submitted to the test of popular suffrage the question, whether colored male citizens should have the right to vote without any such restriction, and a large majority of the electors of the state, in November, 1846, answered the question in the negative. In most of the United States there is a distinction, in respect to political privileges, between free white persons and free colored persons of African blood; and in no part of the country, except in Maine, do the latter, in point of fact, participate equally with the whites, in the exercise of civil and political rights. The manumission of slaves is guarded in some, at least, of the slaveholding states, from abuse and public mischief, by legislative provisions. Thus, for instance, in Tennessee, a deed or will emancipating a slave is not void, but it communicates to the slave only an imperfect right, until the state has assented to the act. The statute of 1777, authorizing the county courts to give the assent of the government to the manumission of slaves, restricted the assent to cases where the slave had rendered meritorious services. The Act of 1801 repealed that part of the Act of 1777, requiring the slave to have rendered meritorious services as a condition of the emancipation, and the county courts were to exercise their sound discretion in giving or withholding the assent. The Act of 1829 vested the same discretion in the chancellors of the state. The Act of 1831 required that slaves, upon being emancipated, be removed beyond the limits of the state; and, in accordance with the policy of the Act, the courts are bound to make it a condition of the assent to the manumission, that security be given that the emancipated slave be forthwith removed beyond the limits *of the United States*, and no free negro is permitted to enter that state or return to it. See Fisher *v.* Dabbs, 6 Yerger's Tenn. Rep. 119, where Ch. J. Catron gives a strong picture of the degradation of free negroes living among whites, without motive and without hope. In Virginia and Kentucky, it is understood that slaves can be set free by will, without the concurrence of the state. The amended constitution of Tennessee, of 1834, prohibits the legislature from passing laws for the emancipation of slaves, without the consent of the owners. So, by the constitution of the territory of Arkansas, as made by a convention of delegates in 1835, there is the like prohibition, and a prohibition, also, of laws preventing emigrants from bringing their lawful slaves with them from other states, for their own use, and not as merchandise. In Alabama, by statute, (Aik. Dig. 452,) all negroes, mulattoes, Indians, and all persons of mixed blood, descended from negro or Indian ancestors, to the third generation inclusive, though one ancestor of each generation may have been a white person, whether bond or free, are declared incapable in law to be witnesses in any case whatever, except for and against each other. In Ohio, persons having more than one half white blood are entitled to the privileges of whites. Wright's Ohio Rep. 578. The rule in Virginia and Kentucky is, that a mulatto, or one having one fourth of African blood, is presumptive evidence of being a slave, and that an apparently white person or Indian is *primâ facie* free, and is actually so, if having less than a fourth of African blood. 3 Dana's Ken. Rep. 385. The best test of the distinction between black and white persons is, says this case, *autopsy*, or the evidence of one's own senses, and personal inspection by a jury is therefore the best and highest evidence as to color. By the amended constitution of North Carolina, in 1835, no free negro, mulatto, or free person of mixed blood, descended from negro

upon contract. The one is bound to render the service, and the other to pay the stipulated consideration.[1] But if the servant

ancestors to the fourth generation inclusive, though one ancestor of each generation may have been a white person, shall vote for members of the legislature. The right of voting is confined to white freemen by the constitutions of Delaware, Virginia, Kentucky, Louisiana, Mississippi, Illinois, Indiana, Ohio, Missouri, South Carolina, and Georgia; and by law in Connecticut, none but free white persons can be naturalized. See *supra*, p. 72. In South Carolina, a free person of color is not a competent witness in the courts of record, although both the parties to the suit are of the same class with himself. Groning *v.* Devana, 2 Bailey's Rep. 192.

The African race, even when free, are essentially a degraded caste, of inferior rank and condition in society. See the judicial sense of their inferior condition, as declared in the case of The State *v.* Harden, and The State *v.* Hill, 2 Spear's S. C. Eq. Rep. 150, 152. Marriages between them and whites are forbidden in some of the states where slavery does not exist, and they are prohibited in all the slaveholding states; and when not absolutely contrary to law, they are revolting, and regarded as an offence against public decorum. The statute of North Carolina, prohibiting marriages between whites and people of color, includes in the latter class *all* who are descended from negro ancestors, to the fourth generation inclusive, though one ancestor of each generation may have been a white person. State *v.* Watters, 3 Iredell, 455. By the Revised Statutes of Illinois, published in 1829, marriages between whites and negroes, or mulattoes, are declared void, and the persons so married are liable to be whipped, fined, and imprisoned. By an old statute of Massachusetts, in 1705, such marriages were declared void, and they were so under the statute of 1786. And the prohibition was continued under the Mass. R. S. of 1836, which declared that no white person shall intermarry with a negro, Indian, or mulatto. This prohibition, however, has since been repealed. A similar statute provision exists in Virginia and North Carolina. Marriages of whites and blacks were forbidden in Virginia, from the first introduction of blacks, under ignominious penalties. Hening's Statutes, vol. i. p. 146. Such connections, in France and Germany, constitute the degraded state of concubinage, which was known in the civil law as *licita consuetudo semimatrimonium*, but they are not legal marriages, because the parties want that equality of *status* or condition which is essential to the contract. Ohio and Indiana are not slaveholding states; and yet, by statute, a negro, mulatto, or Indian, is not a competent witness in civil cases, except where negroes, mulattoes, or Indians alone are parties, nor in pleas of the state, except against negroes, mulattoes, or Indians. In the Act of Ohio of 1829, for the support and better regulation of common schools,

[1] The relation of master and servant arises, where one suffers another to proceed in a service, in which the latter engages only as a volunteer. He who receives the benefit in such a case, is liable, as master, for the negligent acts of the other. Hill *v.* Morey, 26 Verm. 178. The hirer of a person of full age, by the year, can maintain an action for a loss of service against one who imprisons the servant. Woodward *v.* Washburn, 3 Denio's R. 369. So an action lies for enticing away a servant. Haight *v.* Badgeley, 15 Barbour, R. 499. But to maintain such an action, there must be proof of a service owing to the plaintiff, by virtue of an agreement on the part of the servant himself, or some other person having authority to bind him to the service. Campbell *v.* Cooper, 34 N. H. 49.

hired for a definite term, leaves the service before the end of it, without reasonable cause, or is dismissed for such misconduct

the instruction in them is declared to be for the "white youth of every class and grade, without distinction." And in the Act of Ohio of 1807, to regulate black and mulatto persons, it is declared that no black or mulatto person shall be permitted to settle or reside in the state, unless he first produce a fair certificate from some court within the United States, under the seal of the court, of his actual freedom. Nor is a negro or mulatto person permitted to emigrate into, and settle within that state, unless within twenty days thereafter he enter into a bond, with two or more freeholders, in $500, conditioned for his good behavior, and to pay for his support, if found unable to support himself. This Act is still in force. See R. S. of Ohio, 1831, and of Indiana, 1838. These provisions have pretty effectually protected the people of Ohio and Indiana from the presence of any colored population. A statute provision of the same import was passed in Michigan, April 13, 1827; and in Illinois a like policy appears in several statutes between 1819 and 1833, prescribing the means requisite for a black or mulatto person to acquire a lawful residence. So, also, in Indiana, a similar policy prevails by Act of 1831; but that state liberally secures to the master the right to pass through the state to any other state with his negro, or mulatto, or other servants.[1] In Connecticut, by statute, in 1833, any colored person, not an inhabitant of the state, who shall come to reside there for the purpose of being instructed, may be removed, under the Act for the admission and settlement of inhabitants; and it was made penal to set up or establish any school or literary institution in that state, for the instruction of colored persons not inhabitants of the state, or to instruct or teach in any such school or institution, or to board or harbor, for that purpose, any such persons, without the previous consent, in writing, of the civil authority of the town in which such school or institution might be. In an information under that provision against Prudence Crandall filed by the public prosecutor, it was held, by Ch. J. Daggett, at the trial in 1833, that free blacks were not *citizens* within the meaning of the term, as used in the constitution of the United States. And in "An inquiry into the political grade of the free colored population under the constitution of the United States," and of which John F. Denney, Esq., of Pennsylvania, is the author, this same doctrine is elaborately sustained. The decision in Connecticut was brought up for review before the Supreme Court of Errors, and the great point fully and ably discussed; but the cause was decided on other ground, and the question touching the citizenship of free persons of color was left unsettled. Since that decision, William Jay, Esq., in "An inquiry into the character and tendency of the American Colonization and American Anti-Slavery Societies," (pp. 38–45,) has ably enforced the other side of the question, that free colored people, or black persons, born within the United States, are citizens, though under many disabilities. Perhaps, after all, the question depends more on a verbal than on an essential distinction. It is certain that the constitution and statute law of New York (Const. art. 2, N. Y. Revised Statutes, vol. i. p. 126, sec. 2) speaks of men of color as being *citizens*, and capable of being freeholders, and entitled to vote. And if, at common law, all human beings born within the legiance of the king, and under the king's obedience, were natural-born subjects,

[1] By the constitution of Indiana, of 1851, (art. 13, sec. 1,) it is provided that "no negro or mulatto shall come into or settle in the state after the adoption of this constitution."

as justifies it, he loses his right to wages for the period he has served. (a)[1] A servant so hired * may be dismissed *259 by the master before the expiration of the term, either

and not aliens, I do not perceive why this doctrine does not apply to the United States, in all cases in which there is no express constitutional or statute declaration to the contrary. Blacks, whether born free or in bondage, if born under the jurisdiction and allegiance of the United States, are natives, and not aliens. They are what the common law terms natural-born subjects. Subjects and citizens are, in a degree, convertible terms as applied to natives; and though the term *citizen* seems to be appropriate to republican freemen, yet we are equally, with the inhabitants of all other countries, *subjects*, for we are equally bound by allegiance and subjection to the government and law of the land. The privilege of voting, and the legal capacity for office, are not essential to the character of a citizen, for women are citizens without either; and free people of color may enjoy the one, and may acquire, and hold, and devise, and transmit, by hereditary descent, real and personal estates. The better opinion, I should think, was, that negroes or other slaves, born within and under the allegiance of the United States, are natural-born subjects, but not citizens. *Citizens*, under our constitution and laws, mean free inhabitants, born within the United States, or naturalized under the law of Congress. If a slave, born in the United States, be manumitted, or otherwise lawfully discharged from bondage, or if a black man be born within the United States, and born free, he becomes thenceforward a citizen, but under such disabilities as the laws of the states respectively may deem it expedient to prescribe to free persons of color. It was adjudged by the Supreme Court of Pennsylvania, in 1837, that a negro or mulatto was not entitled to exercise the right of suffrage. Hobbs *v.* Fogg, 6 Watts, 553. And it has been adjudged in Tennessee, in 1838, in the case of The State *v.* Claiborne, Meigs, 331, that free blacks are not *citizens* within the provision of the constitution of the United States, art. 4, sec. 2; for free negroes are not in any of the states entitled to *all* the privileges and immunities of citizens, and a state may constitutionally prohibit free persons of color from removing into the state to reside therein. See, also, the official opinion of the attorney-general of the United States, that free persons of color in Virginia were not *citizens* within the intent and meaning of the Act of Congress regulating the foreign and coasting trade. Opinions of the Attorneys-General, Nov. 7, 1821, vol. i. 382.

(a) Huttman *v.* Boulnois, 2 Carr. & Payne's N. P. Rep. 510. Turner *v.* Robinson, 6 Ibid. 15. Libhart *v.* Wood, 1 Watts & Serg. 265. If the servant, according to this last cause, commits a criminal offence, though not immediately injurious to his master, he cannot recover his wages. A person hired by the year cannot quit the service without forfeiting his salary, nor can he be dismissed at pleasure, or without just cause, and thereby be deprived of it. Beckman *v.* N. O. Cotton Press Co. 12 L'a Rep. 67. See, also, *infra*, 509. Covenants for *personal service* cannot be specifically enforced; but the excepted cases of apprentices depend upon parental authority, and of soldiers and sailors on national policy. Mary Clark's case, 1 Blackford's Ind. Rep. 122.

[1] Under an ordinary contract of hiring by the day, the person hired is not bound to prolong his services, in order to complete any particular piece of work on which he may happen to be employed. Wyngert *v.* Norton, 4 Mich. 286.

for immoral conduct, wilful disobedience, or habitual neglect. (a) [1]

There are many important legal consequences which flow from this relation of master and servant.

The master is bound by the act of his servant, either in respect to contracts or injuries, when the act is done by authority of the master. If the servant does an injury fraudulently, while

(a) Callo v. Brouncker, 4 Carr. & Payne's N. P. Rep. 518. Domestic or menial servants, though hired for a year, may, by the custom respecting them, be dismissed on a month's notice, or on the payment of a month's wages. 12 J. B. Moore's Rep. 556.[2] If there be an entire and express contract that certain wages or compensation are to be paid, on condition of a service performed, the service is a condition precedent, and must be performed before suit brought. Cutter v. Powell, 6 Term Rep. 320. But if a servant be hired in the common way, with reference to a general understanding, he is, said Lawrence, J., in that case, entitled to wages for the time he serves, though it be not for the whole year. If hired to labor for a specific time, and he serves part of the time, and is disabled by sickness from completing the service, he is entitled to be paid *pro rata*. Fenton v. Clark, 11 Vermont Rep. 557. If the hired servant for a year leaves the service within the year without cause, it seems to have been conceded, in Hartwell v. Jewett, 9 N. H. Rep. 249, that after the expiration of the year the servant might maintain a suit on a *quantum meruit* for the time he served. In Nolan v. Danks, 1 Rob. L'a Rep. 332, it was held, under the Louisiana Code, that if a laborer, without just cause, before the expiration of his term of service, leaves his employer, he forfeits his wages. If his employer sends him away without just cause before the end of the term, he is entitled to his full wages for the full term; and if he be discharged, for good cause, before the end of his term of service, he is entitled to his wages up to the time of his discharge. This last point is contrary to the rule as stated in the text, and seems to be not quite consistent with the first point in the decision, though it is supported by the court with some strong considerations. The rule in New York is, that if a person hired for a certain time, at a specified compensation, be discharged without cause within the time, he is entitled to his full wages for the whole time; but the question of compensation seems to be subject to reasonable qualifications.[3] Costigan v. Mohawk R. R. Co. 2 Denio, 609. Mr. Sedgwick, in his Treatise on the Measure of Damages, p. 219, says, that it is a delicate and vexed question whether the party has any redress who fails to perform an agreement which is entire, and only performs part of it, though the doing of the thing is a condition precedent. See *infra*, p. 509, where the subject is further considered.

[1] The rule on the subject of wilful disobedience is very stern. See the case of Turner v. Mason, 14 Mees. & Wels. R. 112. No case in this country, it is believed, goes so far in upholding the authority of the master.

[2] A governess is not within the rule. Todd v. Kerrich, 14 E. L. & Eq. 433.

[3] But where a person who agreed to work for a given time, and had the privilege of leaving if dissatisfied, left without alleging any dissatisfaction, but merely to attend to other business, it was held he could not recover for what he had done. Monell v. Burns, 4 Denio's R. 121. Lantry v. Parks, 8 Cowen's R. 63.

in the immediate employment of his master, the master, as well as the servant, has been held liable in damages; and he is also said to be liable if the injury proceeds from the negligence or want of skill in the servant, for it is the duty of the master to employ servants who were honest, skilful, and careful. (a) The master is only answerable for the fraud of his servant while he is acting in his business, and not for fraudulent or tortious acts, or misconduct in those things which do not concern his duty to his master, and which, when he commits, he steps out of the course of the service (b) [1] *But it was considered, in *M'Manus* v. *Crickett*, (c) to be a question of great concern, and of much doubt and uncertainty, whether the master was answerable in damages for an injury wilfully committed by his servant, while in the performance of his master's business, without the direction or assent of the master. The court of K. B. went into an examination of all the authorities, and, after much discussion and great consideration, with a view to put the question at rest, it was decided that the master was not liable in trespass for the

(a) 1 Blacks. Com. 431. Dy. 161, pl. 45. Ibid. 238 b, pl. 38. Grammar v. Nixon, Str. 653. Sly v. Edgley, 6 Esp. N. P. Cas 6. Penn. D. and M. Steam N. Co v. Hungerford, 6 Gill & Johnson, 291. Cowen, J., in Wright v. Wilcox, 19 Wendell, 345. Pothier on Obligations, Nos. 453–456. Domat, 1, 16, 3, No. 1. Harriss v. Mabry, 1 Iredell, N. C. Rep. 240.

(b) Lord Kenyon, in Ellis v. Turner, 8 Term Rep. 533. Parker, Ch. J., in Foster v. The Essex Bank, 17 Mass. Rep. 508–510. Richmond Turnpike Co. v. Vanderbilt, 1 Hill's N. Y. Rep. 480.[2]

(c) 1 East, 106.

[1] Mitchell v. Cressweller, 16 E. L. & Eq. 448. Armstrong v. Cooley, 5 Gilman, R. 509. Wolfe v. Mersereau, 4 Duer, 473. Church v. Mansfield, 20 Conn. 284. Phil. & R. R. R. Co. v. Derby, 14 How. U. S. 468. Southwick v. Estes, 7 Cush. 385. Thames Steamboat Co. v. Housatonic R. Co. 24 Conn. 40. Hibbard v. N. Y. & Erie R. R. Co. 15 N. Y. (1 Smith,) 455. Where the conductor of a railroad train detained the train all night at a station on the route, and the jury found that such detention was wilful on the part of the conductor, the N. Y. Court of Appeals held that this principle did not apply, and that it must be assumed, in the absence of any finding or even proof to the contrary, that it was practicable for the defendants to have found another conductor and forwarded the train without injurious delay. Weed v. Panama R. R. Co. 17 N. Y. (3 Smith,) 362.

[2] This last case was affirmed in the Court of Appeals, 2 Comst. R. 497. The president of the company, who was also its general agent, approved of the trespass complained of, (and even encouraged its commission,) yet it was held that the company was not liable, for its agents had no authority to authorize the doing of an unlawful act.

wilful act of his servant, in driving his master's carriage *260 against another, without his master's direction or * assent. The court considered that when the servant quitted sight of the object for which he was employed, and without having in view his master's orders, pursued the object which his own malice suggested, he no longer acted in pursuance of the authority given him, and it was deemed, so far, a wilful abandonment of his master's business. The case has received the sanction of the supreme courts of Massachusetts and New York, (*a*) on the ground that there was no authority from the master, express or implied, and the servant in that act, was not in the employment of his master. (*b*) [1]

(*a*) 17 Mass. Rep. 508-510. Wright *v.* Wilbox, 19 Wendell, 343. Croft *v.* Alison, 4 Barnew. & Ald. 590, S. P.

(*b*) In Brady *v.* Giles, 1 Moody & Robinson, 494, Lord Abinger held it to be a question of fact for a jury, whether the servant was acting as the servant of the party hiring or of the owner. But in Chandler *v.* Broughton, 1 Crompton & Meeson, 29, it was held that if the owner of a carriage is sitting aside of his servant who drives, and the horse runs away and injures others, trespass lies against the master as being his act. The master is liable as a co-trespasser, if he is perfectly passive without any interposition when the driver was doing the wrong. A passive acquiescence is inferable. M'Laughlin *v.* Pryor, 1 Carr. & Marshman, 354. By the New York R. Statutes, 3 edit. vol. i. 874, the owners of every carriage running or travelling upon any turnpike road or public highway, for the conveyance of passengers, are made liable, jointly and severally, for all injuries and damages done by any person in their employment as a driver, while driving such carriage, whether the act occasioning such injury or damage be wilful or negligent, or otherwise, in the same manner as such driver would be liable [2]. This stringent provision has a salutary tendency to secure the selection of competent and careful drivers. The dividing line, said Judge Cowen, between an act of the servant in the employment of his master, for which the master is or is not liable, is the wilfulness of the act. But though the master be liable for the servant's negligence to the injury of another, when doing a lawful act in his service, he is not liable if the act be wilfully unlawful, unless shown to be done by the master's authority. Lyons *v.* Martin, 8 Adolph. & Ellis, 512. Nor is the master who uses due diligence in the selection of his servants, answerable to one of them for an injury received by him in consequence of another's carelessness while both were engaged in the same service. There is no express or implied contract or principle of policy applicable to the case as between two servants in the same service, and giving an action against the master for an injury by one to the other. Farwell *v.* B. & W. Railroad, 4 Metcalf, 49.[3]

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[1] The same principle was declared to be law in North Carolina. Wessorl *v.* Railroad Co. 4 Jones, Law, (N. C.) 379.

[2] See a similar statute in Illinois. Rev. Stat ch. 93, § 6. Tuller *v.* Voght, 13 Ill. 277.

[3] See the following cases confirmatory of this doctrine. Priestley *v.* Fowler, 3 M. &

If a servant employs another servant to do his business, and in doing it, the servant so employed is guilty of an injury, the master is liable. Thus, in *Bush* v. *Steinman*, (*a*) A. contracted with B. to repair a house, and B. contracted with C. to do the work, and C. contracted with D. to furnish the materials; and

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(*a*) 1 Bos. & Pull. 404. Randleson *v.* Murray, 8 Adolph. & Ellis, 109, S. P. See, also, Burgess *v.* Gray, 1 Manning, Granger & Scott, 578. A., the owner and occupier of premises adjoining the road, employed B. to make a drain, and the workmen under him placed gravel on the highway, by which C. was injured, and A. was held liable for it. The possessor of fixed property must be responsible for the acts of those he employs. But the principal is not liable to one agent or employee for damages occasioned by the negligence or misconduct of another agent or employee; for the relation of master and servant, or principal and agent, creates no contract of duty, that the servant or agent shall suffer no injury from the negligence of others, employed by him in the same business or service. Story on Agency. The Supreme Court in Georgia, in Scudder *v.* Woodbridge, 1 Kelly, 195, limit this rule to *free white agents*, and it is not applicable to slaves. The principal is in that case liable from necessity, resulting from interest to the owner and humanity to the slave.

Wels. 1. Brown *v.* Maxwell, 6 Hill, 594. Hutchinson *v.* Yorke, &c. Railway Co. Law Journal Rep. 296, Sept. 1850. Wigmore *v.* Jay, Id. 300. Murray *v.* S. C. R. Road, 1 McMullen R. 385. Coon *v.* S. & U. R. R. Co. 6 Barb. S. C. R. 231. Affirmed on appeal, 1 Selden, R. 492. Albro *v.* Agawam Co. 6 Cushing, R. 75. Sherman *v.* Rochester & Sy. R. Co. 15 Barb. R. 574. Lloyd *v.* The Mayor, 1 Selden, R. 369. Mears *v.* Com. of Wilmington, 9 Ired. R. 73. Hayes *v.* W. R. Corp. 3 Cush. 270. King *v.* B. & W. R. R. Corp. 9 Cush. 112. Ryan *v.* Cumberland V. R. Co. 23 Penn. 384. Homer *v.* Ill. Central R. Co. 15 Ill. 550. Madison R. R. Co. *v.* Bacon, 6 Ind. 205. And this rule applies to the case of a person who is injured whilst voluntarily assisting the servants in their work. Degg *v.* Midland Railway Co. 40 E. L. & Eq. 376. But a switch-tender, employed by a railway company on a portion of its track upon which it permits another company to run trains, is not a servant of the latter; and an engineer of the latter, injured by the negligence of such switch-tender, may maintain an action against the switch-tender's employer. Smith *v.* N. Y. & Harlem R. R. Co. 19 N. Y. (5 Smith,) 127. But the master must have exercised reasonable care in the selection of the servant; Wiggett *v.* Fox, 36 E. L. & Eq. 486; Tarrant *v.* Webb, 37 E. L. & Eq. 281: for in this as in other cases he is liable for any injuries to the servant, while in his employment, which have been caused by his neglect. Paterson *v.* Wallace, 28 E. L. & Eq. 48. Marshall *v.* Stewart, 33 Id. 1. Keegan *v.* Western R. Corp. 4 Seld. 175. McMillan *v.* Saratoga R. Co. 20 Barb. 449. Noyes *v.* Smith, 2 Wms. (28 Vt.) 59. Byron *v.* Telegraph Co. 26 Barb. (N. Y.) 39. Hallower *v.* Henley, 6 Cal. 209. Indianapolis R. R. Co. *v.* Love, 10 Ind. 554.

It seems that the rule is not different though both servants are not in a common employment. Gillshannon *v.* Stony Brook R. R. Corp. 10 Cush. 228. Russell *v.* Hudson R. R. R. Co. 17 New York, (3 Smith,) 134. The rule appears to be different in Indiana. Fitzpatrick *v.* N. A. R. Co. 7 Ind. 436. But in Ohio, this doctrine is qualified, and a railroad company was held liable where the injury was caused by the negligence of a superior servant. Little Miami R. R. Co. *v.* Stevens, 20 Ohio, 415. This rule is approved in Indiana. Gillenwater *v.* Madison R. Co. 5 Porter, 339. Fitzpatrick *v.* New Albany R. Co. 7 Id. 436. And see Walker *v.* Bolling, 22 Ala. 294.

the servant of D. brought a quantity of lime to the house, and placed it in the road, by which the plaintiff's carriage was overturned; it was held that A. was answerable for the damage, on the ground that all the sub-contracting parties were in the employment of A. But to render this principle applicable, the nature of the business must be such as to require the agency of subordinate persons, and then there is an implied authority to employ such persons. (a) [1]

(a) In Laugher v. Pointer, 5 Barnew. & Cress. 547, the K. B. were equally divided in opinion on the nice and difficult question, whether the owner of a carriage was liable for an injury to the horse of a third person, by the negligent driving of the carriage, when the owner had hired the pair of horses of a stable-keeper to draw it for a day, and the owner of the horses had provided the driver. In Quarman v. Burnett, 6 M. & W. 499, in the Exchequer, 1840, the same question arose, and it was decided that the owner of the carriage was not liable. Mr. Baron Parke observed, in this case, that he concurred with the view of the subject taken by Lord Tenterden and Mr. Justice Littledale, in the case of Laugher v. Pointer, and which case, as Judge Story observed, in his Treatise on Agency, sec. 453, b. note, had exhausted the whole learning on the subject.[2]

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[1] On the subject of injuries arising from negligence, it is said, in Beers v. Housatonic R. R. Co. 19 Conn. R. 566, that the plaintiff is not prevented from recovering, unless he might, by the use of ordinary care, have avoided the consequences of the defendant's negligence. If by ordinary care he might have avoided injury, he is the author of his own injury. See, also, Davies v. Mann, 10 Mees. & Wels. R. 546.

[2] The difficulty in deciding this class of cases consists in determining who is to be regarded as the *master* of the wrongdoer; whether he is the master who directs the work to be done, or he who, having engaged to do the work, sends his own servant to fulfil the engagement. In the language of Parke, B., (Quarman v. Burnett,) "that person is undoubtedly liable, who stands in the relation of master to the wrongdoer." The later cases have adhered to the opinion of Mr. Justice Littledale, in Laugher v. Pointer, and hold that he is the responsible party who directs his servant to fulfil his engagement, and not he who only engages *a person exercising a distinct calling*, by the misconduct of whose servant the injury is caused. Milligan v. Wedge, 12 Ad. & El. 737. Rapson v. Cubitt, 9 M. & W. 710. Allen v. Hayward, 7 Ad. & El. N. S. 960. Rich v. Basterfield, 4 Man. G. & Scott, 801. Reedie v. N. W. Railway Co. (Excheq'r) 13 Jurist Rep. 659, 1849. S. C. Law Reporter, April, 1850, p. 626. Weyant v. N. Y. & Harlem R. Co. 3 Duer, 360.

An exception to the general rule was suggested in some of the earlier English cases, in respect to injuries caused by the negligent management of real property; and it was declared that the owner must take care that his property was so used that others are not injured, whether his property was managed by his own servants, or by contractors, or their servants. (Per Littledale, Justice, in Laugher v. Pointer, citing Bush v. Steinman, *supra*. Sly v. Edgley, 6 Esp. R. 6. Leslie v. Pounds, 4 Taunt. R. 649.)

But this distinction, after having been questioned in Milligan v. Wedge, and Allen v. Hayward, has been expressly overruled in the case of Reedie v. N. W. Railway Co. It was there held, that the case of Bush v. Steinman was only sustainable, if at all, on the ground of *nuisance*.

On the point whether the owner of real property is responsible for injuries occasioned

It is said that the master may give moderate corporal correction to his servant, while employed in his service, for negligence or misbehavior. (*a*) But this power does not grow out * of the contract of hiring; and Doctor Taylor (*b*) justly *261 questions its lawfulness, for it is not agreeable to the genius and spirit of the contract. And without alluding to seamen in the merchants' service, it may safely be confined to apprentices and menial servants while under age, for then the master is to be considered as standing *in loco parentis*. It is likewise understood that a servant may justify a battery in the necessary defence of his master. The books do not admit of a doubt on this point; but it is questioned whether the master can in like manner justify a battery in defence of his servant. In the case of *Leward* v. *Basely*, (*c*) it was adjudged that he could not, because he had his remedy for his part of the injury

(*a*) 1 Blacks. Com. 428. 1 Hawk. P. C. b. 1, ch. 29, sec. 5; b. 1, ch. 60, sec. 23.

(*b*) Elements of Civil Law, p. 413. The right is denied in Pennsylvania. Commonwealth *v* Baird, 1 Ashmead's Rep. 267.

(*c*) 1 Lord Raym. 62. 1 Salk. Rep. 407.

by others not standing in the relation of servants to him, see Rich *v.* Basterfield, *supra.* King *v.* Pedly, 1 Ad. & El. 822. S. C. 3 Nev. & M. 627. King *v.* Moore, 3 Ad. & El. 184. Barnes *v.* Ward, Law Journal Rep. C. P. 195, July, 1850. Fish *v.* Dodge, 4 Denio, 311. Mayor of N. Y. *v.* Bailey, 2 Denio, 433, per Walworth, Ch. Overton *v.* Freeman, 8 E. L. & Eq. 479. Gilbert *v.* Beach, 4 Duer, (N. Y.) 495. Congreve *v.* Morgan, 5 Duer, (N. Y.) 495. Carman *v.* R. R. Co. 4 Ohio, (N. S.) 399.

The doctrine of Bush *v.* Steinman, is not now recognized in England. Overton *v.* Freeman, 8 E. L. & Eq. 479. Reedie *v.* N. W. R. Co. 4 Exch. 256. Peachey *v.* Rowland, 16 E. L. & Eq. 442. It has been rejected in New York, Blake *v.* Ferris, 1 Seld. 48; and see Stevens *v.* Armstrong, 2 Id. 435: in Massachusetts, Hilliard *v.* Richardson, 3 Gray, 349, where the court reviews the cases and examines the authority of Bush *v.* Steinman itself; and in Michigan, DeForrest *v.* Wright, 2 Mich. 368. It is sustained in Wiswall *v.* Brinson, 10 Ired. 554; and in Stone *v.* Cheshire R. Corp. 19 N. H. 427.

For further illustration of the question who is the responsible master, see Sproul *v.* Hemmingway, 14 Pick. R. 1. Stone *v.* Codman, 15 Id. 297. Ross *v.* The Mayor of Madison, 1 Smith's (Ind.) Rep. 98. McCleary *v.* Kent, 3 Duer, 27. Sadler *v.* Henlock, 30 E. L. & Eq. 167. Steel *v.* Southeastern R. Co. 32 Id. 366. Scott *v.* Mayor, &c. 38 Id. 477. McGatrick *v.* Wason, 4 Ohio, (N. S.) 560. Gourdier *v.* Cormack, 2 E. D. Smith, (N. Y.) 254. Cincinnati *v.* Stone, 5 Ohio, (N. S.) 38. Crocker *v.* Calvert, 8 Ind. 127. Patten *v.* Rea, 40 E. L. & Eq. 329.

An owner of land made an excavation therein, within two feet of a public street, and used no precaution against the danger of falling into it. A person in the night-time fell into the excavation, and was injured, and it was held that the owner was not liable. Howland *v.* Vincent, 10 Met. R. 371.

This case can hardly be reconciled with the case of Barnes *v.* Ward, cited *supra.*

by the action *per quod servitium amisit.* It is, however, hesitatingly admitted in Hawkins, and explicitly by other authorities, that he may; and the weight of argument is on that side. (*a*) In England there seems to be a distinction between menial and some other servants, but I know of no legal distinction between menial, or domestic and other hired servants; and the better opinion is, that the master is not bound to provide even a menial servant with medical attendance and medicines during sickness." (*b*)

III. *Of apprentices.*

Another class of servants are apprentices, who are bound to service for a term of years, to learn some art or trade. The temptations to imposition and abuse to which this contract is liable, have rendered legislative regulations particularly necessary.[1]

*262 *It is declared, by the statute law of New York, (*c*) (and which may be taken for a sample, in all essential respects, of the general law in the several states on the subject,) (*d*) that infants, if males, under twenty-one, and if un-

(*a*) 2 Roll. Abr. 546, D. 1 Blacks. Com. 429. Hawk. P. C. b. 1, ch. 60, sec. 23, 24. Reeve's Domestic Relations, p. 378. In Louisiana, it is expressly declared by law, that a master may justify an assault in defence of his servant, as well as a servant in defence of his master. The right is made to rest, in the one case, upon interest, and in the other upon duty. Civil Code of Louisiana, art. 169.

(*b*) Sellen *v.* Norman, 4 Carr. & Payne's N. P. Rep. 80.

(*c*) N. Y. Revised Statutes, vol. ii. p. 154, sec. 1, 2, 4.

(*d*) Statute of Illinois, of 1st of June, 1827; of Indiana, of Feb 15, 1818, though it would seem, by the words of the last Act, that the infant might bind himself an apprentice of his own free will, without any other consent. Elmer's New Jersey Digest, 12, 410. R. S. N. J. 1847, p. 370. Purdon's Penn. Dig. 58. Virginia Revised Code, edit. 1814, vol. i. p. 240. Statutes of Ohio, Chase's edit. vol. iii. 1876. Massachusetts Revised Statutes, 1836. Revised Code of Mississippi, edit. 1822, p. 393. Revised Statutes of Missouri, 1835, p. 66. Revised Statutes of Vermont. 1839, p. 344. Dorsey's Statutory Testamentary Law of Maryland, 1838, p. 30. Some of the statutes are much more provisional than others, and they generally require the apprentice to be taught to read, write, and cipher. In some of the states there seems to

[1] By a recent Act in Maine, ten hours' labor, in the absence of any special agreement, is made a legal day's work; but the Act does not extend to monthly labor, or to agricultural employments. Acts of Maine, 1849, ch. 83. There is a similar provision in N. Hampshire. Laws of N. H. 1847, ch. 488.

married females, under eighteen years of age, may be bound by indenture of their own free will, and by their own act, with the consent of their father, or mother, or guardian, or testamentary executors; or by the overseers of the poor, or two justices, or a judge, as the case may be, to a term of service, as clerk, apprentice, or servant, in any profession, trade, or employment, until the age of twenty-one years if a male, or until eighteen years of age if a female, or for a shorter time. In all indentures, by the officers of the city or town, binding poor children as apprentices or servants, a covenant must be inserted to teach the apprentice to read and write, and if a male, the general rules of arithmetic; and the overseers of the poor are constituted the guardians of every such indented servant. (*a*) The age of the infant must be inserted in the indenture, and the consent of the father or guardian must be signified by a certificate at the end of, or indorsed upon, the indenture. (*b*) For refusal to serve and work, infants are liable to be imprisoned in jail until they shall be willing to serve as such apprentices or servants; and also to serve double the time they had wrongfully withdrawn themselves from service; provided the same does not extend beyond three years next after the end of the original term of service. They are also liable to be imprisoned in some house of correction, not exceeding a month, for ill-behavior or any misdemeanor. (*c*) Infants coming from beyond sea may bind themselves to service until the age of twenty-one, and even beyond it, provided it be to raise money for the payment of their passage,

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be no provision, except for binding out poor children and orphans. In Virginia, orphan boys, bound apprentices, are to be taught common arithmetic; but by the Act of 1804, ch. 60, black or mulatto orphans were not to be taught reading, writing, or arithmetic.

(*a*) This clause, relative to instruction, was first directed in New York, by the statute of 1788, to be inserted in the indenture, and it was not required by the English statutes. In Connecticut, the officers or proprietors of factories, and all manufacturing establishments, are required to have all the children employed therein, whether bound by indenture or otherwise, taught to read, and write, and cipher, and made to attend public worship, and to take due care of their morals; and they are made subject to the visitation of the civil authorities in these respects, and are liable to fine, and to have the apprentices discharged, if found in default. Statutes of Connecticut, 1838, p. 415.

(*b*) New York Revised Statutes, vol. ii. pp. 154, 155, sec. 3, 8, 10; p. 158, sec. 27.

(*c*) Ibid. pp. 158, 159, sec. 28, 29, 30, 31.

and the term of such service does not exceed one year. (*a*)

*263 Grievances of the apprentice or servant, arising from ill-usage on the part of *the master, or grievances of the master arising from a bad apprentice, are to be redressed in the general sessions of the peace, or by any two justices of the peace, who have power to annul the contract, and discharge the apprentice, or imprison him, if he should be in the wrong. (*b*) It is further specially and justly provided, that no person shall take from any journeyman or apprentice any contract or agreement, that after his term of service expired he shall not set up his trade, profession, or employment in any particular place; nor shall any money or other thing be exacted from any journeyman or apprentice, in restraint of the place of exercising his trade. (*c*)

The statute of New York (of which I have given the material provisions) contains the substance of the English statute law on the subject, and the English decisions are mostly applicable. The infant himself must be a party to the indenture, except in the special case of an apprentice who is chargeable as a pauper. The father has no authority under the statute (and the latter cases say he has no authority even at common law) to bind his infant son an apprentice, without his assent; and the infant cannot be bound by an act merely *in pais*; and if he be not a party to the deed, he is not bound. (*d*) It is a settled principle of the English and American law, that the relation of master and apprentice cannot be created, and the corresponding rights and duties of the parent transferred to a master, except by deed. (*e*) [1] The English statute law as to binding out

(*a*) N. Y. Revised Statutes, vol. ii. p. 156, sec. 12.

(*b*) Ibid. p. 159, sec. 32.

(*c*) Ibid. p. 160, sec. 39, 40.

(*d*) The King *v.* Inhabitants of Cromford, 8 East's Rep. 25. The King *v.* Inhabitants of Arnesby, 3 Barnew. & Ald. 584. In the matter of M'Dowles, 8 Johns. Rep. 328. Stringfield *v.* Heiskell, 2 Yeager's Tenn. Rep. 546. Pierce *v.* Messenburgh, 4 Leigh's Rep. 493. Harney *v.* Owen, 4 Blackf. Ind. Rep. 337. Balch *v.* Smith, 12 N. H. Rep. 438. In Maryland, the father appears to have the discretion to bind out his child as an apprentice, on reasonable terms, without any consent on the part of the child. Dorsey's Statutory Testamentary Law of Maryland, 1838 p. 30.

(*e*) Castor *v.* Aicles, 1 Salk. Rep. 68. King *v.* Inhabitants of Bow, 4 Maule &

[1] See Peters *v.* Lord, 18 Conn. R. 337. As to the effect of the father's contract in the indentures, see Van Dorn *v.* Young, 13 Barb. R. 286.

minors as apprentices, to learn some useful art, trade, *or *264 calling, has probably been very generally adopted in this country, with some local variations,[1] and with the settled limitation that both parent or guardian and infant (except the case of paupers) must signify their assent by being parties to the deed. (*a*) The general rule is, that male infants may be bound till their arrival at the age of twenty-one, but females only till their arrival at the age of eighteen. (*b*)[2] In Pennsylvania,

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Selw. 383. Squire *v.* Whipple, 1 Vermont Rep. 69. Commonwealth *v.* Wilbanks, 10 Serg. & Rawle, 416. The statute of 5 Eliz. required the binding to be by indenture.

(*a*) Statutes of Connecticut, 1838, p. 413. In North Carolina, under the Acts of 1762, 1796, and 1800, and revised and amended in Revised Statutes of N. C. 1837. vol. i. the county court may bind out poor orphan children and illegitimate children until 21 years of age in males, and 18 in females, as apprentices, and the master is to teach them to read and write, and, at the expiration of the apprenticeship, to make them an allowance. The binding must be by indenture; and the statute had in view the English regulations in the statutes of 5 & 43 Eliz. Though all the regulations be not precisely followed, the deed is only voidable by the parties. This is the general rule. Petersdorff's Abr. tit. Apprentice, ch. 3, B.; 13 Johns. Rep. 245; nor does a mere abandonment of service by the apprentice avoid it. Down *v.* Davis, 4 Dev. Rep. 64. This is also the English rule. 6 Mod. Rep. 69. 6 Term Rep. 652. 16 East's Rep. 13, 27. 3 Maule & Selw. 189.

(*b*) 4 Greenleaf's Rep. 36, 40. Revised Laws of Illinois, edit. 1833, p. 68. This is the rule in Ohio, and the indenture of service is to be executed by the father, or, in case of his death or incapacity, by the mother, or by guardians appointed for infants under 12 or 14, or by the trustees of the town, as the case may be; and it does not seem to require that the infant should join the execution of the indenture. Statutes of Ohio, 1824. In Connecticut, the statute requires that the minor's assent should be expressed in the indenture, by subscribing the same, when bound by the parent or guardian, as an apprentice, to learn some trade or profession. Males may be bound till 21, and females till 18. Revised Statutes of Connecticut, 1821. If the guardian, in Ohio, binds out the infant until 18 or 21, the Court of Common Pleas must approve of the terms. Chase's Statutes of Ohio, vol. ii. p. 1318. Under the English statute of 5 Eliz., an indenture of apprenticeship, for a less period than seven years, is voidable at the election of the parties, and not otherwise. Rex *v.* Inhabitants of St. Nicholas, Burr. Sett. Cas. 91. Gray *v.* Cookson, 16 East's Rep. 13.

The indentures will not be rendered invalid by a failure to specify the trade, employment, or profession in which the infant is to be instructed. Fowler *v.* Hollenbeck, 9 Barb. 309. Though the indentures be void for informality, yet if the parties have lived together as master and servant, neither party can have a claim against the other beyond the condition of the indentures. Maltby *v.* Harwood, 12 Barb. R. 473.

[1] As to what will be a defence to an action for breach of a covenant to teach an apprentice a trade, see Bell *v.* Herrington, 3 Jones, Law, (N. C.) 320.

[2] An apprentice is not concluded by a statement of his age in the indentures. Drew *v.* Peckwell, 1 E. D. Smith, (N. Y.) 408.

though infants may be bound to apprenticeship under the usual checks, (*a*) yet it has been held (*b*) that an infant could not be bound by his father or guardian, as a servant to another; while in Massachusetts their statute law concerning apprentices does not make void all contracts binding the minor to service that are not made in conformity to the statute. It has been held (*c*) that the father may, at common law, bind his infant son to service, and the contract will be good, independent of the statute. The doctrine is contrary to the English law, and to the construction of the statute of New York, and to the rule in Pennsylvania; and it has been questioned, in the case of *The United States* v. *Bainbridge*. (*d*) It was decided in that last case that the father could not bind his infant son, without his consent, to military service, and that where his enlistment has been held valid, it was by force of the statute authority of the United States. In Louisiana, a minor may be bound to serve as an apprentice to learn some art or trade, with the consent of the parent, or tutor, or parish judge; and the time expires at the age of eighteen in males, and fifteen in females. The contract is made before a notary, and read to, and signed by the parties. (*e*) The master may correct his apprentice with moderation, for negligence or misbehavior. (*f*) Whether an indented apprentice can *265 be assigned by one master to another, is a * question which does not seem to have been definitely settled. (*g*) [1]

(*a*) Commonwealth *v.* Vanlear, 1 Serg. & Rawle, 248. Commonwealth *v.* Moore, 1 Ashmead's Rep. 123. Guthrie *v.* Murphy, 4 Watts, 80. Purdon's Dig. 58, 60.

(*b*) Respublica *v.* Keppele, 2 Dall. Rep. 197. But see *contra*, 1 S. & R. 252. 1 Browne, 275.

(*c*) Day *v.* Everett, 7 Mass. Rep. 145.

(*d*) 1 Mason's Rep. 71.

(*e*) Civil Code of Louisiana, art. 158-167.

(*f*) Ibid. Commonwealth *v.* Baird, 1 Ashmead's Penn. Rep. 267, S. P.

(*g*) The better doctrine is, that an apprentice cannot, without his consent, be transferred or assigned by his master. Haley *v.* Taylor, 3 Dana's Ken. Rep. 222. But in Pennsylvania, by statute, executors and administrators, and even the master, may, under certain circumstances, assign over the apprentice. Purdon's Dig. 60. The New York statute allows the contract made by an infant coming from a foreign country, and binding himself to service, to be assigned to the master, under certain checks;

[1] The trust reposed in the master is a personal trust, which cannot be assigned. Tucker *v.* Magee, 18 Ala. 99. Futrell *v.* Vann, 8 Ired. 402.

It was concluded in the case of *Nickerson* v. *Howard*, (*a*) that such an assignment might be good, by way of covenant between the masters, though not as an assignment to pass an interest in the apprentice. As was observed by Lord Mansfield, (*b*) though an apprentice be not strictly assignable nor transmissible, yet if he continue with his new master, with the consent of all parties, and his own, it is a continuation of the apprenticeship. The master is entitled to the wages and fruit of the personal labor of the apprentice, while the relationship continues and the apprentice is in his service; and there are cases which give the master a right to the wages or earnings of the apprentice while in another's service, and with or without his master's license, and even though the trade or service be different from that to which the apprentice is bound. (*c*) But Lord Hardwicke declared, in the

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and, generally, the contracts for service as clerk, apprentice, or otherwise, may be assigned upon the death of the master, by his executors or administrators, with the assent of the apprentice, and without it, under the orders of the general sessions of the peace. N. Y. Revised Statutes, vol. ii. p. 156, sec. 14, p. 160, sec. 41, 42. The Massachusetts Revised Statutes of 1836, (and which appear to me to be an excellent sample of clear, brief, temperate, and judicious codification,) declare that minors may be bound as apprentices or servants, females until eighteen, or marriage, and males until twenty-one, by the father; or, if he be dead or incompetent, by the mother or lawful guardian, and, if illegitimate, by the mother. If they have no competent parent or guardian, they may bind themselves, with the approbation of the selectmen of the town. Minors above fourteen are to testify their assent by signing the indenture.[1] The overseers of the poor may bind the children of paupers. The court may discharge the apprentice from his service, or the master from his contract, for good cause. The death of the master discharges the apprenticeship, and the right of the father to assign or contract for the services of his children during their minority is saved.

(*a*) 19 Johns. Rep. 113. See, also, Caister *v.* Eccles, 1 Lord Raym. 683. In the case of the Commonwealth *v.* Vanloar, 1 Serg. & Rawle, 248, the assent of both father and apprentice was held to be requisite under the statute law of Pennsylvania, to a valid assignment of the articles of apprenticeship.

(*b*) The King *v.* The Inhabitants of Stockland, Doug. Rep. 70.

(*c*) Hill *v.* Allen, 1 Vesey, 83. Barber *v.* Dennis, 6 Mod. Rep. 69. Lightly *v.* Clouston, 1 Taunt. Rep. 112. Harg. Co. Litt. 117, note *a*. If an apprentice runs away, and enters into another service, his gains belong to the master from whom he

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[1] The mere signature is not enough. The minor's consent must also be distinctly expressed in the indentures. Harper *v.* Gilbert, 5 Cush. 417. And it was held, in Maine, that when a minor above the age of fourteen years is bound to service, the indentures should be made by the father or mother, the minor consenting, and not by the minor, with the consent of father or mother. Whitmore *v.* Whitcomb, 43 Maine, 458.

case before him, that if the master had not done his duty with the apprentice, and had been the unjustifiable cause of his pursuing a different course of life, he would grant relief in *266 *equity against the master's legal claim to his earnings.[1]

Upon the death of the master, the apprenticeship is essentially dissolved, for the end and design of it, as a personal trust, cease; but the assets in the hands of the representatives of the master are chargeable with the necessary maintenance of the infant apprentice. (*a*)[2]

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deserted, though prize-money earned in a ship of war forms, in England, an exception. Carsan *v.* Watts, 3 Doug. Rep. 350. The master of an apprentice is bound to pay for medical attendance on the apprentice, from the nature of the relation between them. It is not so in the case of hired servants; and even the father is only bound when the services have been rendered at his instance. Easley *v.* Craddock, 4 Randolph's Rep. 423. By the English cases, the better opinion would seem to be, that the master is not liable for medical assistance to his hired servants. Newby *v.* Wiltshire, 4 Doug. Rep. 284. Wennall *v.* Adney, 3 Bos. & Pull. 247. *Contra*, Lord Kenyon, in Scarman *v.* Castell, 1 Esp. N. P. Cas. 270.

(*a*) The King *v.* Peck, 1 Salk. Rep 66. Baxter *v.* Burfield, Str. Rep. 1266. It has been held, in Versailles *v.* Hall, 5 L'a Rep. 281, that the contract of apprenticeship was personal, and not susceptible of alienation without the consent of all parties concerned, and, consequently, that it ceased on the insolvency, as well as death of the master, inasmuch as his character and disposition entered into the consideration of the contract.

This relation of master and apprentice was, in its original spirit and policy, an inti-

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[1] If the master neglects to take charge of the apprentice for the whole term, the authority of the parent or guardian will supervene. Commonwealth *v.* Conrow, 2 Barr, R. 402.

A master, taking an apprentice in any particular art or trade, has no right to employ his apprentice in menial services unconnected with the trade. Commonwealth *v.* Hemperly, (Penn.) Law Reporter, vol. xii. July, 1849, p. 129.

[2] In the legislation of England and of the states of the American Union, humane efforts have been made to protect children from laborious toil unsuitable to their years.

In Connecticut, no child under ten years of age shall be employed in any manufacturing or mechanical establishment; and no minor under the age of eighteen shall be employed in any such establishment more than twelve hours in any one day, or more than sixty-nine hours in any one week. (Laws, Conn. 1856, ch. 39.)

There is a similar law in Pennsylvania. Act of Penn. 1849, No. 415. There is also a similar provision in Maine, ch. 83, 1849. And also in N. Hamp., ch. 488, 1847. By an English statute, (10 & 11 Vict. ch. 29,) the hours of labor of young persons and females were restricted, after the first of May, 1848, to *ten hours* in any *one day*, and to *fifty hours* in any *one week*. This law, though opposed in England on grounds of political economy, will be regarded by the humane as reflecting honor upon Lord Ashley, to whose energetic exertions it is to be mainly attributed.

By the laws of New Jersey of 1851, p. 321, no minor under ten years of age is permitted to work in any factory; and no minor whatever can be required to work more than ten hours a day.

mate and interesting connection, calculated to give the apprentice a thorough trade education, and to advance the mechanic arts in skill, neatness, and fidelity of workmanship, as well as in the facility and utility of their application. The relationship, if duly cultivated under a just sense of the responsibility attached to it, and with the moral teachings which belong to it, will produce parental care, vigilance, and kindness on the part of the master, and a steady, diligent, faithful, and reverential disposition and conduct on the part of the apprentice.

In taking leave of the extensive subject of the *domestic relations*, I cannot refrain from acknowledging the assistance I have received from the work of the late Chief Justice Reeve, on that title. That excellent lawyer and venerable man has discussed every branch of the subject in a copious manner; and though there is some want of precision and accuracy in his reference to authority, and sometimes in his deductions, yet he everywhere displays the vigor, freedom, and acuteness of a sound and liberal mind.

LECTURE XXXIII.

OF CORPORATIONS.

A CORPORATION is a franchise possessed by one or more individuals, who subsist as a body politic, under a special denomination, and are vested, by the policy of the law, with the capacity of perpetual succession, and of acting in several respects, however numerous the association may be, as a single individual.

The object of the institution is to enable the members to act by one united will, and to continue their joint powers and property in the same body, undisturbed by the change of members, and without the necessity of perpetual conveyances, as the rights of members pass from one individual to another. All the individuals composing a corporation, and their successors, are considered in law as but one person, capable, under an artificial form, of taking and conveying property, contracting debts and duties, and of enjoying a variety of civil and political rights. One of the peculiar properties of a corporation is the power of perpetual succession; for, in judgment of law, it is capable of indefinite duration. The rights and privileges of the corporation do not determine, or vary, upon the death or change of any of the individual members. They continue as long as the corporation endures.

It is sometimes said that a corporation is an immortal as well as an invisible and intangible being. But the immortality of a corporation means only its capacity to take in perpetual succession so long as the corporation exists. It is so far from being immortal, that it is well known that most of the private corporations recently created by statute are limited in duration to a few years. There are many corporate bodies that are without limitation, and, consequently, capable of continuing so long

as a succession of individual members of the corporation remains and can be kept up.

It was chiefly for the purpose of clothing bodies of men in succession with the qualities and capacities of one single, artificial, and fictitious being, that corporations were originally invented, and, for the same convenient purpose, they have been brought largely into use. By means of the corporation, many individuals are capable of acting in perpetual succession like one single individual, without incurring any personal hazard or responsibility, or exposing any other property than what belongs to the corporation in its legal capacity.

1. *Of the history of corporations.*

Corporations, private as well as public or municipal, were well known to the Roman law, and they existed from the earliest periods of the Roman republic. (*a*) It would appear, from a passage in the Pandects, (*b*) that the provisions on this subject were copied from the laws of Solon, who permitted private companies to institute themselves at pleasure, provided they did nothing contrary to the public law. But the Romans were not so indulgent as the Greeks. They were very jealous of

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(*a*) They were known to the Twelve Tables, for that early code allowed private companies to make their own by-laws, provided they were not inconsistent with the public law. *Vide supra*, vol. i. p. 524, Table 8th.

(*b*) Dig. 47, 22, 4. See, also, 3 St. John on the Manners of Ancient Greece, 76, 77. The free states of Greece, subsequently to the period of the heroic age, were merely cities with their districts, and with internal constitutions of their own, and possessing the exclusive management of their own concerns. The confederation of cities was for mutual defence. Heeren on the Political History of Ancient Greece, edit. Oxford, 1834. The people of Attica, under the division of tribes, were in a degree distinct and independent corporations. They had each their respective heads or presidents, and enjoyed the right of deliberating and deciding in common upon matters connected with their own interests, and of framing any rules and regulations for themselves, provided they were not at variance with the laws of the whole state. See Schöman's Dissertation on the Assemblies of the Athenians, p. 346, where he refers to Gaius De Collegiis, lib. 4, D. The *Demi* were subdivisions of the tribes, and they had each their respective magistrates, their own independent property, their common treasury, and general meetings or assemblies for deliberation and decision on their own affairs. It was necessary for every citizen of Attica, whether genuine or adopted, to belong to some one Demus, and to have his name enrolled in its register. Id. 353, 356. These civil and political institutions bear some analogy to the counties, cities, and towns in our American states.

such combinations of individuals, and they restrained those that were not specially authorized; and every corporation was illicit that was not ordained by a decree of the senate or of the emperor. (a) *Collegia licita*, in the Roman law, were like our incorporated companies, societies of men united for some useful business or purpose, with power to act like a single individual; and if they abused their right, or assembled for any other *269 purpose than that expressed in their charter, *they were deemed *illicita*, and many laws, from the time of the twelve tables down to the times of the emperors, were passed against all illicit or unauthorized companies. (b) In the age of Augustus, as we are informed by Suetonius, (c) certain corporations had become nurseries of faction and disorder; and that emperor interposed, as Julius Cæsar had done before him, (d) and dissolved all but the ancient and legal corporations—*cuncta collegia, præter antiquitus constituta distraxit.* We find, also, in the younger Pliny, (e) a singular instance of extreme jealousy indulged by the Roman government of these corporations. A destructive fire in Nicomedia induced Pliny to recommend to the Emperor Trajan, the institution, for that city, of a fire company of 150 men, (*collegium fabrorum*,) with an assurance that none but those of that business should be admitted into it, and that the privileges granted them should not be extended to any other purpose. But the emperor refused to grant, and observed that societies of that sort had greatly disturbed the peace of the cities; and he observed, that whatever name he gave them, and for whatever purpose they might be instituted, they would not fail to be mischievous.

The powers, capacities, and incapacities of corporations, under the English law, very much resemble those under the civil law; and it is evident that the principles of law applicable to corporations under the former, were borrowed chiefly from the Roman law, and from the policy of the municipal corporations

(a) Dig. 47, 22, 3, 1.
(b) Taylor's Elements of the Civil Law, pp. 567-570.
(c) Ad. Aug. 32.
(d) Suet. J. Cæsar, 42.
(e) Epist. b. 10. Letters, 42, 43.

established in Britain and the other Roman colonies, after the countries had been conquered by the Roman arms. Under the latter system, corporations were divided into ecclesiastical and lay, civil and eleemosynary. They could not purchase or receive donations of land without a license, nor could they alienate without just cause. These restraints *bear a *270 striking resemblance to the mortmain and disabling statutes in the English law. They could only act by attorney; and the act of the majority bound the whole; and they were dissolved by death, surrender, or forfeiture, as with us. (*a*) Corporations or colleges for the advancement of learning were entirely unknown to the ancients, and they are the fruits of modern invention. But in the time of the latter emperors the professors in the different sciences began to be allowed regular salaries from the government, and to become objects of public regulation and discipline. By the close of the third century these literary establishments, and particularly the schools at Rome, Constantinople, Alexandria, and Berytus, assumed the appearance of public institutions. Privileges and honors were bestowed upon the professors and students, and they were subjected to visitation and inspection by the civil and ecclesiastical powers. (*b*) It was not, however, until after the revival of letters, or at least, not until the 13th century, that colleges and universities began to confer degrees, and to attain some portion of the authority, influence, and solidity which they enjoy at the present day. (*c*) The erection of civil or municipal corporations, for political and commercial purposes, took place in the early periods of the history of modern Europe. Nor were they unknown to the ancient Romans, for their dominion was composed of numerous cities or municipal corporations. (*d*)

(*a*) 1 Brown's Civil and Adm. Law, 142, 143. Wood's Inst. of the Civil Law, p. 134.

(*b*) 1 Bro. Civil Law, 151, 162, 163, 164.

(*c*) Ibid 151, 152, note.

(*d*) The history of the conquest of the world by Rome, says M. Guizot, in his History of the Civilization of Europe, edit. Oxford, p. 42, is the history of the conquest and foundation of a vast number of cities. In the Roman world there was, as to Europe, an almost exclusive preponderance of cities, and an absence of country populations and dwellings. It was a great coalition of municipalities, once free and independent, (for cities were states,) and whose powers, upon their conquest, were transferred to the central government and municipal sovereignty of Rome.

Cities, towns, and fraternities were invested with corporate powers and privileges, and with a large civil and criminal jurisdiction. These immunities were sought after from a spirit of liberty as well as of monopoly, and created as barriers against feudal tyranny. They afforded protection to commerce and the mechanic arts, and formed some counterpoise to the exorbitant powers and unchecked rapacity of the feudal barons. (a)

*271 By this means, order and security, industry, *trade, and the arts, revived in Italy, France, Spain, Germany, Flanders, and England; and to the institution of civil or political corporations, with large charter privileges, may be attributed, in some considerable degree, the introduction of regular government and stable protection, after Europe had, for many ages, been deprived, by the inundation of the barbarians, of all the civilization and science which had accompanied the Roman power. (b)

But although corporations were found to be very beneficial in the earlier periods of modern European history, in keeping alive the spirit of liberty, and in sustaining and encouraging

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(a) Hallam on the Middle Ages, vol. i. pp. 165–171, 303, 304 The corporation of the city of London had its privileges and the rights of its freemen secured by a provision in the Magna Charta. It is stated in Glanville, b. 5, ch. 5, that if a villein remained for a year and a day in any privileged town, which had franchises by prescription or charter, he became thenceforward a free member of the corporation. See, also, Bracton, lib. 1, ch. 10, sec. 3, fol. 6, b. One of the laws of William the Conqueror was to the same effect; and this custom prevailed equally in France and Scotland, and boroughs everywhere became the cradles of freedom. Lord Coke (Co. Litt. 137 b) says, that manumission, among other significations, meant the incorporating of a man to be free of a company or body politic, as a freeman of a city, or burgess of a borough. Messrs. Merewether and Stephens, in their History of Boroughs and Municipal Corporations in the United Kingdom, vol. i., Introduction, London, 1835, contend that there were no municipal incorporations until the reign of Henry IV., though boroughs existed in England from the earliest period; and the burgesses were the permanent, free, and privileged inhabitants and householders sworn and enrolled at the court leet. The terms *corporation* and *body corporate* first appear in the reign of Henry IV., in any public document. The first charter of incorporation to a municipal body was granted under Henry VI. Afterwards, under Edward IV., the doctrine was first advanced in the common pleas, that the existence of corporations might be inferred from the nature of the grant, without words of incorporation. Ibid. Int. 34.

(b) Smith's Inquiry into the Wealth of Nations, vol. i. pp. 395–401. Robertson's Charles V. vol. i. pp. 31, 34. Hallam on the Middle Ages, vol. i. pp. 78–80. Prescott's History of Ferdinand and Isabella, vol. i. Int. pp. 14–18, 53–56. The Castilian cities in Spain anticipated the cities of Italy, France, England, and Germany, in the acquisition of valuable privileges and jurisdictions.

the efforts for social and intellectual improvement, their exclusive privileges have too frequently served as monopolies, checking the free circulation of labor, and enhancing the price of the fruits of industry. Dr. Smith (*a*) does not scruple to consider them, throughout Europe, as generally injurious to the freedom of trade and the progress of improvement. (*b*) The propensity, in modern times, has, however, been to multiply civil corporations, especially in the United States, where they have increased in a rapid manner and to a most astonishing extent. The demand for charters of incorporation is not merely for municipal purposes, but usually for the more private and special object of assisting individuals in their joint-stock operations and enterprising efforts, directed to the business of commerce, manufactures, and the various details of internal improvement. This branch of jurisprudence becomes, therefore, an object of curious as well as of deeply interesting research. The multiplication of corporations, and the avidity with which they are sought, have arisen in consequence of the power which a large and consolidated capital gives them over business of every kind; and the facility which the incorporation gives to the management of that capital, and the security which it affords to the persons of the members, and to their property not vested in the corporate * stock. The convention of the *272 people of New York, when they amended their constitution in 1821, endeavored to check the improvident increase of corporations, by requiring the assent of two thirds of the mem-

(*a*) Inquiry, vol. i. pp. 62, 121, 130, 132, 139, 462.

(*b*) The monopoly or restrictive system which protected the industry of privileged individuals, by confining the exercise of business as traders, manufacturers, and mechanics, to persons licensed, or who had undergone apprenticeships and examinations, destroyed free competition and perfection in the mechanic arts. The policy still prevails in many parts of continental Europe, and in considerable vigor in Sweden. Laing's Travels in Sweden in 1838. In England, the statute concerning Monopolies, of 21 James I. ch. 3, which was a magna charta for British industry, was a declaratory act, and declared that all monopolies, and all licenses, charters, grants, letters-patent, &c., "to any persons or bodies politic, for the *sole* buying, selling, making, working, or using anything within the realm," were unlawful and void, with the exception of patents for twenty-one years for inventions, &c., and of vested corporate rights relative to trade. This statute, says Mr. Hume, contained a noble principle, and secured to every subject unlimited freedom of action, provided he did no injury to others, nor violated statute law.

bers elected to each branch of the legislature, to every bill for creating, continuing, altering, or renewing any body politic or corporate. (*a*) Even this provision seems to have failed in its

(*a*) This provision, it has been said, only applied to private, and did not apply to public or municipal corporations. Nelson, Ch. J., in the case of The People *v.* Morris, 13 Wendell, 325. Walworth, Ch., in Warner *v.* Beers, 23 Wend. Rep. 126. Purdy *v.* The People, 4 Hill's Rep. 391. But it was decided by the Supreme Court of New York, in De Bow *v.* The People, 1 Denio, 1, and by the Court of Errors in the case of Purdy *v.* The People, that the constitutional check extended to all corporations, whether public or private; and that to ascertain whether a bill requiring a vote of two thirds of each house was properly passed, the courts may look beyond the printed statute-book, to the original certificates indorsed on the bill, and even to the journals kept by the two houses. The constitution of Michigan requires the assent of two thirds of the members of each house of the legislature to every act of incorporation.[1] The constitution of New Jersey also requires three fifths of the members elected to each house to pass any charter for banks or moneyed corporations, and all such charters to be limited to a term not exceeding twenty years. The revised constitution of New York, in 1846, imposed further restraints upon the creation, and further responsibilities upon the duties of corporations. It declared that corporations might be formed under general laws, but should not be created by special act, except for municipal purposes, and in cases where, in the judgment of the legislature, general laws would not enable them to attain their object.[2] The term corporation in the article was to be construed to include all associations and joint-stock companies, having any of the powers and privileges of corporations not possessed by individuals or partnerships. No Act was to be passed granting any special charter for banking purposes, but corporations may be formed for such purposes under general laws. The legislature may provide for the registry of all bills and notes issued as money, and require ample security for the redemption of them in specie. The stockholders in every corporation and joint-stock association for banking purposes, issuing notes of any kind to circulate as money, after the 1st of January, 1850, are to be individually responsible to the amount of their respective shares therein, for all its debts and liabilities contracted after that day. In case of insolvency of any bank or banking association, the bill-holders to have preference over all other creditors.[3] Consti-

[1] A General Banking Act, passed by the requisite two thirds, was held void by the Supreme Court of Michigan, so far as it purported to confer corporate rights on the companies organized under its provisions, in opposition to a previous decision upholding it by McLean, J., in the Circuit Court of the United States. Green *v.* Graves, 1 Doug. Mich. 351. Falconer *v.* Campbell, 2 M. L. 195.

[2] The discretion exercised by the legislature, in an act of special incorporation, cannot be questioned by the courts. Mosier *v.* Hilton, 15 Barb. R. 655.

[3] And the assignee of a stockholder, in an insolvent corporation, succeeds to the same rights and liabilities as attached to his assignor. James *v.* Woodruff, 2 Denio's R. 574. And the same rule applies to an assignee before insolvency. 2 Barb. S. C. Rep. 294.

In Illinois, no bank can be incorporated unless the law has been submitted to the people and approved by them. Constitution of 1848. So, also, in Wisconsin, Constitution of 1848.

purpose, for in the session of 1823, being the first session of the legislature under operation of this check, there were thirty-nine new private companies incorporated, besides numerous other

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tution of N. Y. of 1846, art. 8. The constitution makes it the duty of the legislature to provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses thereof. So the legislature itself is prohibited from giving or loaning in any manner the credit of the state to, or in aid of, any individual, association, or corporation. Const. art. 7, sec. 9. There has been a constantly increasing prejudice in this country against civil, and especially moneyed corporations, ever since President Jackson, during his administration, commenced and carried on an unrelenting hostility to the Bank of the United States, and which terminated in the final extinction of that bank. The constitution of Wisconsin, established in 1846, went to the utmost extreme in its hostility to all banking institutions. It declares that there shall be no bank of issue within that state; that the legislature shall not have power to authorize or incorporate any institution having any banking power or privilege, or confer any banking power or privilege on any institution or person; that no corporation or person within that state, under any pretence, shall make or issue any paper-money, note, bill, certificate, or other evidence of debt, intended to circulate as money; that no corporation within that state, under any pretence, shall exercise the business of receiving the deposits of money, making discounts, or buying or selling bills of exchange, or do any other banking business whatever; that no bank, or any agency of any bank or banking institution in or without the United States, shall be established or maintained in that state; that it shall not be lawful to circulate within the state after 1847, any paper-money, note, bill, certificate, or other evidence of debt, less than the denomination of $10, and after 1849, less than $20; and the legislature is required forthwith to enact adequate penalties for the punishment of all violations and evasions of the provisions.

The construction of the restrictive clause in the constitution of New York, of 1821, received a learned discussion and great consideration in the cases of Warner *v.* Beers, president of the North American Trust and Banking Company, and of Bolander *v.* Stevens, president of the Bank of Commerce in New York; 23 Wendell's Rep. 103. Those institutions were voluntary associations of individuals, formed under the provisions of the Act of New York of April 18, 1838, entitled, "An Act to authorize the business of banking," and which Act allowed the voluntary creation of an indefinite number of such associations, at the pleasure of any persons who might associate for the purpose, upon the terms prescribed by the statute. The great question raised in those cases was, whether those institutions were corporations within the purview of the constitution, requiring the assent of two thirds of the members elected to each branch of the legislature, to every bill creating any body politic or corporate; and the statute in that case did not appear to have been passed, and did not in fact pass by such an enlarged majority. The decision of the Court of Errors, on a writ of error from the Supreme Court, on the 7th of April, 1840, was, that the Banking Act was constitutionally passed, though it did not receive the assent of two thirds of the members elected to each branch of the legislature, and that the associations formed under the Act were not bodies politic or corporate, *within the meaning of the constitution.* It seemed to be admitted, in the opinion given, that the restrictive clause had not an-

acts, amending or altering charters. The various acts of incorporation of private companies for banking, manufacturing,

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swered the policy which dictated it.[1] It was considered that *the spirit and meaning of the restrictive clause* was to guard against the increase of joint-stock corporations, for banking and other purposes of trade and profit to the corporators, with exclusive privileges, not enjoyed by the citizens at large; that although those banking associations had many of the distinguishing characteristics of corporations, they did not come within the true legal interpretations, and still less within *the spirit and design of the restrictive clause.* The statute conferred the power of free banking, and did not create any monopoly, nor secure to any association privileges which might not be enjoyed in the same manner by all others, nor place them beyond the entire control of the legislature. The decision of the Court of Errors was received and confirmed on the principle of *stare decisis*, in a subsequent writ of error from the Supreme Court to that court, in December, 1845, in the case of Gifford *v.* Livingston, 2 Denio, R. 380. But though these associations are not *corporations* within the *spirit and meaning of the restrictive clause* in the constitution, requiring the assent of two thirds of the members of each branch of the legislature to pass a corporation, yet it is held that they are, to all *other* intents and purposes, corporations, and as such, liable to taxation on their capital, if deriving any income or profit from it, like other corporations. The People *v.* Assessors of Watertown, 1 Hill's N. Y. Rep. 616. The People *v.* The Supervisors of Niagara, 4 Hill's N. Y. Rep. 20. See, also, *infra*, vol. iii. p. 26, for a British statute founded on similar principles in the creation of joint-stock companies. The above decision, in 4 Hill, was affirmed on error in the same case in 7 Hill, 504.[2]

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[1] The constitutional provision requiring two thirds, &c., no longer exists, and the new constitution of 1846, art. 8, sec. 1, provides that all general laws and special acts (creating corporations) may be altered from time to time, or repealed.

[2] The powers of joint-stock banking companies, formed under the statute of New York, entitled "An Act to authorize the business of banking," passed April 18, 1838, have been considered in numerous cases, some of which are not mentioned in the preceding note.

1. The constitutionality of the banking law must be considered as finally settled, by the decisions cited in the note. It must also be remembered, that the question of the constitutionality of this law arose under the constitution of 1821. The new constitution of 1846 has not retained the provision which requires the assent of two thirds of the members elected to each branch of the legislature, to every bill erecting a corporation; and, moreover, it expressly declares that "*corporations may be formed under general laws.*" Art. 8, sec. 1.

2. On the question whether these associations are subject to the provisions of the Revised Statutes as to moneyed corporations, (1 R. S. 589, art. 1,) and as to the dissolution of insolvent corporations, (2 R. S. 463, secs. 39, 42,) see Leavitt *v.* Tylee, 1 Sandf. Ch. Rep. 207. Gillett *v.* Moodie, (Court of Appeals, July, 1850.) Boisgerard *v.* The New York Bank. Co. 2 Sandf. Ch. R. 23. Sagory *v.* Dubois, 3 Sandf. Ch. R. 485.

3. It has been held that the Supreme Court had not summary jurisdiction in relation to the election of directors of those associations. In the matter of Bank of Dansville, 6 Hill, 370. With regard to the extent and effect of the restriction of the Rev. Stat. (vol. i. 558, 591,) as to the assignment of assets over $1,000, without a resolution of the directors, see Gillett *v.* Campbell, 1 Den. 520; Gillett *v.* Moody, 3 Comst. 479; Gillett *v.* Phillips, 3 Kern. 141.

literary, charitable, and insurance purposes; for turnpikes, and railroads, and toll-bridges; and for many other objects upon which private industry, skill, and speculation can be freely and advantageously employed, constitute a mighty mass of charters, which occupy a large part of the volumes of the statute law in almost every state. (a) All these incorporations are contracts between the government and the company, which cannot ordinarily be affected by legislative interference; and it has accordingly been attempted to retain a control over these private corporations, by a clause, now usually inserted in the acts of incorporation, that "it shall be lawful for the legislature, at any

(a) The laws of Massachusetts give the greatest facility to the creation of bodies politic and corporate. "When any lands, wharves, or other real estate, are held in common by five or more proprietors, they may form themselves into a corporation." Revised Statutes of 1836, part 1, tit. 13, ch. 43, sec. 1. So, in New York, by statute in 1811, (and which is still in force,) manufacturing corporations may be created by the mere association of five or more persons filing a certificate designating their name, capital, object, and location. A similar law was passed in Michigan and Connecticut, in 1837. The increase of corporations, in aid of private industry and enterprise, has kept pace in every part of our country with the increase of wealth and improvement. The Massachusetts legislature, for instance, in the session of 1837, incorporated upwards of seventy manufacturing associations, and made perhaps forty other corporations relating to insurance, roads, bridges, academies, and religious objects. And in 1838, the legislature of Indiana authorized any twenty or more citizens of any county, on three weeks previous public notice, to organize themselves, and become an agricultural society, with corporate and politic powers; and the inhabitants of any and every town or village may incorporate themselves for the institution and management of a public library. In Pennsylvania, the courts of quarter sessions, *with the concurrence of the grand jury of the county*, may incorporate towns and villages; Purdon's Dig. 130; and literary, charitable, or religious associations and fire companies may be incorporated under the sanction of the Supreme Court. Ib. 168, 172.

4. As to the effect of these associations of the law of May 14, 1840, prohibiting the issuing of bills or notes, not payable on demand, and without interest, see Smith *v.* Strong, 2 Hill, R. 241; Swift *v.* Beers, 3 Denio, R. 70; Hayden *v.* Davis, 3 McLean, R. 276; Tylee *v.* Yates, 3 Barb. S. C. Rep. 222; Leavitt *v.* Blatchford, 5 Barb. S. C. Rep. 10; S. C. 3 Comst. R. 19; Ontario Bank *v.* Schermerhorn, 10 Paige, R. 110.

5. Suits may be brought by or against these associations, in the name of their presidents, or in the name of the association. Delafield *v.* Kinney, 24 Wend. R. 345. Case *v.* The Mec. Banking Association, 1 Sandf. Sup. Ct. Rep. 693.

See, on the general subject of these banking companies, Palmer *v.* Lawrence, 3 Sandf. S. C. R. 161; Palmer *v.* Yates, 3 Sandf. S. C. R. 138. See Laws of 1854, ch. 242, further regulating them. Curtis *v.* Leavitt, 15 N. Y. (1 Smith,) 9. International Bank *v.* Bradley, 19 N. Y. (5 Smith,) 245.

time hereafter, to alter, modify, or repeal the act." (*a*) With this general view of the rise and progress of corporations, I shall proceed to a more particular detail of the general principles of law applicable to the subject. (*b*)

(*a*) In Massachusetts, there is a standing statute provision, that every act of incorporation which should be thereafter passed, shall at all times be subject to amendment, alteration, or repeal, at the pleasure of the legislature, unless there should be in the same act an express provision to the contrary. Act of 1830. Revised Statutes of 1836.[1] In North Carolina, all bodies corporate are limited to thirty years, unless otherwise specially declared. Revised Statutes of North Carolina, 1837.[2] In New York it is held, and very correctly, that though a charter of incorporation cannot pass without the assent of two thirds of the members of each house, it cannot be altered without the like assent, notwithstanding the charter contains the reservation of a power in the legislature to alter, modify, or repeal the charter at pleasure; for that reservation conferred no new power, but was only to retain the power which the legislature then had over the subject. Com. Bank of Buffalo *v.* Sparrow, 2 Denio, R. 97.

(*b*) There has been a disposition in some of the states to change, in an essential degree, the character of private incorporated companies, by making the members personally responsible in certain events, and to a qualified extent, for the debts of the company. This is intended as a check to improvident conduct and abuse, and to add to the general security of creditors; and the policy has been pursued to a moderate and reasonable degree only, in Rhode Island, New York, Maryland, and South Carolina.[3] But in Massachusetts, by a series of statutes, passed in 1808, 1818, 1821, and 1827, an unlimited personal responsibility was imposed upon the members of manufacturing corporations, equally as in the case of commercial partnerships. The wisdom of the policy has been strongly questioned, (Amer. Jurist, vol. ii. p. 92, art. 6; Id. vol. iv p. 307;) and, on the other hand, it has been supported by high authority; (Parker, Ch. J., 17 Mass. Rep. 334;) and whether it be well or ill founded, it is admirably well calculated to cure all undue avidity for charters of incorporations. This

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1 There is a similar provision in the Rev. Stat. of Conn. tit. 3, ch. 12, sec. 164, (1849,) and in the Laws of Vt. 1851, ch. 45.

2 In Louisiana, the duration of corporations is limited to *twenty-five years*. There was a general law for the formation of corporations, passed in this state in 1848, and it is conspicuous for clear and comprehensive provisions. Laws, 1848, Act 100. R. S. p. 115, sec. 8, (1856.)

3 By the laws of Rhode Island, of 1847, members of manufacturing corporations are liable for the corporate debts until the capital stock be paid; and the note or obligation of the stockholder is not payment. There is a similar law in Georgia. Acts of 1847. See, also, Louisiana R. S. (1856,) p. 116, sec. 14; Laws of Vt. (1851,) No. 60; Mass. R. S. p. 330, sec. 16, 17; Laws of N. H. (1856,) ch. 1852. R. R. stockholders are liable, in N. Y., to the extent of their unpaid subscriptions, to all creditors; and for thirty days personal service of laborers if an execution against the corporation shall be returned unsatisfied. Laws of 1854, ch. 282. In some recent statutes the stock of the corporation is made liable for its debts in the absence of corporate property, and the individuals whose stock is taken have a claim against the corporation. R. S. of Me. (1857,) p. 328, ch. 46, sec. 24 and seq. Laws of Vt. (1852,) No. 22.

II. * *Of the various kinds of corporations, and how* *273 *created.*

unlimited personal responsibility was restrained by statute in 1828 and 1830, and the responsibility applied only in the case of banks, to the stockholders at the time of loss, by mismanagement of the directors, or for outstanding bills at the time the charter expires. They are made liable in their individual capacities only to the extent of the stock they may hold in the bank at the time of the abuse, or at the time of the expiration of the charter. This provision was continued by the Massachusetts Revised Statutes of 1836, p. 312, sec. 30, 31, and has been essentially adopted by statute in New Hampshire, in 1837, in respect to manufacturing corporations. Persons holding stock in corporations *as trustees* for others, are especially exempted from personal responsibility. Act of Mass. 1838. The personal liability of the stockholders does not enable the creditors to sue them. It is the business and duty of the corporation, enforced by bill in equity in its name, to compel payments from individual stockholders.[1] Baker *v.* Atlas Bank, 9 Metcalf, 182. In Percy *v.* Millaudon, 20 Martin's Rep. 68, directors of a bank were held personally responsible to the stockholders for gross negligence or wanton disregard of duty. The statutes of Michigan, in 1837, 1838, go further, and make the directors liable for the amount of indebtedness of an insolvent bank; and stockholders are made liable, secondarily, in proportion to the amount of their stocks. See Angell & Ames on Corporations, pp. 546–564, 3d edit., relative to the personal responsibility of corporators under state statutes.

In England, the statute of 4 and 5 William IV. ch. 94, reciting 6 Geo. IV. ch. 91, by which the king was enabled to render the members of any corporation, thereafter created, individually liable for its contracts, enacted that the king, after three months' notice in the gazette of his intention, might, by letters-patent, grant to any company or association, for any trading, charitable, literary, or other purpose, corporate powers, subject to such conditions for the prevention of abuses in the management of their affairs, the security of creditors and the protection of the public, as the king may see fit to impose; but no execution upon any judgment or decree to issue without special leave of the court after notice of the persons to be charged, nor after the expiration of three years after such person shall have ceased to have been a member of the

[1] This applies only to that section of the Act by which stockholders are liable for the deficiencies in the capital stock caused by the misconduct of directors. They are liable to the suit of the *bill-holders* on the dissolution of the bank for the *whole of the bills.* See, on the adjustment of their liabilities, Crease *v.* Babcock, 10 Met. 525. All the bill-holders should be plaintiffs, and all the stockholders defendants. See, also, Bogardus *v.* Manufacturing Co. 3 Seld. 147. No action at law lies against stockholders. Knowlton *v.* Ackley, 8 Cush. 93.

An Act, under which the property of a manufacturing company, including its right to call assessments and the *liability of stockholders for its debts,* is vested in trustees for distribution among the creditors, is a bar to a suit by a creditor against a stockholder under an Act making members of manufacturing companies liable for their debts. Walker *v.* Crain, 17 Barb. 119.

When the statute provides that an execution against the corporation may be levied on any member, a suit must be regularly brought and carried to execution against the corporation before the members are liable. Dauchy *v.* Brown, 24 Vt. 197. See, also, Grose *v.* Hilt, 36 Me. 22.; Mackenzie *v.* Railway Co. 28 Eng. L. & Eq. 216.

Corporations are divided into *aggregate* and *sole*.(a) A corporation sole consists of a single person, who is made a body

company. See, also, *infra*, vol. iii. p. 27, *note*. By the statutes of 8 and 9 Vict., for consolidating in one Act the provisions respecting the constitution of incorporated companies, ch. 16, 17, 18, shareholders are liable individually to the amount of their shares, and no further. In New York, not only in manufacturing incorporations under the general Act of March 22, 1811, ch. 67, but in several of the charters of fire insurance companies, there is a provision, that in respect to the debts of the company contracted before the corporation expires, the persons composing the corporation at the time of its dissolution shall be individually responsible to the extent of their respective shares in the funds of the company. By this means a stockholder, according to some recent decisions, incurs the risk not only of losing the amount of stock subscribed, but of being liable for an equal sum, provided the debts due at the time of the dissolution require it. See Briggs *v.* Penniman, 1 Hopkins's Rep. 300; S. C. 8 Cowen's Rep. 387; and see *infra*, p. 312. The tendency of legislation and of judicial decisions in the several states is to increase the personal responsibility of stockholders in the various private corporate institutions, and to give them more and more the character of partnerships, with some of the powers and privileges of corporations. In Angell & Ames on Corporations, ch. 17, 3d edit., the extent of the personal liability of the members of a private corporation for the debts of the company is fully examined.[1]

(a) Co. Litt. 8 b. 250 a.

[1] Stockholders, it has been held, who are "jointly and severally liable" for the corporations' debts, are principal debtors, and not sureties; and therefore not discharged, by time having been given to the corporation by the creditor. Harger *v.* McCullough, 2 Denio's R. 119.

A creditor of a corporation, of which the charter renders the stockholders personally liable for its debts, is not affected in his rights against the stockholders, by an arrangement between the corporation and the stockholder, reducing and relinquishing the number of shares subscribed. Mann *v.* Pentz, 2 Sandf. Ch. Rep. 257. Mann *v.* Currie, 2 Barb. S. C. Rep. 294.

Where a corporation incurred debts exceeding three times the amount of its capital, contrary to Rev. Stat. (vol. i. 604, sec. 3,) it was decided that the directors, under whose administration this amount of debt was incurred, were personally liable, not only to creditors whose debts were contracted during the existence of their excess of corporate debts, but to any creditor after any lapse of time. Tallmadge *v.* Fishkill Iron Co. 4 Barb. S. C. Rep. 382.

There seems to be some conflict as to when the liability of a stockholder begins and ends. In Bank *v.* Burnham, 11 Cush. 183, it is held that a member is liable for debts contracted *during* his membership even after selling his shares. For debts contracted *before* his membership, he ceases to be liable on ceasing to be a member. See, also, Hill *v.* London Assurance Co. 38 Eng. L. & Eq. 407.

In Connecticut, only those are liable for corporation debts who hold stock when the action is brought. Middletown Bank *v.* McGill, 5 Conn. 28.

In New York, it seems to be unsettled who are to be considered members and liable for the company's debts. See McCullough *v.* Moss, 5 Den. 567; U. S. Trust Company *v.* U. S. Fire Insurance Co. 18 N. Y. (4 Smith,) 199.

corporate and politic, in order to give him some legal capacities and advantages, and especially that of perpetuity, which, as a natural person, he cannot have. A bishop, dean, parson, and vicar, are given in the English books as instances of sole corporations; and they and their successors in perpetuity take the corporate property and privileges; and the word successors is generally as necessary for the succession of property in a corporation sole, as the word heirs is to create an estate of inheritance in a private individual. (*a*) A fee will pass to a corporation aggregate, without the word successors in the grant, because it is a body, which, in its nature, is perpetual; but, as a general rule, a fee will not pass to a corporation sole, without the word successors, and it will continue for the life only of the individual clothed with the corporate character. (*b*) There are very few points of corporation law applicable to a corporation sole. They cannot, according to the English law, take personal property in succession, and their corporate capacity, in that respect, is confined to real property. (*c*) The corporations generally in * use with us are aggregate, or the union of *274 two or more individuals in one body politic, with a

(*a*) Co. Litt. 8 b. 9 a. There are instances in this country of a minister of a parish seised of parsonage lands in the right of his parish, being a sole corporation, and of county and town officers created sole corporations by statute. Angell & Ames on Corporations, 3d edit. 25.

(*b*) Co. Litt. 94 b. and notes 46 and 47 to Co. Litt. lib. 1. Viner, tit. Estate, L.

(*c*) 1 Kyd on Corp. 76, 77. Co. Litt. 46 b. But, by statute, a corporation sole may be enabled to take personal as well as real property by succession; and a treasurer or collector, for instance, is sometimes created a corporation sole, or *quasi* corporation, for the purpose of taking bonds and other personal property to him in his official character, and of transmitting the same to his successor.

In New Hampshire, under the statutes, stockholders are, in general, liable only for debts of the corporation contracted while they are stockholders. Chesley *v.* Pierce, 32 N. H. 388.

As to personal liability of stockholders for debts of the corporation contracted out of its legitimate business, see Kearney *v.* Buttles, 1 Ohio St. R. 362.

A fraudulent assignment of stock to evade liability is void as against creditors. Dauchy *v.* Brown, 24 Vt. 197.

Where it is provided, in a promissory note of a corporation, that the personal property of stockholders shall not be liable, the liability of the corporation is not thereby affected. Smith *v.* Eureka Flour Mills, 6 Cal. 1.

Where shares in a company, whose members were liable for corporate debts, were sold, with a covenant against incumbrances, *held* that the covenant was broken, if at the time of the sale the assets of the corporation were less than its debts. Clark *v.* Perry, 30 Me. 148.

capacity of succession and perpetuity. Besides the proper aggregate corporations, the inhabitants of any district, as counties, towns, and school districts, incorporated by statute, with only particular powers, are sometimes called *quasi* corporations. No private action for neglect of corporate duty, unless given by statute, lies against them, as such a corporation. Having no corporate fund, each inhabitant is said to be liable to satisfy the judgment, if the statute gives a suit against such a community. (a)

Another division of corporations, by the English law, is into *ecclesiastical* and *lay*. The former are those of which the members are spiritual persons, and the object of the institution is also spiritual. With us they are called religious corporations. This is the description given to them in the statutes of New York, Ohio, and other states, providing generally *for the incorporation of religious societies*, (b) in an easy and popular manner, and for the purpose of managing, with more facility and advantage, the temporalities belonging to the church or congregation.[1] Lay corporations are again divided into *eleemosynary* and *civil*. An eleemosynary corporation is a private charity, constituted for the perpetual distribution of the alms and bounty of the founder. In this class are ranked hospitals for the relief of poor, sick, and impotent persons, and colleges and academies established for the promotion of learning and piety, and endowed with property, by public and private donations. (c) Civil corporations are

(a) Russell *v.* The Men of Devon, 2 Term Rep. 667. Riddle *v.* Proprietors of Locks, &c. on Merrimack River, 7 Mass. Rep. 187. Parsons, Ch. J., Merchants' Bank *v.* Cook, 4 Pick. Rep. 414. Adams *v.* Wiscasset Bank, 1 Greenleaf's Rep. 361. Chase *v.* Merrimack Bank, 19 Pick. 569. In the case of The Attorney-General *v.* Corporation of Exeter, (2 Russell's Rep. 53,) Lord Eldon held, that if a fee-farm rent was chargeable on the whole of the city, it might be demanded of any one who holds property in it, and he would be left to obtain contribution from the other inhabitants.

(b) Act of New York, April 5, 1813, ch 60, of Ohio, February 5, 1819.

(c) 1 Blacks. Com. 471. 1 Kyd on Corp. 25-27. 1 Lord Raym. 6, 8. 1 Ves. 537. 9 Ves. Jr. 405. 1 Burr. Rep. 200. Lord Holt, in Phillips *v.* Bury, cited in 2 Term Rep. 353. Dartmouth College *v.* Woodward, 4 Wheaton, 681.

[1] A right as a corporator in a religious society is obtained by stated attendance on divine worship, and contributing to its support, in a mode usual in the congregation. Cammeyer *v.* United German L. Churches, &c., 2 Sandf. Ch. Rep. 186. For the power of religious corporations to hold land, under the New York Acts, see Tucker *v.* St. Clement's Church, 3 Sandf. S. C. Rep. 242.

established *for a variety of purposes, and they are *275 either *public* or *private.* Public corporations are such as are created by the government for political purposes, as counties, cities, towns, and villages; they are invested with subordinate legislative powers, to be exercised for local purposes connected with the public good; and such powers are subject to the control of the legislature of the state.(*a*)[1] They may also be empow-

(*a*) The People *v.* Morris, 13 Wendell, 325. They are common in every state. One of the first acts of the General Assembly of Connecticut, 1639, was the incorporation of all towns in the colony with town privileges for local purposes, such as choosing officers and magistrates for holding local courts, and to provide for durably keeping a registry of deeds and mortgages, and for the maintenance of schools and public worship. The establishment of towns with corporate powers, as local republics, was the original policy throughout New England, and it had a durable and benign effect upon the institutions and moral and social character of the people. M. de Tocqueville, in his De la Democratie en Amerique, tom. i. pp. 64, 96, appears to have been very much struck with the institutions of New England towns. He considered them as small, independent republics, in all matters of local concern, and as forming the principle of the life of American liberty existing at this day.

[1] Where the city authorities had united with a committee of citizens to call a meeting for the consideration of national affairs, and by the firing of cannon, not authorized by the city authorities, a person was injured, it was held that the city was not liable. Boyland *v.* The Mayor, &c. of New York, 1 Sandford's (Law) Rep. 27. A municipal corporation cannot be made liable for an injury arising from a defect in the execution of the corporation ordinances; as for an injury inflicted by a swine in the streets, where swine were prohibited running at large; Levy *v.* The Mayor, &c. of N. Y. Ib. 465; nor for injuries caused by a mob; Prather *v.* Lexington, 13 B. Monroe, 559; nor for damages caused by a contractor's workmen in grading the streets; Kelly *v.* Mayor, &c. of N. Y. 1 Kern. 432; nor for acts of citizens, obstructing the streets when the officers have had no notice; Griffin *v.* Mayor, 5 Seld. 456. But see Lacom *v.* Mayor, 3 Duer, 406; Blake *v.* Ferris, 1 Seld. 48; Lloyd *v.* Mayor, Ib. 369, where, the injuries being caused by persons in the employ of the city or its agents, the corporation was held liable. The ordinary powers of a municipal corporation does not authorize the common council to furnish a dinner for the citizens and guests at the public expense; Hodges *v.* The City of Buffalo, 2 Denio's R. 110; nor to appropriate money for the celebration of Independence Day; and an injunction was properly granted to restrain such an act; New London *v.* Brainerd, 22 Conn. 552.

The powers of municipal corporations are discussed in the case of City Council *v.* Ahrens, 4 Strobh. R. 241, and Same *v.* Baptist Church, 4 Strobh. 306. Ordinances prohibiting the sale of intoxicating liquors, and restraining inter-mural interments, were held to be constitutional and valid.

Municipal corporations are not liable for consequential damages resulting from their opening and grading, with proper care and skill, public streets, in pursuance of their chartered powers. Radcliff's Ex'rs *v.* The Mayor, 4 Comstock, R. 195. Plant *v.* Long Island Railroad, 10 Barb. R. 26. Adams *v.* Saratoga & W. Co. 11 Barb. R. 454. Nor are towns, in New York, liable for not repairing roads. Morey *v.* Newfane, 8 Barb. R. 645.

Though the judicial tribunals have no authority to interfere with the police regulations of a municipal corporation, yet such corporations have no more right than a private indi-

ered to take or hold private property for municipal uses; and such property is invested with the security of other private rights. (*a*) So corporate franchises attached to public corporations are legal estates coupled with an interest, and are protected as private property. If the foundation be private, the corporation is private, however extensive the uses may be to which it is devoted by the founder, or by the nature of the institution. A bank, created by the government, for its own uses, and where the stock is exclusively owned by the government, is a public corporation.[1] So a hospital created and endowed by the government, for general purposes, is a public and not a private charity. But a bank whose stock is owned by private persons is a private corporation, though its object and operations partake of a public nature, and though the government may have become a partner in the association by sharing with the corporators in the stock. (*b*) The same thing may be said of insurance, canal, bridge, turnpike, and railroad companies. The uses may, in a certain sense, be called public, but the corporations are private, equally as if the franchises were vested in a single per-

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(*a*) Angell & Ames on Corporations, 3d edit. 30. These local corporations, as cities and towns, can sue and be sued; and the judicial reports in this country, and especially in the New England states, abound with cases of suits against towns, in their corporate capacity, for debts and breaches of duty for which they were responsible.

(*b*) Marshall, Ch. J., United States Bank *v.* Planters' Bank, 9 Wheaton, 907. It has even been held that a state bank may be considered a private corporation, though owned entirely by the state. Bank of South Carolina *v.* Gibbs, 3 M'Cord's Rep. 377.

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vidual to erect a nuisance upon their lands, and an injunction will be granted to restrain such act. Brower *v.* The Mayor, &c. of N. Y. 3 Barb. S. C. Rep. 254. They are liable for the negligence and unskilfulness of their agents. Lloyd *v.* The Mayor, 1 Selden, R. 369. Meares *v.* Com. of Wilmington, 9 Ired. R. 73. See *supra*, p. 281, n. 2. Mayor of Memphis *v.* Lasser, 9 Humph. R. 757. Akron *v.* McComb, 18 Ohio R. 229. See further, *post*, 291, 334–5.

The power of a municipal corporation, like the Mayor, &c. of N. Y., to grant exclusive and perpetual privileges in the nature of franchises was denied, and the powers of the city government, its subjection to the authority of the courts, and the effect of an injunction upon its acts, were discussed at great length in the recent cases arising from the establishment of street railroads. See Milhau *v.* Sharp, 15 Barb. 193; 17 Barb. 435; Davis *v.* Mayor, 1 Duer, 451; Att.-Gen. *v.* Mayor, 3 Id. 119; People *v.* Sturtevant, 5 Seld. 263.

[1] A corporation is private as distinguished from a public corporation, unless the whole interest belongs to the government, or it is vested with political or municipal power. Rundle *v.* Del. & R. Canal, 1 Wallace, Jr's, C. C. Rep. 275.

son. (*a*) A hospital founded by a private benefactor is, in point of law, a private corporation, though dedicated by its charter to general charity. A college, founded and endowed in the same manner is a private charity, though from its general and beneficent objects it may acquire the character of a public institution. (*b*) If the uses of an eleemosynary corporation be for general charity, yet such purposes will not of themselves constitute it a public corporation. Every charity which is extensive in its object may, in a certain sense, be called a public charity. Nor will a mere act of incorporation change a charity from a private to be a public one. The charter of the crown, said Lord Hardwicke, (*c*) cannot make a charity * more or less public, but only more permanent. It is the extensiveness of the object that constitutes it a public charity. A charity may be public, though administered by a private corporation. A devise to the poor of a parish is a public charity. The charity of almost every hospital and college is public, while the corporations are private. To hold a corporation to be public, because the charity was public, would be to confound the popular with the strictly legal sense of terms, and to jar with the whole current of decisions since the time of Lord Coke. (*d*)

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In England, corporations are created and exist by prescription, by royal charter, and by act of Parliament. With us they are created by authority of the legislature, and not otherwise. There are, however, several of the corporations now existing in this country, civil, religious, and eleemosynary, which owed their origin to the crown under the colony administration.

(*a*) Bailey *v.* Mayor of New York, 3 Hill's Rep. 531.

(*b*) Dartmouth College *v.* Woodward, 4 Wheaton, 518. Story, J., Ibid. 668, 669, 697–700. The case of St. Mary's Church, 7 Serg. & Rawle, 559.

(*c*) 2 Atk. Rep. 88.

(*d*) Sutton's Hospital, 10 Co. 23. Lord Hardwicke, 2 Atk. Rep. 88. Lord Holt, in Phillips *v.* Bury, reported at large in 2 Term Rep. 352. The opinions of the judges in Dartmouth College *v.* Woodward, 4 Wheaton, 518. All the essential principles laid down by the court, in the case of Dartmouth College *v.* Woodward, were asserted and applied with great force by Mr. Justice Story, in the case of Allen *v.* M'Keen, 1 Sumner, 276, to Bowdoin College, in the State of Maine. That college is a private corporation, of which the state of Massachusetts is founder, and the visitatorial and all other powers and franchises are vested in a board of trustees, under the charter, and they have a permanent right and title to their offices.

Those charters granted prior to the Revolution were upheld, either by express provision in the constitutions of the states, or by general principles of public and common law of universal reception; and they were preserved from forfeiture by reason of any nonuser or misuser of their powers, during the disorders which necessarily attended the Revolution. There is no particular form of words requisite to create a corporation. A grant to a body of men to hold mercantile meetings, has been held to confer a corporate capacity. (*a*) A grant of lands to a county or hundred, rendering rent, would create them a corporation for that single intent, without saying, to them and their successors. (*b*)

There is no doubt that corporations, as well as other private rights and franchises, may also exist in this country *277 *by prescription; which presupposes, and is evidence of a grant, when the acts and proceedings on which the presumption is founded could not have lawfully proceeded from any other source. (*c*) It requires the *acceptance* of the charter to create a corporate body; for the government cannot compel persons to become an incorporated body without their consent, or the consent of at least the major part of them. (*d*)[1] The

(*a*) The case of Sutton's Hospital, 10 Co. 27, 28, 30. 1 Rol. Abr. tit. Corporation, F. Denton *v.* Jackson, 2 Johns. Ch. Rep. 325.

(*b*) Dyer's Rep. 100 a, pl 70, cited as good law by Lord Kenyon, in 2 Term Rep. 672. 1 Rol. Abr. tit. Corporation, F. 3, 4. Angell & Ames on Corporations, 3d edit. 64. There is no doubt that the grant or statute creating a corporation, to give it operation, may be *accepted* by the grantees or a majority of the corporation; for a grant of a corporation is in the nature of a contract, and requires a mutual concurrence of wills. Angell & Ames on Corporations, 3d edit. 67-72. Their acceptance or consent may be implied from circumstances. Bank of the United States *v.* Dandridge, 12 Wheaton, 70.

(*c*) Dillingham *v.* Snow, 3 Mass. Rep. 276 Stockbridge *v.* West Stockbridge, 12 Id. 400. Hagerstown Turnpike Co. *v.* Creeger, 5 Harr. & Johns. 122. Greene *v.* Dennis, 6 Conn. Rep. 302. Angell & Ames on Corporations, 57-59, 3d edit.

(*d*) Yates, J., 4 Burr. Rep. 2200. Lord Kenyon, 3 Term Rep. 240. Ellis *v.* Marshall, 2 Mass. Rep. 269. Lincoln and Ken. Bank *v.* Richardson, 1 Greenleaf's Rep. 79.

[1] Haslet *v.* Wotherspoon, 1 Strobh. Eq. 209. Goddard *v.* Pratt, 16 Pick. R. 412. A corporation can derive no advantage from an act which it does not accept. Green *v.* Seymour, 3 Sandf. Ch. R. 285. It is held, in England, by the Exchequer Chamber, reversing

acceptance may in many cases be inferred from the acts of the majority of the corporators; and a written instrument, or vote of acceptance, is not indispensable. (*a*)

III. *Of the powers and capacities of corporations.*

When a corporation is duly created, many powers, rights, and capacities are attached to it. Some of them are deemed to be necessarily and inseparably incident to a corporation by tacit operation, without an express provision; though it is now very generally the practice to specify, in the act or charter of incorporation, the powers and capacities with which it is intended to endow the corporation.

(1.) *Of their ordinary powers.*

The ordinary incidents to a corporation are, 1. To have perpetual succession, and of course, the power of electing members in the room of those removed by death or otherwise; 2. To sue and be sued, and to grant and to receive by their corporate name; 3. To purchase and hold lands and chattels; 4. To have a common seal;[1] *5. To make by-laws for the government of the corporation; 6. The power of *amotion*, or removal of members. Some of these powers are to be taken, in many instances, with much modification and restriction; and the essence of a corporation, according to Mr. Kyd, consists only of a capacity to have perpetual succession, under a special denomination and an artificial form, and to *278

(*a*) Charles River Bridge *v.* Warren Bridge, 7 Pick. Rep. 344, Parker, Ch. J., and Wilde, J. Bank of United States *v.* Dandridge, 12 Wheaton, 70, 71.

the judgment of the Queen's Bench, that a railway company, incorporated by Act of Parliament, and authorized to form a line of railway, were not obliged to make the railway; nor did the company, by making part of the line, oblige themselves to make the remainder. York & N. M. R. Co. *v.* Regina, 18 Eng. L. & Eq. 199. S. C. 16 Id. 299. It is not essential that the acceptance of a charter should appear on the records of a corporation. It may be inferred from the acts of the corporators or of the corporation. Taylor *v.* Newberne, 2 Jones, Eq. (N. C.) 141. As to what is evidence of an acceptance of a charter, see Gleaves *v.* Turnpike Co. 1 Sneed, (Tenn.) 491.

1 By an Act of New York, (Laws of 1848,) p. 305, the impression of the seal of an incorporation on paper is valid as if made on wax. So in Mass. Laws, 1855, c. 228. Such a seal was held good at common law, in Allen *v.* Sullivan R. R. Co. 32 N. H. 446.

take and grant property, contract obligations, and sue and be sued, by its corporate name, and to receive and enjoy, in common, grants of privileges and immunities. (*a*) According to the doctrine of Lord Holt, (*b*) neither the actual possession of property, nor the actual enjoyment of franchises, are of the essence of a corporation. (*c*)

(2.) *Of quasi corporations.*

There are some persons and associations who have a corporate capacity only for particular, specified ends, but who can in that capacity sue and be sued as an artificial person. (*d*) Thus, in

(*a*) 1 Kyd on Corp. 13, 69, 70. Blackstone says that the first five incidents mentioned in the text are *inseparably* incident to every corporation aggregate. The New York statute also declares, that there are powers which vest in every corporation without being specified. 1 Blacks. Com. 475. N. Y. Revised Statutes, vol. i. p. 599. But in the case of Sutton's Hospital, 10 Co. 30 b, 31 a, it was held that, to make ordinances or by-laws was not of the essence of a corporation, and no doubt a valid corporation may be created by law, without any other essential attributes than those mentioned by Kyd.

(*b*) The King *v.* The City of London, Skinner's Rep. 310. A gift of personal property, or of the proceeds. rents, and profits of real estate in trust to be paid over to a corporation, is good. Wright *v.* Trustees of Meth. Epis. Church, 1 Hoffman's Ch. Rep. 217.

(*c*) The general rule is, that every corporation has a capacity to take and grant property and to contract obligations. But these general powers incident at common law, are restricted by the nature and object of the institution ; and in pursuance thereof it may make all contracts necessary and useful in the course of the business it transacts, as means to enable it to effect such object, unless prohibited by law or its charter. To attain its legitimate object, it may deal precisely as an individual who seeks to accomplish the same end. It may contract for labor and materials, and make purchases, and borrow money for such objects, and give notes, bonds, and mortgages towards payment. The decisions are numerous on this subject. See 1 Cowen's R. 513; 3 Wendell's R. 96; 5 Id. 590; 2 Hill's N. Y. R. 265; 9 Paige's R. 470; 1 Watts's R. 385, and especially the case of Barry *v.* Merchants' Exchange Company, 1 Sandford's Ch. R. 280, where these general corporate powers are liberally considered and established in the able and learned judgment of the assistant vice-chancellor. It is further established, that the capital stock of the corporation mentioned in its charter, is not *per se* a limitation of the amount of property, either real or personal, which it may own. It may divide its profits among the stockholders, at such times and to such amount as the directors may deem expedient. Instead of dividing the profits, they may, in their discretion, suffer the surplus of profits to accumulate beyond their original capital, as the interest of the institution shall appear to dictate. There is no restriction by law, except by special statutes in specific cases, in the amount of credit which moneyed corporations may create by the use of corporate capital. Barry *v.* Merchants' Exchange Company, *ubi supra.*

(*d*) Gibson, Ch. J., The Commonwealth *v.* Green, 4 Wharton's Rep. 531, 598.

New York, by statute, each county, and the supervisors of a county, the loan officers and commissioners of loans, each town, and the supervisors of towns, the overseers of the poor, and superintendents of the poor, the commissioners of common schools, the commissioners of highways, and trustees of school districts, are all invested, for the purpose of holding and transmitting public property, with corporate attributes *sub modo.* The supervisors of the county can take and hold lands for the use of the county; and all these several bodies of men are liable to be sued, and are enabled to sue in their corporate capacity. (*a*) Every county and town is a body politic for certain purposes; and this is no doubt the general provision in this country, and especially in the northern states, in respect to towns. (*b*) So, at common law, every parish or town was a corporation for local necessities, and the inhabitants of a county or hundred might equally be incorporated for special ends. (*c*) In short, the English law *affords many, and *279

(*a*) N. Y. R. S. vol. ii. p. 473. See, also, the statute laws of the several states, in *pari materia.* N. Y. R. S. 2d edit. vol. i. 384, 385, 416.

(*b*) N. Y. R. S. vol. i. pp. 337, 364. Statute Laws of Ohio, 1831. Revised Statutes of Massachusetts, 1836. Revised Statutes of Indiana, 1838. R. S. of New Jersey, 1847, tit. 6, ch. 20.

(*c*) Hobart, 242. Chamberlain of London's case, 5 Co. 63. Rogers *v.* Davenant, 1 Mod. Rep. 194. Dyer's Rep. 100. Lord Kenyon, 2 Term Rep. 672. In Massachusetts, by immemorial usage, the inhabitants of towns charged by law with the performance of duties are held to be individually liable in their property, though sued by a collective name as a corporation. The same rule applies to parishes and school districts. Gaskill *v.* Dudley, 6 Metcalf, 546. In the case of Beardsley *v.* Smith, 16 Conn. R. 368, it was adjudged, after a thorough discussion, that the individual property of the citizens of the city of Bridgeport, and the citizens individually, were liable, on execution, for the debts of the corporation. It was shown, in that case, to be the immemorial usage, and uniformly supported by judicial decisions throughout New England, that the inhabitants of towns and other municipal communities of corporations and *quasi* corporations were liable, in their persons and property for the debts of the towns or corporations, by taxation or execution; and numerous cases were referred to by the court in confirmation of the doctrine, as in 7th and 14th Mass., 19 Pickering, 1 Greenleaf, 5th, 6th, and 10th Conn. Reports, and by analogous cases and practice in 2 Term, 660, 2 Russ. 45, 11 East, 77. See *supra*, p. 274, n. to S. P. But this personal responsibility does not extend to the members of voluntary associations of ecclesiastical societies, unless so subjected by the provisions of its charter. They are private, and not a municipal or *quasi* corporation, compelled by law, like towns, cities, and school districts, to assume duties and contract debts. Jewett *v.* The Thames Bank, 16 Conn. R. 511. In Georgia, the county courts are

our American law more numerous examples, of persons and collective bodies of men endowed with a corporate capacity, in some particulars declared, and without having in any other respect the capacities incident to a corporation. (a)

(3.) *Of corporations as trustees.*

A corporation being merely a political institution, it has no other capacities or powers than those which are necessary to carry into effect the purposes for which it was established. A corporation is incapable of a personal act in its collective capacity. (b) It cannot be considered as a moral agent, and, therefore, it cannot commit a crime, or become the subject of punishment, or take any oath, or appear in person, or be arrested or outlawed. (c) It was formerly understood that a corporation could not be seised of lands to the use of another, and that it was incapable of any use or trust, and, consequently, that it could not convey lands by bargain and sale. (d) But the objection that a corporation could not convey by bargain and sale was utterly rejected by the C. B., in the case of *Sir Thomas Holland* v. *Bonis*, (e) as a dangerous exception to the capacity

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invested with power to incorporate the associations for special purposes, not extending to banking or insurance business, and the members are to be bound for contracts, as in case of partnerships. Hotchkiss, Statute Code of Georgia, 1845, p. 372. But see *supra*, p. 272 *a*, as to the regulation of corporations in New York.

(a) Jackson *v.* Hartwell, 8 Johns Rep. 422. Denton *v.* Jackson, 2 Johns. Ch. Rep. 325. Todd *v.* Birdsall, 1 Cowen's Rep. 260. Grant *v* Fancher, 5 Id. 309. North Hempstead *v.* Hempstead, 2 Wendell's Rep. 109. School District in Rumford *v.* Wood, 13 Mass. Rep. 193 Overseers of N. W. *v.* Overseers of S. W., 3 Serg. & Rawle, 117. Angell & Ames on Corporations, 17, 2d ed. See, also, *supra*, p. 274. In the case of Purdy *v.* The People, 4 Hill's Rep. 384, 395, one of the senators (Paige, Senator,) held, that towns and counties in New York were not corporations even *sub modo*, at the time of the adoption of the constitution, nor are they now, in the proper sense of the term. See, also, to that point, Jackson *v.* Cory, 8 Johns. Rep. 385, Hornbeck *v.* Westbrook, 9 Id 73. They were made *quasi* corporations by the Revised Statutes.

(b) 1 Kyd on Corp. 225.

(c) 1 Ibid. 71, 72. 1 Blacks. Com. 477. From the current of modern decisions there can be no doubt, however, that a corporation, equally with an individual, may gain a freehold by a disseisin committed by its agent, whether authorized by deed or vote. See Angell & Ames on Corporations, 152, 3d edit.

(d) Bro. tit. Feoffments, pl. 10. Bacon on Uses, 57. Gilbert on Uses, by Sugden, 6, 7.

(e) 3 Leon. Rep. 175.

to convey; and, at this day, the only reasonable limitation is, that a corporation *cannot be seised of land in trust, for purposes foreign to its institution. (*a*) Equity will now compel corporations to execute any lawful trust which may be reposed in them; and in the case of the *Trustees of Phillips' Academy* v. *King*, (*b*) it was held, that a corporation was capable of taking and holding property as a trustee. Many corporations are made trustees for charitable purposes, and are compelled, in equity, to perform their trusts. (*c*) [1] Corporations appear to be deemed competent to perform the duties of trustees, and to be proper and safe depositories of trusts; and, among the almost endless variety of purposes for which corpo- *280

(*a*) Jackson *v.* Hartwell, 8 Johns. Rep. 422.

(*b*) 12 Mass. Rep. 546.

(*c*) Green *v.* Rutherford, 1 Ves. 462, 468, 470, 475. Gilbert on Uses, by Sugden, 7, note. 1 Kyd on Corp. 72. 2 Johns. Ch. Rep. 384, 389. City of Coventry *v.* Attorney-General, 2 Bro. P. C. 236. Attorney-General *v.* City of London, 3 Bro. Ch. R 171. Dummer *v.* Corporation of Chippenham, 14 Vesey, 245. See Angell & Ames on Corporations, 3d edit pp. 124–130, on the powers of a corporation to be seised in trust for the use of another, where the cases are well collected, and the reason of them illustrated. Mr. Preston, in his Treatise on Conveyancing, vol. ii. pp. 247, 254, 257, 263, insists, that the more approved authority and better opinion is, that a corporation cannot stand *seised to a use* on a conveyance to them, though a corporation may be a *cestui que use.* In one case, it has been admitted that a corporation might *give a use;* and, therefore, a bargain and sale in fee by a corporation would be good. But if a corporation can give a use, it can, upon the same principle, equally stand seised to a use; and the rule ought to be consistent and uniform, either that a corporation can give and stand seised to a use, or that they can do neither. The New York statute of May 14th, 1840, ch. 318, with just and politic liberality, authorized any incorporated college, or other literary incorporated institution, to take a grant or conveyance of real or personal estate, to be held in trust; (1.) For an observatory; (2.) To found and maintain professorships and scholarships; (3.) To provide and keep in repair a place of burial for the dead; (4.) For any specific purpose within the authorized objects of their charter. Real and personal estate may also be conveyed to any city or village corporation in trust for education, for the diffusion of knowledge, for the relief of distress, and for ornamental grounds, upon such conditions as the grantor or donor, and the corporation may agree to. It may also be conveyed to commissioners of common schools, and trustees of school districts, for the benefit of common schools therein.

1 Nor can they be relieved from the trust on the ground of inconvenience and the advantages that would result to all parties from a change of trustees, without proof of incapacity or unfaithfulness in the corporation, or failure of the objects of the charity. Harvard College *v.* Society for Promoting Theological Education, 3 Gray, 280.

rations are created at the present day, we find them (a) authorized to receive and take by deed or devise, in their corporate capacity, any property, real and personal, in trust, and to assume and execute any trust so created and declared. The Court of Chancery is vested with the same jurisdiction over these corporate trusts which it ordinarily possesses and exercises over other trust estates. The directors of corporations, as trustees, are liable personally for a fraudulent misapplication of funds, and trust moneys may be pursued in the hands of any person receiving them without consideration, or with notice of the trust. One director or trustee may be sued alone for a breach of trust, without bringing the others before the court. Corporations are also created with trust powers of another kind; as for the purpose of loaning money on a deposit of goods and chattels, by way of pledge or security. (b) It will *soon become difficult to trace the numerous and complicated modifications which corporations are made to assume, and the much greater diversity of objects for which they are created. We are multiplying in this country, to an unparalleled extent, the institution of corporations, and giving them a flexibility and variety of purpose unknown to the Roman or the English law. The study of this title is becoming every year more and more interesting and important.

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(4.) *Of their capacity to hold lands, and to sue and be sued.*

1. *To hold lands.*

It was incident at common law to every corporation to have a capacity to purchase and alien lands and chattels, unless they were specially restrained by their charters, or by statute. (c) Independent of positive law, all corporations have the absolute *jus disponendi* of lands and chattels, neither limited as to objects nor circumscribed as to quantity.[1] They may execute a mort-

(a) See Farmers' Fire Insurance and Loan Company, Laws of N. Y., April 17th, 1822, ch. 240.

(b) The New York Lombard Association, Laws of N. Y., April 8th, 1824, ch. 187.

(c) Co. Litt. 44 a, 300 b. Sid. 161, note at the end of the case. 10 Co. 30 b. 1 Kyd on Corp. 76, 78, 108, 115. Com. Dig. tit. Franchise, F. 11, 15, 16, 17, 18. Parker, Ch. J., in First Parish in Sutton v. Cole, 3 Pick. Rep. 239.

1 This doctrine is controverted and the cases ancient and modern analyzed at great

gage to secure a debt. This was so understood by the bar and court in the modern case of *The Mayor and Commonalty of Colchester* v. *Lowten;* (*a*) and this common-law right of disposition continued in England until it was taken away, as to religious corporations, by several restraining statutes, in the reign of Elizabeth. (*b*) We have not reënacted in New York those disabling acts; but the better opinion, upon the construction of the statute *for the incorporation of religious societies,* (*c*) is, that no religious corporation can sell in fee any real estate without the chancellor's order. The powers given to the trustees of religious societies incorporated under that act are limited to purchase and hold real estate, and then to demise, lease, and improve the same for the use of the congregation. This limitation of the corporate power to sell is confined to religious corporations; *and all others can buy and sell at pleasure, *282 except so far as they may be specially restricted by their charters or by statute. (*d*) [1] Corporations have a fee-simple for the purpose of alienation,[2] but they have only a determinable fee for the purposes of enjoyment. On the dissolution of the corporation, the reverter is to the original grantor or his heirs;[3] but the grantor will be excluded by the alienation in fee, and in that way the corporation may defeat the possibility of a reverter. (*e*)

(*a*) 1 Ves. & Bea. 226, 237, 240, 244; and it was so adjudged in the case of Barry *v.* The Merchants' Exchange Company, 1 Sandford's Ch. Rep. 250.

(*b*) By the statute of 4 and 5 Wm. IV. c. 76, all lay civil corporations in England are restrained from selling or mortgaging any real estate, except under a government license, in the mode prescribed.

(*c*) Laws of New York, sess. 36, ch. 60, sec. 11. This Act has not been either revised or repealed. See N. Y. Revised Statutes, vol. iii. p. 298.

(*d*) Corporations holding for charitable purposes, says Lord Eldon, 1 Ves. & Bea. 246, can alienate at law, but the alienee will be a trustee.

(*e*) Preston on Estates, vol. ii. p 50.

length in Grant on Corporations, pp. 127-139. The learned author endeavors to show that, at common law, corporations are restrained in their right to alienate lands as well as in all their other powers.

1 See the provisions of the N. Y. R. S. as to the right of corporations to hold lands. 1 R. S. p. 599, sec. 1.

2 The People *v.* Mauran, 5 Denio's R. 389. Nicoll *v.* N. Y. & E. R. R. 2 Kern. 121.

3 See Bingham *v.* Weiderwax, 1 Comst. R. 509.

In England, corporations are rendered incapable of purchasing lands without the king's license; and this restriction extends equally to ecclesiastical and lay corporations, and is founded upon a succession of statutes from Magna Charta, 9 Hen. III. to 9 Geo. II., which took away entirely the capacity which was vested in corporations by the common law. These statutes are known by the name of the statutes of mortmain, and they applied only to real property; and were introduced during the establishment and grandeur of the Roman church, to check the ecclesiastics from absorbing in perpetuity, in hands that never die, all the lands of the kingdom, and thereby withdrawing them from public and feudal charges. (a) The earlier statutes of mortmain were originally levelled at the religious houses; but the statute of 15 R. II., ch. 5, declared that civil or lay corporations were equally within the mischief and within the prohibition; and this statute made lands conveyed to any third person, for the use of a corporation, liable to forfeiture, in like manner as if conveyed directly in mortmain. (b) We have not

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(a) Lord Ch. Brougham observed, that the object of the Mortmain Act was to prevent land from being placed *extra commercium* upon the feudal principle of protecting the lords against having tenants who never died, but that there was no intention of preventing by will the investment of moneys in improvements upon land already in mortmain. Giblett *v.* Hobson, 3 Mylne & Keen, 517.

(b) Co. Litt. 2 b. 2 Blacks. Com. 268-274, and 1 Blacks. Com. 479. The Mortmain Acts apply to corporations exclusively; and trusts made by feoffment, grant, or devise to unincorporated bodies, for charitable uses and purposes, *not deemed superstitious*, have not been held to be invalid, under the Mortmain Act of 23 Hen. VIII. ch. 10, and that of 1 Ed. VI. ch. 14. Porter's case, 1 Co. 24 a. Martidale *v.* Martin, Cro. E. 288. Case (5 Ed. VI.) cited by the assistant vice-chancellor, in Wright *v.* Trustees of Meth. Epis. Church, 1 Hoffman's Ch. Rep. 248. Adams and Lambert's case, 4 Co. 104 b. Sir F. Moore's Rep. 648. The prohibition to alienate a mortmain was qualified. The right to seize the lands as a forfeiture belonged to the mesne lords and the king, and if they remitted the forfeiture, the alienation was good. The interests of the heir were not considered; he was bound by the alienation. Wilmot's Opinions, p. 9. Attorney-General *v.* Flood, Hayes's Irish Exch. Rep. 611. The assistant vice-chancellor in Wright *v.* M. E. Church, in 1 Hoffman's Rep. 254.

In 1843, an attempt was made in the English House of Commons to repeal the statutes of mortmain, and allow of the establishment of schools, hospitals, churches, and religious and monastic institutions for the relief of the poor, the encouragement of charity and religion, at the pleasure and with the bounty of individuals; but the motion met with no encouragement, and was withdrawn. The statute of 9 Geo. II. ch. 36, is now the leading English statute of mortmain. It declares that no lands or moneys to be laid out thereon, shall be given or charged for any *charitable* uses, unless

in this country reënacted the statutes of mortmain, or generally assumed them to be in force; and the only legal check to the acquisition of lands by corporations, consists in those special restrictions contained in the acts by which they are incorporated, and which usually confine the capacity to purchase real estate to specified and necessary objects;[1] and in the force to be given to the exception of corporations out of the statute of *wills, (a) which declares that all persons, other than bodies politic and corporate, may be devisees of real estate. (b) *283

The statutes of mortmain are in force in the state of Pennsylvania. It has been there held and declared, by the judges of the Supreme Court of that state, (c) that the English statutes of mortmain have been received, and considered the law of that state, so far as they were applicable to their political condition; and that they were so far applicable " that all conveyances by deed or will, of lands, tenements, or hereditaments, made to a

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by deed, executed in the presence of two witnesses, twelve months before the death of the donor, and enrolled in chancery within six months after its execution, and be made to take effect immediately, without power of revocation. The two universities, and the scholars, upon the foundation of the colleges of Eton, Winchester, and Westminster, were excepted out of the Act.

(a) 32 Hen. VIII. c. 1. N. Y. Revised Statutes, vol. ii. p. 57, sec. 3.

(b) If corporations are limited in the purchase of lands to lands of a specific yearly value, say £200, and the value be within the sum prescribed when purchased, and the lands afterwards rise in value by good husbandry, or extraneous causes, the title of the corporation is not thereby affected, and the yearly value at the time of the purchase is all that the limitation requires. This is the just and equitable rule.[2] 2 Inst. 722.

(c) 3 Binney's Rep. App. 626. The statutes of mortmain apply, in Pennsylvania, only so far as they prohibit dedications of property to superstitious uses, or grants to corporations without a statutory license. Methodist Church v. Remington, 1 Watts's Rep. 218.

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[1] See The Warden, &c. v. Southeastern Co. 13 Eng. L. & Eq. 240; Bostock v. N. Staffordshire Railway Co. 32 Eng. L. & Eq. 101. A municipal corporation, having power to hold estate real and personal for its public use, cannot hold lands beyond its boundaries for a highway. Riley v. City of Rochester, 5 Seld. 64.

[2] The law was so declared in the great case of Bogardus v. Trinity Church, 4 Sandf. Ch. R. 634. If, at the time of the grant, the income exceed the prescribed limit, it is a question between the corporation and the sovereign power, of which third persons cannot avail themselves.

body corporate, or for the use of a body corporate, were void, unless sanctioned by charter or act of assembly." (*a*) In the other states it is understood that the statutes of mortmain have not been reënacted or practised upon; and the inference from the statutes creating corporations and authorizing them to hold real estate to a certain limited extent is, that our statute corporations cannot take and hold real estate for purposes foreign to their institution. (*b*)[1] As we have no general statutes of mortmain, perhaps a legally constituted corporation in another state can purchase and hold lands *ad libitum* in New York, provided their charter gave them the competent power. (*c*)[2] A corpo-

(*a*) By the statute in Pennsylvania of 6th of April, 1833, passed since the declaration of the judges mentioned in the text, all purchases of land by any corporation, or by any person in trust for one, without the license of the commonwealth, are made subject to forfeiture, and the same penalty extends to all lands held by corporations existing in other states, either directly or through the medium of trustees or feoffees. Purdon's Dig. 350. But in Runyan *v.* Lessee of Coster, 14 Peters, 122, it was adjudged that a corporation of another state, authorized to purchase and hold lands in Pennsylvania or elsewhere, is competent to purchase and hold lands in that state, subject, nevertheless, to be devested of the estate, and to a forfeiture of it to the state of Pennsylvania, whenever that state thinks proper to institute process for that purpose. The corporation holds a defeasible estate if held without a license procured from Pennsylvania.

(*b*) Parker, Ch. J., in First Parish in Sutton *v.* Cole, 3 Pick. Rep. 232. The provincial statute of Massachusetts of 28 Geo II. was commonly called a statute of mortmain. It was virtually repealed by the statute of 1785, which was a substitute for it; and it has been held, that a bequest in trust for pious and charitable uses was not void. Bartlet *v.* King, 12 Mass. Rep. 537. The Revised Statutes of Massachusetts of 1836, continue the same provision, and deacons and churchwardens of Protestant churches are made bodies politic, competent to take donations for their churches, and for the poor thereof. Revised Statutes, part 1, tit. 8, sec. 39. The British Mortmain Acts were never recognized as the law of Virginia or Kentucky. Robertson, Ch. J., 4 Dana, 356. Lathrop *v.* Commercial Bank of Scioto, 8 Dana, 114. In Louisiana, substitutions and *fidei commissa* are abolished. Civil Code, art. 1507. The object was to prevent property from being placed out of commerce, but it does not apply to naked trusts to be executed immediately.

(*c*) This is declared to be the law in Kentucky. Lathrop *v.* Commercial Bank of Scioto, 8 Dana, 114. The decision in that case goes to establish the doctrine, that a

[1] But it is presumed to be held or conveyed for corporate purposes until the contrary is proved. Farmers' L. & T. Co. *v.* Curtis, 3 Seld. 466. See State *v.* Mansfield, 3 Zabr. 510; State *v.* Newark, 1 Dutch. 315.

[2] State *v.* B. C. & M. R. R. Co. 25 Vt. 433. Steamboat Co. *v.* McCutcheon, 13 Penn. 13. Thompson *v.* Swoope, 24 Penn. 474.

ration may take a mortgage upon land by way of security for loans made in the course and according to the usage of its lawful operations; or in satisfaction of debts previously contracted in the course of its dealing. Such Acts are generally provided for in the charters of incorporation; and without such a special authority, it would seem to be implied in the reason and spirit of the grant, if the debt was *bonâ fide* created in the regular course of business. (*a*)

2. *To sue and be sued.*

Corporations have a capacity to sue and be sued by their corporate name. (*b*)[1] Private moneyed corporations are not *only liable to be sued like private individuals in assumpsit for breaches of contract, but they may be sued *284

corporation of another state or nation can contract and sue on contracts made by its agent in Kentucky, provided they be such as its charter authorizes, and consistent with the local law and policy of the state; and a corporation of another state can take and hold lands by purchase, mortgage, or devise, when consistent with its charter, and not denied by positive law. This liberal and enlightened decision was fully considered and ably sustained.

(*a*) Silver Lake Bank *v.* North, 4 Johns. Ch. Rep. 370. Baird *v.* Bank of Washington, 11 Serg. & Rawle. 411.[2]

(*b*) But individual members of a corporation cannot, by a bill in equity, sue for corporate claims without the consent of the corporation; and if the corporation neglect their rights and duties, and individual corporators wish for redress, they must at least make the corporation a party defendant. Hersey *v.* Veazie, 24 Maine Rep. 1.[3]

[1] One state, *as a corporation*, may institute a suit in another. Hines *v* The State of North Carolina, 10 Smedes & Marsh. R. 529. Judgment may be rendered against a corporation upon an indictment, upon default of appearance, after due notice to appear. Boston C. & M. R. R. *v.* State, 32 N. H. 215.

A right to sue includes a right to refer. Alexandria Canal Co. *v.* Swann, 5 How. U. S. 83. Brady *v.* The Mayor, &c. of Brooklyn, 1 Barb. S. C. Rep. 584. A suit will not lie against a corporation for a dividend, without a previous demand. State *v.* Baltimore & Ohio R. Co. 6 Gill, R. 363.

[2] Farmers' L. & T. Co. *v.* Clowes, 4 Edw. C. 575.

[3] As to the power of a court of equity over corporations, at the suit of a single stockholder, see Salomons *v.* Laing, 12 Beav. 339; Dodge *v.* Woolsey, 18 How. U. S. 331; Kean *v.* Johnson, 1 Stockt. 401; Hodges *v.* Screw Co. 3 R. I. 9; R. R. Co. *v.* Harris, 27 Miss. 517; R. R. Co. *v.* Wheeling, 13 Gratt. 40. As to how far single stockholders are bound by acts of the corporation beyond its powers or modifying its original charter, see above cases and *ex parte* Johnson, 31 E. L. & Eq. 430; Insurance Co. *v.* Connor, 17 Penn. 136; Insurance Co. *v.* Hobart, 2 Gray, 543. The acceptance of an amendatory Act changing materially the charter, does not bind a non-assenting member. R. R. Co. *v.* Harris, 27 Miss. 517.

by a special action on the case for neglect and malfeasance and breaches of duty, and in actions of trespass and trover for damages resulting from trespasses and torts committed by their agents under their authority; and the authority of such agents need not be under seal. (a) From their inability to be arrested,

(a) Yarborough v. The Bank of England, 16 East's Rep. 6. Smith v. B. & S. Gaslight Co. 1 Adolph. & Ellis, 526. Maund v. Monmouth Canal Co. 1 Car. & Marshman, (606,) 330, Phil. ed. Townsend v Susquehanna Turnpike, 6 Johns. Rep. 90. Gray v. Portland Bank, 3 Mass. Rep. 364. Chestnut Hill Turnpike v. Rutter, 4 Serg. & Rawle, 6. Fowle v. Common Council of Alexandria, 3 Peters's U. S. Rep. 398. Rabassa v. Orleans Navigation Co. 5 L'a Rep. 461. Shaw, Ch. J., 19 Pick. Rep. 516. Rector of the Ascension v. Buckhart, 3 Hill, 193. Angell & Ames on Corporations, pp. 385–391, 3d edit. Mayor of New York v. Bailey, 2 Denio, 433. In Ohio, it has been adjudged that corporations are liable, like individuals, for injuries done, as by cutting ditches and watercourses, in such a manner as to cause the water to overflow and injure the plaintiff's land, although the act done was not beyond their lawful powers.[1] Rhodes v. Cleveland, 10 Ohio Rep. 159. Individuals are liable, if in the commission of a lawful act, damage thereby accrues to another, provided he could have avoided it with due care. Lambert v. Bessey, T. Raym. 421. A railroad company is not responsible for a building set on fire and destroyed by a spark from a railroad engine, *provided* there was no negligence on the part of the company, and there was the exercise of due care and skill. The damage was the unavoidable and casual result of the performance of a lawful act.[2] Burroughs v. Housatonic R. R Co. 15 Conn. Rep. 124. S. P. *infra*, vol. iii 436.

[1] The same doctrine is established in New York. Hay v. The Cohoes Co. 2 Comst. R. 159. (S. C. 3 Barb. S. C. Rep. 42.) Tremain v. Same, Id. 163. As to the liability of corporations for the acts of their agents, see note (1,) *post*, p. 291. And Delmonico v. The Mayor, &c. of N. Y. 1 Sandf. (Law) R. 222. McCombs v. Town Council of Akron, 15 Ohio R. 474. Watson v. Bennett, 12 Barb. R. 196. Howell v. Buffalo, 15 N. Y. (1 Smith,) 512. City of Dayton v. Pease, 4 Ohio, (N. S.) 80.

[2] Railroad v. Yeiser, 8 Barr's R. 366. McCready v. South Carolina R. R. Co. 2 Strobh. R. 365. Sheldon v. Hudson R. R. R. Co. 14 N. Y. (4 Kernan,) 218. Lake Ontario R. R. Co. v. Mason, 16 N. Y. (2 Smith,) 451. Under a statute in Massachusetts, making railroads liable for injuries done to buildings by fire communicated by their engines, it was held that the corporation was liable for injuries done to a house which had been set on fire by sparks from a shop, which was destroyed by fire communicated by the engine. Hart v. Western R. R. Corporation, 13 Met. R 99. There is a similar statute in Maine, under which it has been decided that a railroad company is liable for any property set on fire by sparks from a locomotive, which is a subject of insurance, and even for growing trees. Pratt v. Atlantic and St. Lawrence R. R Co. 42 Maine, 579. In Piggot v. Eastern Counties R. Co. 3 Man. G. & Scott's R. 229, it was held that the *onus* was on the company to show due care. See, also, Huyett v. P. & R. R. 23 Penn. 373. Aldridge v. G. W. R. Co. 3 M & G. 515. Where cattle are trespassers on a railroad, their owners cannot maintain an action against the railroad company for injuries to the cattle by the passage of the trains. Vandegrift v. Rediker, 2 New Jersey R. 185. Clark v. Syr. & U. Co. 11 Barb. R. 112. But the circumstances under which the owner of cattle is liable as a trespasser differ in different jurisdictions. N. Y. & E. R. R. v. Skinner, 19 Penn. 298. C. & M. R. R. v.

corporations are to be sued by original writ or summons; and, at common law, they might be compelled to appear by distress or seizure of their property. (*a*) A foreign corporation, in the

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(*a*) The process, pleadings, and other proceedings at law and equity, in suits by and against corporations, and the competency of corporators as witnesses in suits in which the corporation is a party, are fully discussed, and with a reference, in the most ample manner, to English and American authorities, in Angell & Ames's Treatise on Corporations, ch. 18. See *infra*, p. 290. Upon judgment and execution against a corporation for a debt, its property, real and personal, may be attached or seized and sold, as in the case of individual defendants. It is the ordinary practice. Buchanan, Ch. J., in State of Maryland *v.* Bank of Maryland, 6 Gill & Johnson, 219. Slee *v.* Bloom, 5 Johnson's Chancery, 366. S. C. 19 Johnson's R. 456. Pierce *v.* Patridge, 3 Metcalf, 44. Perry *v.* Adams, Id. 51. The Queen *v.* The Victoria Park Co. 1 Adolph. & Ellis, N. S. 288. If a railroad company contracts debts which it is unable to pay, the better opinion would seem to be, that the wood and iron on the railway may be taken on execution and sold; and the purchaser acquires thereby a right of property in the articles, and may take possession of them and carry them away, though the company be thereby rendered unable to execute its corporate purpose, and may in consequence forfeit its charter. See this question very ably discussed in the American Law Magazine, vol. iv. No. 8, for January, 1845. This very point has since been decided in the State of North Carolina *v.* Rives, 5 Iredell's N. C. Rep. 297. It was held that the R. R. company's interest in land might be sold with the fixtures and materials, and the purchaser takes and holds them until the charter expires, and then the land reverts to the original proprietor. The corporate franchise cannot be sold, nor does the sale dissolve the corporation. See, also, the right to sell the fixtures, in Ranney *v.* Orleans N. Company, 6 Robinson's L. Rep. 381. But, on the other hand, in Winchester and L. Turnpike Road Company *v.* Vimont, 5 B. Monroe, 1, it was adjudged that a turnpike road was not the subject of sale, even under a decree in chancery, to pay debts. The *stock* belonged to individuals, and not to the company. The *mere road* belonged to the company as a right of way only for particular uses, and when it ceases to be thus used, the land reverts to the grantors. The purchaser at such a sale would not acquire any valuable right, for corporate powers would not follow the purchase. A sale of the road would not carry a right to the tolls, for that would be the sale of a chose in action, which cannot be thus effected. The only proper remedy for the creditor under this decision, if not under that in the preceding case, is by decree, applying by a receiver the net tolls to the payment of the creditor. In Pennsylvania, corporation franchises cannot be sold on execution; but under their sequestration Act of 16th June, 1836, though turnpike roads, railroads, and canals may be the subject of sequestration for debt, yet where the public have an interest in them, the court may order that the revenues be applied in the first place to keep the works in repair. The Susquehanna Canal Company *v.* Bonham, 9 Watts & Serg. 27. At common law, the first process or summons against a corporation was to be served on

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Patchin, 16 Ill. 198. C. H. & D. R. R. *v.* Waterson, 4 Ohio St. R. 424. See, further, as to liability for negligence by railroads, Marsh *v.* New York & E. R. Co. 14 Barb. R. 364; Willetts *v.* Buffalo R. Co. 14 Barb. R. 585; Munger *v.* Tonawanda R. Co. 4 Comst. R. 349; Brand *v.* Schenectady & T. Co. 8 Barb. R. 368; Phil. & Read. R. *v.* Derby, 14 How. U. S. 468; C. C. & C. R. Co. *v.* Elliot, 4 Ohio St. R. 474; Trow *v.* Vt. C. R. R. Co. 24 Vt. 487.

character of its members as aliens, (unless they be alien enemies,) may sue in the federal courts. (*a*) They may sue upon a mortgage taken upon lands as security for a debt. (*b*) *285 The same rule, allowing corporations of one state *to contract and sue in their corporate name in another,

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the mayor, president, or other head officer. The statute law of New York (N. Y. Revised Statutes, vol. ii. p. 457) has simplified the common-law proceeding, by directing that the writ, or first process, against a body corporate, be served on the president, presiding officer, cashier, secretary, or treasurer; and if the process be returned served, that the plaintiff, instead of being driven to compulsory and vexatious steps to compel an appearance by *distringas*, may enter an appearance for the defendants, of course, and proceed as in cases of personal actions against natural persons. The Revised Codes of Virginia, (1 R. C. 1819,) and of North Carolina, (1 R. S. 1837,) have a similar provision for the service of process on corporations. 1 Robinson's Pr. 134. In Connecticut, corporations are liable to the process of foreign attachment, and the officers can be made parties, and held to answer on oath. Knox *v.* Protection Ins. Co. 9 Conn. Rep 430. See Brumly *v.* Westchester M. B. So. 1 Johns. Ch. Rep. 366, S. P So, in the province of New Brunswick, by statute of 6 Wm. IV. c. 33, a writ of summons is substituted for the original writ, and a corporation may be proceeded against in a summary way. Kerr's N. B. Rep. 276. Corporations show by proof, on the trial, that they are a corporation. Carmichael *v.* Trustees of School Lands, 3 Howard's Miss. Rep. 84. Williams *v.* Bank of M. 7 Wendel', 539. But corporations are not liable to be sued out of the state, except upon foreign attachment *in rem*, under local statutes. Clarke *v.* N. J. Steam N. Co. 1 Story's Rep. 531. Bushel *v.* Commonwealth Ins. Co. 15 Serg. & Rawle, 176. A public municipal corporation cannot be sued out of the county in which it is situated. Lehigh County *v.* Kleckner, 5 Watts & Serg. 181. Nor can a foreign corporation be used in New York under their Attachment Act, which only contemplated the case of a liability to arrest. M'Queen *v.* M. M. Co. 16 Johnson. 6. But its property may be attached by a process *in rem.* Clark *v.* New Jersey Co. 1 Story, C. C. R. 531. A foreign corporation cannot be sued as trustee for effects in their hands, under the Attachment Act in Massachusetts. Union T. Road *v.* N. E. M. Ins. Co. 2 Mass. Rep. 37. Peckham *v.* N. Parish in H. 16 Pick. 286. But they may *in rem*; under the Attachment Act of Pennsylvania. Bushel *v.* Commonwealth Ins. Co. 15 Serg. & Rawle, 176. Angell & Ames on Corporations, 334–342, 2d edit.; and in New Hampshire and other states under their foreign attachment law, or whenever effective service can be made upon it or its property. Libbey *v.* Hodgdon, 9 N. H. Rep. 394. Martin *v.* Bank of Alabama, 14 L'a R. 415. U. S. Bank *v.* Merchants' Bank, 1 Rob. Va. R. 573.

(*a*) Society for Propagating the Gospel *v.* Wheeler, 2 Gall. Rep. 105. Henriques *v.* Dutch W. India Co. 2 L. Raym. 1535.

(*b*) Silver Lake Bank *v.* North, 4 Johns. Ch. Rep. 370. It is now settled by statute, (N. Y. Revised Statutes, vol. ii. p. 457,) that a foreign corporation may, upon giving security for the payment of the costs of suit, prosecute in the courts of the state, in the same manner and under the same checks as domestic corporations. A state is a corporation, and may sue in another state. Delafield *v.* The State of Illinois, 2 Hill's N. Y. Rep. 159. Angell & Ames on Corporations, 3d edit. 376.

has been declared in several of the other states, and may be now considered as the general law of the land. (a)[1]

(a) Williamson v. Smoot, 7 Martin's L'a Rep. 31. N. Y. Firemen Ins. Co. v. Ely, 5 Conn. Rep. 560. Portsmouth Livery Company v. Watson, 10 Mass. Rep. 91. Taylor v. Bank of Alexandria, 5 Leigh, 471. Bank of Edwardsville v. Simpson, 1 Missouri Rep. 184. Lathrop v. Commercial Bank of Scioto, 8 Dana, 114. Stewart v. U. S. Ins. Co. 9 Watts's Rep. 126. Bank of Washtenaw v. Montgomery, 2 Scammon's Rep. 422. Bank of Augusta v. Earle, 13 Peters's Rep. 519–591. Guaga Iron Co. v. Dawson, 4 Black. (Indiana) Rep. 202. Bank of Marietta v. Pindall, 2 Randolph's Rep. 465; but in this last case it was held, that the bank of another state could not enforce a *primary* contract made in Virginia. A foreign corporation is permitted to sue in the English courts. Henriques v. Dutch W. India Co. 2 Lord Raym. 1532. S. C. 1 Str. 612. 2 Ibid. 807. National Bank of St. Charles v. De Barnales, 1 C. & Payne, 569. Angell & Ames on Corporations, 314, 315, 2d ed. So, a sovereign may sue in England, in equity as well as at law. Hullett v. King of Spain, 1 Dow & Clarke's Rep. 169. S. C. 3 Simons, 338. Brown v. Minis, 1 M'Cord's S. C. Rep. 80. In this case a shade of doubt was thrown over the question, but there was no decision. In the case above mentioned, from 2 Randolph, the court held, that as it was the policy of Virginia to restrain all banking operations by corporations not established by their own laws, a bank in Ohio could not be permitted to establish an agency in Virginia for discounting notes, or carrying on other banking operations, nor could an action be sustained in Virginia by the bank on a note thus acquired. This limitation to the general rule, that a foreign corporation may sue, is the same in effect as that prescribed by the New York statute, and which will not allow the corporation of any other state or country to do any act, or maintain a suit on any contract arising therein, which is not allowed to be done by any domestic corporation. It was in this view that the court, in the case of Randolph, held that the Ohio Bank could not make a *primary* contract in Virginia, in relation to banking business, as by discounting notes, though, if the same be done in Ohio, the bank could sustain a suit thereon in Virginia. The court in Virginia raised, but did not decide the question, whether the bank in Ohio might not make a *secondary* contract in Virginia, for carrying into effect the contract originally made in Ohio. A point bearing on this was decided in the English case of Henriques, where a suit by a Dutch corporation, on a recognizance of bail taken in England, was sustained: and in the case of the Silver Lake Bank v. North, where a mortgage taken in New York on lands in that state, to secure a bank loan made in Pennsylvania, was enforced.

[1] But a corporation can only *be sued* in the jurisdiction where its business is done. N. J. R. R. Co. v. M. C. R. R. Co. 5 McL. 444. Nor does the accidental temporary presence of its officers in the foreign state give jurisdiction. Moulin v. Insurance Co. 4 Zabr. 222. This is true only where a corporation confines its business to the state in which it is created. Where it makes contracts and owns property in another state, the rule is different. Moulin v. Trenton Ins. Co. 1 Dutch. (N. J.) 57. A corporation, though a citizen for the purpose of giving the U. S. courts jurisdiction in suits with the inhabitants of other states, is not entitled under the constitution of the United States to the privileges of citizens in other states. Warren Co. v. Etna Co. 2 Paine, C. C. 501. Tatem v. Wright, 3 Zabr. 429.

(5.) *Of their right to hold to charitable uses.*

It has been a question of grave import and difficult solution, whether a corporation, instituted as a charity, could be permitted to become the *cestui que trust* of lands devised for charitable uses. Corporations are excepted out of the statute of wills in England, and in New York and most of the other states; and it has been decided that they cannot be directly devisees at law. (*a*) But in England, by the statute of 43 Eliz. ch. 4, commonly called the statute of charitable uses, lands may be devised to a corporation for a charitable use, and the Court of Chancery will support and enforce the charitable donation. The various charitable purposes which will be sustained are enumerated in the statute; and the administration of justice, in this or any other country, would be extremely defective, if there was no power to uphold such dispositions. The statute of Elizabeth has not been reënacted in New York, New Jersey, Pennsylvania, or Maryland, and probably not in any of the United States, though it may not have been abrogated in some of them; (*b*) and the inquiry then is, whether a court of equity has

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It may now be considered as a settled principle of law, that a corporation in one state or country may not only sue, but may make valid contracts in another, provided their charter warrants such contracts, and there is no *positive* disability by statute for a corporation to make such contracts in the state where they are made. As a general rule, personal rights and contracts have no locality, and the laws of comity apply in their fullest extent, between the several states of the Union. This whole doctrine was definitely established in the Supreme Court of the United States, in the case of the Bank of Augusta *v.* Earle, 13 Peters, 519, where it was held, in a clear and able opinion, delivered by the chief justice, that the purchase by a competent agent in Alabama of a bill of exchange, by an incorporated bank of another state, was a valid contract.[1] A foreign corporation may contract according to the laws in another state, and according to the rate of interest in such other state, though that rate be higher than in its own state, when neither the charter, nor the laws of such other state prohibit it. Frazier *v.* Willcox, 4 Rob. L'a R. 517.

In several of the states, banking corporations, incorporated out of the state, are prohibited by statute from exercising banking powers within it.

(*a*) Jackson *v.* Hammond, 2 Caines's Cases in Error, 337.

(*b*) The statute of Eliz. is in force in North Carolina, (1 Hawks, 96); and in Kentucky the statute of charitable uses of 43 Eliz. is held to be in force, and was never repealed; and, consequently, though there be a defect or want of *cestui que use* to take

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[1] Day *v.* Newark Man. Co. 1 Blatchford, R. 628 Mumford *v.* Am. Life Ins. Co. 4 Comst. R. 463. City Bank of Columbus *v.* Beach, 1 Blatch. R. 425.

power to execute and enforce such trusts as charities, independent of any statute, and when no statute declares them unlawful. The statute of wills merely *excepts corporations from the description of competent devisees; and there is nothing in the Act declaring it unlawful for a corporation to take for a charitable use. They are left in the same state as if the statute of wills had not been passed; and the question is, whether a court of equity may sustain and enforce a devise to or for the use of a corporation, provided the object be a charity in itself lawful and commendable. (*a*) *286

The case of *The Baptist Association* v. *Hart* (*b*) was one in which a bequest of personal property to the plaintiffs, as trustees, failed for want of an incorporation;[1] but the reasoning in the case has thrown embarrassment over this question. It was

the use, or, if the use be too indefinite and uncertain to be enforced independent of the statute, yet the Court of Chancery will obviate the difficulty, and give it effect as near the general intent as may be, under the *cy pres* doctrine. Gass and Bonta *v.* Wilhite, 2 Dana's Ken. Rep. 170. In that case it was held, that the objects and purposes of the articles of association of the people called *Shakers* were charitable and pious, and valid in law, that the statute of 43 Eliz. was *pro tanto* a revocation of the prior statutes of mortmain; and though a corporation, according to the principles of the common law, could not be seised to a use, yet, since the statute of Elizabeth, the courts have maintained devises to corporations, in trust for charitable uses; that where a trust was for a charitable use, its being a perpetuity was no objection to it; that, as there was no restraint in Kentucky similar to the Mortmain Act of 9 Geo. II, religious societies might acquire and hold property for religious purposes in other modes than that pointed out in the Act of 1814. The exception in the English statute of wills, prohibiting devises to corporate bodies, is omitted in the Kentucky statute of wills. 4 Dana, 356. In Massachusetts, the statute of 43 Eliz. c. 4, is in force so far as to determine what are gifts to charitable uses. Sanderson *v.* White, 18 Pickering, 328. It is adopted in principle and substance in Massachusetts. Going *v.* Emery, 16 Pick. 107. Burbank *v.* Whitney, 24 Pick. 153. And in Connecticut the statute of Elizabeth was virtually reënacted as early as 1702.[2]

(*a*) In the case of the Trustees of Phillips Academy *v.* King, 12 Mass. Rep. 546, it was adjudged that an aggregate corporation was capable, from its nature, unless specially disqualified, of taking and holding property as a trustee.

(*b*) 4 Wheaton, 1.

[1] Bequests to unincorporated societies are sustained, where the object is competent and the designation sufficiently clear. 2 Sandf. Ch. R. 133. Potter *v.* Chapin, 6 Paige, R. 639, 649.

[2] In Indiana, the principles of the statute of 43 Eliz. c. 4, have been adopted, and are in force, with one or two exceptions. M'Cord *v.* Ochiltree, 8 Blackford, R. 15. The statute of 43 Elizabeth is not in force in Maryland. Wilderman *v.* Baltimore, 8 Md. 551.

there said that the statute of Elizabeth did give validity to some devises to charitable uses which were not valid without the aid of the statute; and the opinion of the chief justice seemed rather to be (for there was no authoritative decision of the court on the point) that the original interference of chancery on the subject of charities, where the *cestui que trust* had not a vested equitable interest, was founded on the statute of Elizabeth; and that, independent of the statute, a court of equity would not sustain a charitable bequest, where no legal interest was vested. The accuracy of this conclusion remains yet to be established by judicial sanction; and there is a recent and direct authority against it in the case of *The Orphan Asylum Society* v. *M'Cartee*, (*a*) in which it was decided, in New York, by Chancellor Jones, after a very elaborate discussion and consideration, that a devise of lands to executors, in trust for a charitable corporation, for charitable purposes, was a legal and valid trust, to be enforced in equity. Lord Northington, in the case of *The Attorney-General* v. *Tancred*, (*b*) affirmed that devises to corporations, though void under the statute of wills, were always considered as good in equity if given to charitable uses; and that the uniform rule of the Court of Chancery, *before* as well as at and after the statute of Elizabeth, was, that where the uses were charitable, and the grantor competent to convey, the court would aid even a defective conveyance to uses. This same principle has been advanced in other cases, and by very high authority. (*c*) The weight of

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(*a*) See p. 288, note.

(*b*) 1 Eden's Rep. 10. 1 Wm. Blacks. Rep. 91.

(*c*) Sir Joseph Jekyll, in Eyre *v.* Countess of Shaftesbury, 2 P. Wms. 119. See, also, 2 Vern. Rep. 342; Lord Ch. J. Wilmot, in Attorney-General *v.* Lady Downing, Wilmot's Opinions, pp. 24, 33; 1 Bro. Rep. 15; 7 Vesey, 69; Lord Eldon, in Attorney-General *v.* The Skinner's Company, 2 Russ. R. 416; Sir John Leach, in Attorney-General *v.* The Master of Brentwood School, 1 Mylne & Keen, 376. In the case of the Attorney-General *v.* Mayor of Dublin, 1 Bligh's Rep. N. S. 347, Lord Redesdale declared that the statute of Elizabeth created no new law on the subject of charitable uses, but only a new machinery and ancillary jurisdiction. It is stated, in Duke on Uses, p. 163, that Symons sold lands, by bargain and sale, to Fleming, upon confidence to perform a charitable use, which he declared by will. The bargain was never enrolled, and yet the lord chancellor decreed a sale of the lands by the heirs, to be applied according to the limitation of the use. This was the 24 Eliz., and before the statute of charitable uses. Chancellor Walworth, in 7 Paige, 80, places reliance

English opinion and argument would seem to be in favor of an original and necessary jurisdiction in chancery, in respect to bequests and devises in trust, to persons competent to take for charitable purposes, when the general object of the charity was specific and certain, and not contrary to any positive rule of law.

The elements of the doctrine of the English chancery relating to charitable uses, are to be found in the civil law; (*a*) and it is questionable whether the English system of charities is to be referred exclusively to the statute of Elizabeth. The statute has been resorted to as a guide, because it contained the largest enumeration of just and meritorious charitable uses; and it may, perhaps, be considered rather as a declaratory law, or specification of previously recognized charities, than as creating, as some cases have intimated, (*b*) the objects of chancery juris-

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on this case as evidence of the common-law jurisdiction of chancery over charitable uses. Lord Hardwicke, in Attorney-General *v.* Middleton, 2 Vesey, 327, held, that before and independent of the statute of Elizabeth, the Court of Chancery did exercise original jurisdiction in cases of charities *at large*, and not regulated by charter. It was, in the cases of charities, afterwards provided for by the statute of Elizabeth. Lord Chancellor Sugden, in the case in Ireland of the Incorporated Society *v.* Richards, 1 Connor & Lawson, 58, S. C. 1 Drury & Warren R. 258, reviews and analyzes all the cases, and concludes that there was an inherent jurisdiction in chancery existing before, after, and at the time of the statute of 43 Eliz., sustaining devises to charitable uses. though void at law.

(*a*) Code, lib. 1, tit. 2, sec. 19, 26; tit. 3, sec. 38. Dig. 30, tit. 1. Ib. 33, 2, 16. Strahan's note to Domat, b. 1, tit. 1, sec. 16. Swinburne, part 6, sec. 1. 2 Domat, b. 3, tit. 1, sec. 6; b. 4, tit. 2, sec. 2, 6; b. 3, tit. 1, sec. 6. Lord Thurlow, in White *v.* White, 1 Bro. Rep. 12. By a rescript of the Emperor Diocletian, corporations could not take real estate without special license; and Gibbon, who refers to the rescript of Diocletian, says, that there were several laws under the Roman emperors enacted with the same design as the English statutes of mortmain. Gibbon's Hist. vol. ii. 345. He alludes, however, to several instances in which those laws had been suspended in favor of Christian charities. The edict of Constantine (as cited from the Theodosian Code by the assistant vice-chancellor, in his able and learned opinion on the subject, in Wright *v.* The Trustees of the Methodist Episcopal Church, 1 Hoffman's Rep. 246) gave legality to legacies to the Christian church, and broke down the Roman statutes of mortmain. Legacies to pious uses became afterwards privileged in the Roman law, and their uncertainty was no objection to their validity. Charities have their foundation in Christianity. A religious purpose is a charitable purpose. Lord Langdale, 1 Keen, 233. Their element is Christian benevolence, or an enlarged love of human kind, without regard to selfish considerations, or even the relations of blood, or affinity, or friendship.

(*b*) 1 Ch. Cas. 134, 267. 6 Dow's Rep. 136.

diction over charities. If the whole jurisdiction of equity over charitable uses and devises was grounded on the statute of Elizabeth, then we are driven to the conclusion that, as the statute has never been reënacted, our courts of equity in this country are cut off from a large field of jurisdiction, over some of the most interesting and meritorious trusts that can possibly be created and confided to the integrity of men. It *288 would appear from the preamble * to the statute of Elizabeth, that it did not intend to give any new validity to charitable donations, but rather to provide a new and more effectual remedy for the breaches of those trusts. (a)

(a) The statute defined the charities which chancery would protect, and which were to be enforced; but the better opinion is, that it left the jurisdiction as it existed prior to the statute, untouched. In Dashiell v. Attorney-General, 5 Harr. & Johns. 392, it was decided, after an able discussion, that, independent of the statute of 43 Eliz., (and which had not been adopted in Maryland,) a court of chancery cannot sustain and enforce a devise to charitable uses, which would, without the statute, have been void at law, as vague and indefinite. The same decision was made in Virginia, in Gallego v. The Attorney-General, where the statute of 43 Eliz. was repealed. 3 Leigh's Rep. 450.[1] Janey's Executor v. Latane, 4 Ibid. 327. See, also, Story, J., in 3 Peters's U. S. Rep. 494, S. P. But in Whitman v. Lex, 17 Serg. & Rawle, 88, it was held, that a bequest to St. Michael and Zion churches in Philadelphia, the interest to be laid out in bread annually for ten years, *for the poor of the Lutheran congregation*, was a valid bequest. That case established that a trust in favor of an incorporated, religious, or charitable society, was an available one; and the same principle was declared in the case of the Mayor and Corporation of Philadelphia v. Elliott, 3 Rawle's Rep. 170, and by Mr. Justice Baldwin, in the case of Sarah Zana's will, decided in the Circuit Court for Pennsylvania, 1833, and cited in 2 How. U. S. 195, 197. Though the statute for charitable uses of 43 Eliz. was not extended to Pennsylvania, yet the principles adopted in chancery, in the application of that statute, applied as part of the common law. The Supreme Court of Pennsylvania, in Zimmerman v. Anders, 6 Watts & Serg. 218, declared that a devise of real estate to an unincorporated association for religious purposes, but incorporated after the testator's death, was good, and that the conservative provisions of the statute of Elizabeth, and charitable uses supported before that statute and beyond it, are in force there. So in the American Bible Society v. Wetmore, 17 Conn. R. 181, it was admitted as a rule of equity to recognize and protect charities not incorporated, in their interests in bequests and devises, though not incorporated, but remaining in abeyance. See Inglis v. Sailors' Snug Harbor, 3 Peters's R. 99. Where the *object was defined*, and the instrument not inadequate, they give relief to the extent of the English chancery. The bequest, in the case in 9 Vesey, 399, would be good there. It is immaterial whether the person to take be *in esse* or not, or how uncertain the objects

[1] Wheeler v. Smith, 9 How. U. S. 55.

(6.) *Their powers to make contracts.*

It was an ancient and technical rule of the common law, that a corporation could not manifest its intentions by any

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may be, provided there *be a discretionary power vested anywhere* over the application of the testator's bounty to these objects. If the intention sufficiently appears on the bequest, it would be held valid. But where the particular charitable object is not specified, or the charitable purpose in the channel of the testator's intention cannot be effected, there is no case in Pennsylvania in which the courts have undertaken to make new channels for the trust on the doctrine of *cy pres*, though there might be trustees willing and competent to act. Report of the Pennsylvania Commissioners on the Civil Code, Jan. 1835. *Uncertainty of individual* object would seem to be a characteristic of charity, for *personal or individual* certainty has often been held fatal to it.[1] The cases to this point are cited by Mr. Binney, in his argument in the great will case referred to in a subsequent page. The decree in the case of the Orphan Asylum Society *v.* M'Cartee, was reversed, on appeal to the Court of Errors of New York; (9 Cowen's Rep. 437;) but it was on the ground that the devise to the corporation was *direct*, and not a *trust* for the corporation; and the opinion of Chancellor Jones, on that point, remains undisturbed. The question relative to the jurisdiction of chancery over devises to charitable uses, remains to be definitely settled in this country. See *infra*, vol. iv. p 503. In Moore *v.* Moore, 4 Dana's Ken. Rep. 357, it was held, that a court of equity, without the aid of any statute, may enforce a trust, whenever it is so defined or described by the donor as to enable the court, consistently with the rules of law, to ascertain and apply it to the objects intended; and where, in such case, there is no trustee appointed by the will, the court will act as trustee and appoint one. The chancery jurisdiction, whether a trust was deemed a charity or not, had been established in England prior to the statute of 43 Eliz. It was further considered that the statute of Elizabeth, so far as it gave *validity* to numerous charitable gifts and bequests which would otherwise be void, was in force in Kentucky; but so far as it related to the *remedy*, when no specific application existed or had failed, by authorizing the appropriation, upon the civil law doctrine of *cy pres*, of the charity to some suitable and congenial purpose of charity, it was not applicable to our institutions, or in force. In this last case, the equity jurisdiction over charitable bequests and trusts was ably and learnedly discussed by Ch. J. Robertson, in delivering the opinion of the court; and in the case of Potter *v.* Chapin, 6 Paige's Rep. 639, it was held, that the Court of Chancery would sustain a gift or bequest, or dedication of personal property to public or charitable uses, if the same be not inconsistent with local law or public policy, and where the object of such gift or dedication is specific and capable of being carried into effect according to the intention of the donor. Chancellor Walworth said, that the decision in the case of the Baptist Association *v.* Hart's Executors, 4 Wheaton's Rep. 1, was generally admitted to be wrong. That decision was, that the Baptist Association was not incorporated; that the indi-

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[1] As to bequests void for uncertainty, see Second Congregational Society, &c. *v.* First Congregational Society, &c. 14 N. Hamp. R. 315. Wade *v.* The American Colonization Society, 7 Smedes & Marsh. R. 663. Bridges *v.* Pleasants, 4 Ired. Eq. R. 26. White *v.* University, Id. 19. Pickering *v.* Shotwell, 10 Barr's R. 23. Owens *v.* Missionary Society, 14 N. Y. (4 Kernan,) 380.

personal act or oral discourse, and that it spoke and acted only by its common seal. (a) Afterwards the rule was relaxed,

vidual associates could not take as trustees, they being a body vague and uncertain; and that no legal interest vested; and that legacies to charities were sustained in England under the statute of Elizabeth only. Again, in the case of the Dutch Church in Garden-street v. Mott, 7 Paige, 77, it was decreed, that the Court of Chancery had an original jurisdiction to enforce and compel the performance of trusts for pious and charitable uses, when the devise or conveyance in trust was made to a trustee capable of taking the legal estate.

In the case of Milne v. Milne, 17 L'a Rep. 46, under the will of Alexander Milne, in which legacies were left to two public charitable asylums, to be, after the death of the testator, incorporated and established at Milneburgh, it was held that the courts were bound to aid in carrying out the intention of the will. The legacies were conditional, and took effect when the corporations were created, by way of executory devise. Also, in the case of Executors of Burr v. Smith, 7 Vermont Rep. 241, a bequest of money to certain unincorporated societies was held good, and that there was a jurisdiction in equity independent of the statute of Elizabeth; and so, again, in Sanderson v. White, 18 Pickering, 328, it was held that if trustees in a charity case, and having visitatorial powers, are guilty of a violation of law, they may be proceeded against either at law or in equity, and that equity has a general jurisdiction over abuses of all trusts. It was admitted, in the case of Inglis v. The Sailors' Snug Harbor, 3 Peters's U. S. Rep. 99, that a bequest to an association to be thereafter incorporated, will vest when the corporation is created. So, again, in Bartlett v. Nye, 4 Metcalf's R. 378, a devise of real estate to an unincorporated society, for charitable uses, was held valid, and equity would enforce the trust as against the heirs.[1]

In the case already alluded to, in 1 Hoffman's Ch. Rep. 202, the whole subject of the jurisdiction of chancery over gifts and devises to charitable uses is examined with great industry and learning, and the numerous cases before and since the statute of Elizabeth analyzed; and the assistant vice-chancellor (Hoffman) concludes that there was a jurisdiction in chancery anterior to the statute uses of 43 Eliz., over charitable uses, upon the ground of trust, and that the courts of equity in New York possess that jurisdiction. He cites several ancient cases from the precedents of bills and pleadings, printed under the direction of the English record commission in 1821, and he held it demonstrable that the statute of Eliz. did not establish a single new principle in the law of charities, and that where that statute does not exist, feoffments and grants to trustees for charitable uses were valid. Id. 244 to 265. The statute of Eliz. specified the objects which were to be deemed charities, and the English chancery enforces none other. The power to enforce such charities was in the court, by virtue of its original constitution, independent of the statute. Under the English statute of mortmain, of 9 Geo. II., ch. 36, a corporation cannot take the proceeds of lands devised or directed to be sold, nor moneys arising from the sale of land given to charitable uses by will. Id. pp. 223, 227. But in New York, a devise to trustees for the use of a corporation

(a) Davies's Rep. 121, the case of The Dean and Chapter of Fernes.

[1] Brown v. Kelsey, 2 Cush. 243.

and, for the sake of convenience, corporations were permitted to act, in ordinary matters, without deed, as to retain a

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is valid, though a direct devise of land to a corporation for charitable uses is void. The English statute of Geo. II. avoids any gift or appointment to any person of any interest or estate in lands, or of any money or benefit derived from the sale of lands, if it be for the benefit of any charitable use. (Amb. 20, 155, 635. 14 Vesey, 541. 2 Keen, 172. Seaton on Decrees, 130. 1 Hoffman's Ch. Rep. 234.) But under the N. Y. R. S. vol. ii. p. 57, sec. 3, a devise in trust to lease or sell lands and pay the proceeds to a corporation, is valid, and, as the assistant vice-chancellor observed, "the great law of charities has been saved." Mr. Binney, in a learned and able argument in the case of Vidal *v.* The City of Philadelphia, in the Supreme Court of the United States, in February, 1844, 2 How. U. S. 127, selected from the volumes of the British record commission, published in 1827, above fifty cases of bills and answers in chancery relating to charitable uses, from the reign of Richard II. to that of Elizabeth; and which went to show the fact of the exercise of chancery jurisdiction in cases of charitable uses before the 43d of Elizabeth, and that charitable uses, for general and indefinite purposes, as well as for specific charities, were assisted at that period precisely as they are now. The fact, I think, may be considered indisputable, that chancery uses are lawful uses by the common law, and that the statute of Elizabeth was only an ancillary remedy, now supplied by chancery as the rightful original tribunal for such trusts. The cases were considered in this light in the opinion of the Supreme Court as delivered by Mr. Justice Story, in the great case of Vidal *v.* Girard's Executors, above mentioned. The decision in this last case may be said to close all further discussion and controversy on the subject, and it establishes that a corporation has a legal capacity to take real or personal estate in trust for charitable, eleemosynary, and beneficial uses and purposes, in the same manner and to the same extent as a private person may do, and the trusts may be enforced in equity. It was declared that equity had an inherent jurisdiction before the statute of Eliz., upon the ground of the common law, to enforce charitable uses. Mr. Assistant Vice-Chancellor Sandford, in his very learned and able judgment in the case of Kniskern *v.* The Lutheran Churches, 1 Sandford's Ch. R. 439, recognizes the same doctrine; and I refer to that case for the elucidation and establishment of the great principle, that courts of equity will give effect to charities directed to religious purposes, on the ground of a trust, and will see that the intent of the founder of them, for civil as well as religious purposes, be carried into effect. If a charity be created for a religious purpose, in a Christian congregation designated by the name of a sect, without any specification of the particular worship or tenets intended, the intent of the founder will be deduced from the tenets, and doctrine, and discipline of the congregation avowed and practised by its professors and worshippers at the time of the donation, and the charity will be held appropriated to such church, and to none other.[1] This case is distinguished by an exuberant display of theological

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[1] The rights and authorities of ecclesiastical corporations, both in the administration of charities and *temporalities*, and in enforcing church government, have been much discussed in later cases in New York. The People *v.* Steele, 2 Barb. S. C. Rep. 397. Miller *v.* Gable, 2 Denio's R. 492. See, also, Smith *v.* Nelson, 18 Vermont R. 511. In this last case, the relation of the ecclesiastical to the civil power is examined at large; and the opinion of Ch. J. Williams is marked by extraordinary perspicuity, precision, and strength. See, also,

*289 servant, cook, or butler. (a) The case in 12 Hen. *VII. 25, (b) was, that a bailiff, as a servant to a corporation,

learning on the subject of Lutheran creeds and faith, and for the intelligence, discretion, and logical acuteness of the assistant vice-chancellor. The same principles and conclusions of equity were stated and declared in the analogous cases of Lady Hewley's Charity, before the English courts, in The Attorney-General v. Pearson, 7 Simons, R. 290; Attorney-General v. Shore, Id. 309, note; S. C. 9 Cl. & Fin. 390, 553; 11 Simons, 615, 626, note. See, also, Angell & Ames on Corporations, 3d edit. 137-150, for a full digest of the cases on this litigated question of the power of a corporation to take as devises for charitable uses. In Shotwell v. Mott, 2 Sandford, Ch. R. 46, the learned vice-chancellor renews the discussion of the jurisdiction of the Court of Chancery over charitable uses, and he considers it as having existed at common law long prior to the time of the Tudors; that the point is now settled by judicial decisions, whether the trustees were a corporation or individuals, or the gift was to trustees by name, or merely for an object sufficiently definite and specific to be carried into effect. Id. p. 50. Until the statute of 9 Geo. II., charitable uses were protected by the common law. We inherited them from England, and our land is filled with benevolent institutions, endowed and upheld by that law; and it is clear that our statutes of *uses and trusts* never intended to cut off gifts and devises to charitable uses, but only *private* uses and trusts which had perplexed real property by their intricacies and refinements, and *public* trusts and charitable uses were not within the purview of the Revised Statutes; the statute of uses of 27 Henry VIII. ch. 10, never had any application to public charities. Id. pp. 50-53. The legal restrictions against *perpetuities* were never directed against gifts for charitable uses, or for any eleemosynary purposes. It is the policy of the law to encourage their extent and duration. Thelusson's will was not a charity, and charities are not inalienable by trustees. Attorney-General v. Hungerford, 2 Clark & Fin. 357, 374. Attorney-General v. Warren, 2 Swanston, 291, 302. Shelford on Mortmain and Charitable Uses. Dutch Church v. Mott, 7 Paige, 77. Griffin v. Graham, 1 Hawk's N. C. Rep. 96. This decision of the vice-chancellor of New York respecting charities, is spirited, luminous, and sound, and places the validity of public charities on solid foundations, and draws the just and intelligent distinction between public and private trusts and perpetuities.[1]

(a) Plowd. Rep. 91 b. 2 Saund. Rep. 305. 3 P. Wms. 423, arg., and 1 Kyd on Corporations, 260.

(b) Bro. tit. Corporations, 51.

Cammeyer v. The Corporation, &c. 2 Sandf. Ch. R. 186. Robertson v. Bullions, 9 Barb. R. 64.

The following decisions will appear remarkable to the American readers: Vice-Chancellor Knight Bruce has decided, that a legacy for the best essay on Natural Theology, demonstrating its evidence and its adequacy as a system of universal religion, was void, as inconsistent with Christianity; and that a legacy for the best essay upon Emigration to America, was void for uncertainty. Briggs v. Hartley, Eng. Law Journal Rep. Dec. 1850, p. 416. In Chancery.

[1] There have been, since this note was written, several variant decisions in the courts of New York, on the question whether the principles of the English law as to charitable uses

could justify without being authorized by deed; but that no interest could depart from a corporation, as a lease for years, a license to take fees, and a power of attorney to make livery, without deed. So, in *Manby* v. *Long*, (*a*) it was held, that a bailiff to a corporation, for the purpose of distress, did not require an appointment in writing. In *Rex* v. *Bigg*, (*b*) the old rule was still further relaxed; and it seems to have been established, that though a corporation could not contract directly, except under their corporate seal, yet they might, by mere vote, or other corporate act, not under their corporate seal, appoint an agent, whose acts and contracts, within the limit of his authority, would be binding on the corporation. In a case as late as 1783, (*c*) it was held, that the agreement of a major part of a

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In England, if there be no trustees, and the object is wholly undefined, the king administers the charity as *parens patriæ*; but with us the information of the attorney-general may be the appropriate remedy, or the executors or trustees may apply directly to the court for direction, as in the case of Wright *v.* The Trustees of the Methodist Episcopal Church, 1 Hoffman's Ch. R. 202. And it seems to be understood that the rents of the land accruing between the death of the testator and the sale of the lands, go to the heir and not to the charity. Ibid. 266.

In North Carolina, on the other hand, it was held, that a bequest to a number of persons in their aggregate capacity, but not incorporated, and when the object of the bequest was wholly indefinite, was void. The English doctrine of charities, by which such bequests were to be executed *cy pres*, was deemed unsound, and not the equity law in that state. Holland *v.* Peck, 2 Iredell's Eq. 255.

(*a*) 3 Lev. Rep 107. Smith *v.* B. & S. Gas-Light Company, 3 Neville & Manning, 771. 1 Adolph. & Ellis, 526, S. C.

(*b*) 3 P. Wms. 419.

(*c*) Maxwell *v.* Dulwich College, cited in 1 Fonb. Tr. 296, note. But in Carter *v.* Dean and Chapter of Ely, 7 Simons, 211, the authority of that case as a precedent was very much questioned, and the vice-chancellor considered it as resting on its particular and singular circumstances, and that it did not in the least disturb the settled rule of law, that eleemosynary and ecclesiastical corporations were not bound by any-

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have been abrogated, or essentially modified by the Revised Statutes, particularly by the statutes of uses and trusts. The decision of the Court of Appeals seems to be in accordance with the views expressed in the Author's note. Williams *v.* Williams, 4 Seld. 525.

The Supreme Court and the Superior Court of New York considered the Revised Statutes as applying to and governing charitable uses, as well as private trusts. Ayers *v.* Methodist Church, 3 Sandf. S. C. Rep. 351. Yates *v.* Yates, 9 Barb. R. 324. Andrew *v.* New York Bible and Prayer-Book Society, 4 Sandford's S. C. R. 156.

The power of the courts to change the administration of a charity on the doctrine of *cy pres*, is considered in Harvard College *v.* Society for Promoting Theological Education, 3 Gray, 280.

corporation, entered in the corporation books, though not under the corporate seal, would be decreed in equity. In *Yarborough* v. *The Bank of England*, (a) it was admitted that a corporation might be bound by the acts of their servants, though not authorized under their seal, if done within the scope of their employment. At last, after a full review of all the authorities, the old technical rule was condemned in this country as impolitic, and essentially discarded; for it was decided by the Supreme Court of the United States, in the case of *The Bank of Columbia* v. *Patterson*, (b) that whenever a corporation aggregate was acting within the range of the legitimate purpose of its institution, all parol contracts, made by its authorized agents, were *express* and binding promises of the corporation; and all duties imposed upon them by law, and all benefits conferred at *290 their request, raised *implied* *promises, for the enforcement of which an action lay. (c)[1] The adjudged cases

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thing in the shape of an agreement regarding their lands, unless it was evidenced by a deed or writing under their corporate seal.

(a) 16 East's Rep 6.

(b) 7 Cranch, 299 Many v. Beekman Iron Co. 9 Paige, 188, S. P.

(c) It was held by Lord Mansfield, in the case of The King v. The Bank of England, Doug. 523, that *assumpsit* would lie against a corporation for refusal to transfer stock; and the same point was ruled by the Supreme Court of New York, in the case of Kortright v. Buffalo Commercial Bank, 20 Wendell, 91, and affirmed on error, 22 Ibid. 348. It may now be considered as settled law, that an action of assumpsit will lie against a corporation on an implied promise. See the numerous cases referred to in Angell & Ames on Corporations, 368, 382–385, 3d edit. So a special action on the case will lie against a corporation for neglect or breaches of duty. Trover and trespass will also lie against a corporation in certain cases.[2] Ibid. 330–333. So, all corporations, whether public or private, may issue negotiable paper for a debt con-

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[1] See Gassett v. Andover, 21 Vermont R. 343. Sheldon v. Fairfax, Id. 102. Haynes v. Covington, 13 S. & M. 408. Ross v. City of Madison, 1 Smith's Ind. 98. Butts v. Cuthbertson, 6 Geo. R. 166.

[2] In Maund v. The Monmouthshire Canal Co. 4 Man. & Grang. R. 452, it was held that trespass might be maintained against a corporation.

A foreign corporation, conducting a railroad within the state of New Jersey, is liable for injuries equally with a domestic one. Austin v. N. Y. and E. R. R. Co. 1 Dutch. 381. In Connecticut, it is held, that an action for malicious prosecution lies against a corporation. Goodspeed v. Bank, 22 Conn. 530. *Contra*, in Missouri, Childs v. Bank, 17 Mis. 213. A corporation illegally disturbed in the exercise of its franchise by another corporation, may maintain a bill enjoining the disturbance as a nuisance. B. & L. R. R. v. S. & L. R. R. et al. 2 Gray, 1; and see Newark Plank Road Co. v. Elmer, 1 Stoctk. 754.

in England, and in Massachusetts, were considered as fully supporting this reasonable doctrine; and that the technical rule that a corporation could not make a promise except under its seal, would be productive of great mischiefs. As soon as it was established that the regularly appointed agent of the corporation could contract in their name without seal, it was impossible to support the other position. Afterwards, in *Fleckner* v. *United States Bank*, (*a*) it was decided, by the same court, that a bank, and other commercial corporations, might bind themselves by the acts of their authorized officers and agents, without the corporate seal. Whatever might be the original correctness of the

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tracted in the course of their proper business. Kelley *v.* Mayor, &c. of Brooklyn, 4 Hill's N. Y. Rep. 263.[1] In the case of Regina *v.* A Railroad Company, Q. B., June, 1846, it was adjudged in the Q. B., after a learned discussion, that an indictment would lie against a corporation aggregate for a misfeasance.[2] The proper punishment is the assessment of a fine. It seemed to be assumed in that case as undeniable, that a corporation was indictable for a wrongful omission of duty. In this country it is the well-settled and familiar practice, that *quasi* corporations, created by law for purposes of public policy, are subject to indictment for breach or neglect of duty. Mower *v.* Leicester, 9 Mass. R. 247. Riddle *v.* Locks and Canals, 7 Mass R. 169. See, also, Angell & Ames on Corporations, 3d edit. pp. 391–394.

It may properly be observed, while on the responsibility of corporations, that it is a settled principle that corporations are subject to taxes and assessments as owners and occupiers of land and other property as individuals, when their charters contain no stipulation of exemption. Spencer, Ch. J., in the matter of M'Queen *v.* Middletown M. C. 16 Johnson, 7. Clinton Wool & C. M. Co. *v.* Morse & Bennett, cited by Ch. J. Thompson, in 15 Johnson, 382. Ontario Bank *v.* Bunnell, 10 Wendell, 186. Bank of Watertown *v.* Assessors, &c., 25 Wendell, 686. Providence Bank *v.* Billings 4 Peters, 514. People *v.* Supervisors of N. Y., 18 Wendell, 605. People *v.* Supervisors of Niagara, 4 Hill, N. Y. Rep. 20. See, also, *supra*, vol. i. pp. 424, 428; and see. also, Angell & Ames, 3d edit. pp. 427, 428, 429, 431, and ch. 13, where the cases are digested, and the subject discussed fully and ably.

(*a*) 8 Wheaton, 338.

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[1] When they have power to take a note, and hold and convey real and personal estate, they have necessarily the power to negotiate the note in their ordinary business. McIntire *v.* Preston, 5 Gilman, R. 48. For the liability of a corporation on an implied promise, see Beers *v.* The Phœnix Co. 14 Barb. R. 350; Clark *v.* Cuckfield Union, 11 Eng. L. & Eq. 442; Lowe *v.* London & N. W. Co. 14 Eng. L. & Eq. 18.

[2] Queen *v.* The G. N. R. Co. 9 Ad. & El. (N. S.) Rep. 315. New York Legal Observer, 1846. Commonwealth *v.* N. B. Br. Proprietors, 2 Gray, 339. State *v.* M. & E. R. R. Co. 3 Zabr. 360. State *v.* Vt. C. R. R. 1 Wms. 103. Boston, C. & M. R. R. *v.* State, 32 N. H. 215.

ancient doctrine, that a corporation could only act through the instrumentality of its common seal, when that doctrine was applied to corporations existing by the common law, it had no application to corporations created by statute, whose charters contemplate the business of the corporation to be transacted exclusively by a board of directors. The rule has even been broken in upon in modern times, in respect to common-law corporations. The acts of the board of directors, evidenced by a written vote, are as completely binding upon the corporation, and as complete authority to their agents, as the most solemn acts done under the corporate seal. With respect to banks, from the very nature of their operations in discounting notes, receiving deposits, paying checks, and other ordinary contracts, it would be impracticable to affix the corporate seal as a confirmation of each individual act. Where corporations have no specific mode of acting prescribed, the common-law mode of acting may be properly inferred. But every corporation created by statute must act as the statute prescribes; and it is a settled doctrine that a corporation may be bound by contracts not under its corporate seal, and by contracts made in the ordinary discharge *291 *of the official duty of its agents and officers.

Lastly, in the case of *Osborn* v. *United States Bank*, (*a*) it was declared, that though a corporation could only appear by attorney, the authority of that attorney need not be under seal; and the actual production of any warrant of attorney to appear in court, is not necessary in the case of a corporation more than in the case of an individual. (*b*)

(*a*) 9 Wheaton, 738.

(*b*) Nor need the appointment of the agent in the common transactions of the corporation be evidenced by the records of the corporation. Commercial Bank of Buffalo *v.* Kortright, 22 Wendell, 348. The board of directors of a corporation, for all business purposes, are the corporation, and they may authorize a committee to sell or mortgage real estate, and that power implies an authority to affix the corporate seal. Burrill *v.* Nahant Bank, 2 Metcalf's R. 163.[1]

[1] *Any* seal, put to an instrument by the authorized agent of the corporation, will make that instrument the *deed* of the corporation. Milldam Foundry *v.* Hovey, 21 Pick. 417. Porter *v.* A. & K. R. R. Co. 37 Me. 349. South Baptist Society in Albany *v.* Clapp, 18 Barb. 35. See, however, Turnpike Co *v.* McCullough, 25 Penn. 303; Stebbins *v.* Merritt, 10 Cush. (Mass.) 27; Phillips *v.* Coffee, 17 Ill. 154; Osborne *v.* Tunis, 1 Dutch. (N. J.)

That corporations can now be bound by contracts made by their agents, though not under seal, and also on implied contracts to be deduced by inference from corporate acts, without either a vote, or deed, or writing, is a doctrine generally established in the courts of the several states, with great clearness and solidity of argument; (a) and the technical rule of the

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(a) Eastman v. Coos Bank, 1 N. H. Rep. 26. Maine Stage Company v. Longley, 14 Maine Rep. 444. Warren v. Ocean Ins. Co. 16 Ibid. 439. Hayden v. Mid. Turnpike Company, 10 Mass. Rep. 397. The Proprietors of the Canal Bridge v. Gordon, 1 Pick. Rep. 297. Bulkley v. The Derby Fishing Company, 2 Conn. Rep. 252. Danforth v. Schoharie Turnpike Company, 12 Johns. Rep. 227. Dun v. Rector of St. Andrew's Church, 14 Ibid. 118. Mott v. Hicks, 1 Cowen's Rep. 513. The Baptist Church v. Mulford, 3 Halsted's Rep. 182. The Chestnut Hill Turnpike v. Rutter, 4 Serg. & Rawle, 16. Duncan, J., in Bank of Northern Liberties v. Cresson, 12 Ibid. 312. Legrand v. Hampden Sidney College, 5 Munf. Rep. 324. Colcock v. Garvey, 1 Nott. & M'Cord, 231. Bank of United States v. Dandridge, 12 Wheaton, 64. Bank of the Metropolis v. Guttschlick, 14 Peters, 19. Union Bank of Maryland v. Ridgely, 1 Harr. & Gill, 324. Poultney v. Wells, 1 Aiken's Rep. 180. Comm. Bank Orleans v. Newport Manufacturing Company, 1 B. Monroe's K. Rep. 14. Bates & Hines v. The Bank of Alabama, 2 Ala. Rep. N. S. 451. See, also, Angell & Ames on Corporations, 218, 219, 222, 2d edit. and the numerous authorities there referred to. The English law is more strict on this subject; for the *general* rule is still understood to be, that a corporation, though created by statute, cannot express its will, except by writing, under the corporate seal. The *excepted* cases are: 1. Where the acts done are of daily necessity, or too insignificant for the trouble of the seal; 2. Where the corporation has a head, as a mayor, who may give commands; 3. Where the acts to be done must be done immediately, and cannot wait for the formalities of a seal; 4. Where it is essential to a moneyed institution that they should have the power to issue notes and accept bills. East London Waterworks v. Bailey, 4 Bingham's Rep. 283. 12 J. B. Moore's Rep. 532, S. C. Tindal, Ch. J., in Fishmongers' Co. v. Robertson, 5 Manning & Granger, 131, 188. If the contract be *executed*, the general rule does not apply; and therefore *assumpsit* for use and occupation may be maintained by a corporation aggregate against a tenant who has occupied premises under them, and paid rent. The Mayor of Stafford v. Till, 4 Bing. 75. 12 J. B. Moore's Rep. 260. In Smith v. B. & S. Gas-Light Company, 3 Neville & Manning, 771, it was held that a corporation might authorize an agent to distrain, by parol; but that in cases of extraordinary acts to be done, or where an estate is to be vested or divested, there must be a deed. In Beverly v. Lincoln Gas-Light & C. Co. 6 Adolph. & Ellis, 829, it was adjudged that a corporation aggregate might be sued in *assumpsit*, on a contract by parol, and, whether expressed or implied, for goods sold and delivered. This was a relaxation of the ancient rule of the common law to the same extent as had already been made by the courts of the United States, to which the learned judge, (Patterson,) who delivered the opinion of the K. B. in that case, alluded. The English court took

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683. And it was held, in States v. Allis, 18 Ark. 269, that to bind a corporation by specialty, the corporate seal must be affixed to the instrument.

common law may now be considered as being, in a very great degree, done away in the jurisprudence of the United States. But it is equally well settled that though parol evidence be admissible to prove the agency and contracts of the agent of a corporation, (for the appointment of the agent need not be by seal in the case of ordinary contracts,) corporations, like natural

care, however, "to disclaim entirely the right or the wish to innovate on the law upon any ground of inconvenience, however strongly made out," but admitted that if the old rule had been treated by previous decisions with some degree of strictness, and if "the principle, in fair reasoning, leads to a relaxation of the rule for which no prior decisions can be found expressly in point, the mere circumstances of novelty ought not to deter us." The liberal and sound reasoning contained in this decision, with the qualified reserve accompanying it, are both to be commended. It was further declared, in Church *v.* Imperial G. L Co. 6 Adolph. & Ellis, 846, that it made no difference as to the right of a corporation to sue on a contract entered into by them without seal, whether the contract be executed or executory. In the case of The Mayor of Ludlow *v.* Charlton, 6 Mees. & Wels. 820, in the Exchequer, in 1840, Baron Rolfe gave an elaborate discussion and judgment on the question how far a corporation could be bound by a contract without their corporate seal. It was held, that the late English cases did not go so far as to explode the old rule, or to hold a corporation bound in the same manner as individuals by executed contracts. The general rule of the necessity of a seal to render a corporate contract valid still existed. The exception was limited to small matters, or those not admitting of delay, or where the rule would greatly obstruct the every-day ordinary convenience of the body corporate without an adequate object, or where the conveyance almost amounted to necessity. The power of accepting bills of exchange and issuing promissory notes came within the principle of the exception. The decisions in Beverley *v.* The Lincoln G. L. & C. Co. and in Church *v.* Imperial Gas-Light Co., were founded on the principle governing the exceptions. The decision in this exchequer case was followed by the Supreme Court of New Brunswick, in Seelye *v.* Lancaster Mill Company, Kerr's Rep. 377; and these decisions tend to narrow the doctrine maintained in our American courts. Homersham *v.* Wolverhampton Co. 4 Eng. L. & Eq. 426. Governor, &c. of Copper Miners *v.* Fox, 3 Eng. L. & Eq. 420. But as dealing in contracts with corporate bodies has become so common, and the agency of corporations of some description or other is present in the infinite business concerns of the country, it becomes very difficult to ascertain, and dangerous to mistake, any certain test by which to determine whether the transaction in the given case comes within the principle of the exception to the general rule.[1]

[1] The rule of the common law has been recently still further relaxed by the Court of Q. B., so that any contract, for goods or work necessary to the purposes of the corporation, the benefit of which has been enjoyed, is binding even if not under seal. Clark *v.* Guardians of Cuckfield Union, 11 E. L. & Eq. 442. See, also, Henderson *v.* R. M. S. Navigation Company, 32 E. L. & Eq. 167, where the statement of the exceptions to the common-law rule, contained in the opinion of Baron Rolfe, quoted *supra*, was considered too narrow, and only applicable to municipal corporations; per Erle, J., p. 172. See, also, Reuter *v.* E. Tel. Co. 37 E. L. & Eq. 189.

persons, are bound only by the acts and contracts of their agents, done and made within the scope of their authority. (a)[1]

(a) Essex Turnpike Corporation v. Collins, 8 Mass. Rep. 299. Clark v. Corporation of Washington, 12 Wheaton, 40. Bank of U. S. v. Dandridge, Ibid. 64. Leggett v. New Jersey Manufacturing and Banking Company, Saxton's New Jersey Ch. Rep. 541, April term, 1832. Bank of the Metropolis v. Guttschlick, 14 Peters, 19. As corporations act by agents, they are responsible in damages for injuries inflicted through their means. Goodloe v. City of Cincinnati, 4 Ohio Rep. 500. A special action on the case will lie for neglect of corporate duty by which the plaintiff suffers. Riddle v. Proprietors, &c. 7 Mass. Rep. 169. The powers and responsibilities resulting from corporate agents are very fully considered, and the substance of all the decisions is given in Angell & Ames on Corporations, ch. 9.

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[1] A corporation cannot be made liable for the acts of its agents, not within its corporate powers, even though such acts be ratified by the directors. McCullough v. Moss, 5 Denio's R. 567. Boom v. The City of Utica, 2 Barb. S. C. Rep. 104. See, also, Hodges v. The City of Buffalo, 2 Denio's R. 110; Noyes v. R. & B. R. R. Co. 1 Wms. 110.

And where a municipal corporation constructed, through their agents, a bridge so negligently that it fell, and the plaintiff was injured, it was held that the corporation was not liable, the Act under the authority of which the construction of the bridge was ordered being unconstitutional. The Mayor, &c. of Albany v. Cunliff, 2 Comst. R. 165.

But *generally* a corporation is liable for the negligence and unskilfulness of its agents, especially if there has been any want of due care in the selection of such agents. Grote v. The Chester, &c. R. Co. 2 Welsby, H. & Gor. Rep. 251. Mayor of N. Y. v. Bailey, 2 Denio's R. 433. See *ante*, p. [283,] and notes; see, also, The Rochester, &c. Co. v. The City of Rochester, 3 Comst. R. 463; Lloyd v. The Mayor, &c. 1 Selden, R. 369; Meares v. Com. of Wilmington, 9 Ired. R. 73; Mayor of Memphis v. Lasser, 9 Humph. R. 757; Akron v. Macomb, 18 Ohio R. 229. See *ante*, 304, [275,] n. Hickok v. Plattsburgh, 15 Barb. R. 428. Ross v. City of Madison, Smith's Ind. R. 98. Hutson v. The Mayor, &c. 5 Sandf. S. C. R. 289. Jones v. R. R. Co. 1 Wms. 399. Goodwin v. Union Screw Co. 34 N. H. 378.

As to delegation of authority by directors, see Burrill v. Nahant Bank, 2 Met. 163; Gillis v. Bailey, 1 Fost. 149. As to how far the knowledge of the president affects the corporation with notice, see Winchester v. R. R. Co. 4 Md. 231, 239. On the binding force of acts of directors beyond the chartered powers of the company, see Bargate v. Shortridge, 31 E. L. & Eq. 44, per Lord St. Leonards. As to how far the company is bound by the fraud of directors, see National Exchange Co. v. Drew, 32 E. L. & Eq. 1. As to forgery by agent, see Bank of Ireland v. Evans, Ibid. 23; Mechanics' Bank v. N. Y. & N. H. R. R. 4 Duer, 480, 3 Kern. 599. This case arose on a fraudulent certificate of stock issued by the defendants' president and transfer agent, Schuyler, and coming by assignment into the possession of the plaintiffs. The defendants were discharged by the Court of Appeals reversing the decision of the Superior Court. See *infra*, p. [621,] n. There has been recently some very stringent legislation in several of the states against the fraudulent issue of stock by the agents of corporations, making it a felony punishable by fine and imprisonment. R. S. of Me. (1857,) c. 121, § 10. N. H. Laws, (1854,) c. 1520. Mass. Laws, (1856,) c. 123. N. Y. Laws, (1855,) c. 155. See p. 621, note.

The question how far a company can invalidate its own contracts, on the ground that they are *ultra vires*, was discussed at great length in the House of Lords, in Railway Co. v. Hawks, 35 E. L. & Eq. 8.

(7.) *Of the corporate name.*

It is a general rule that corporations must take and grant by their corporate name.[1] Without a name, they could not perform their corporate functions; and a name is so indispensable a part of the constitution of a corporation, that if none be expressly given, one may be assumed by implication. (*a*) A misnomer in a grant by statute, or by devise, to a corporation, does not avoid the grant, though the right name of the corporation be not used, provided the corporation really intended it to be made apparent. (*b*) [2] So an immaterial variation in the name of the corporation does not avoid its grant; though it is not settled, with the requisite precision, what variations in the name are or are not deemed substantial. The general rule to be collected from the cases is, (*c*) that a variation from the precise name of the corporation, when the true name is necessarily to be collected from the instrument, or is shown by proper averments, will not invalidate a grant by or to a corporation, or a contract with it; and the modern cases show an increased *293 liberality *on this subject. For a corporation to attempt to set aside its own grant by reason of misnomer in its own name, was severely censured, and in a great measure repressed, as early as the time of Lord Coke. (*d*)

(*a*) Marriott & Pascall's case, 1 Leon. Rep. 163. Anon. 1 Salk. Rep. 191. 1 Blacks. Com. 474, 475. 1 Kyd on Corporations, 234, 237, 250, 253. 10 Co. 28 b, 29 b.

(*b*) Case of the Chancellor of Oxford, 10 Co. 57 b. Inhabitants *v.* String, 5 Halsted's Rep. 323.

(*c*) 1 Kyd on Corp. 236, 252. 6 Co. 64 b. 10 Co. 126 a. Road Company *v.* Creeger, 5 Harr. & Johns. Rep. 122. African Society *v.* Varick, 13 Johns Rep. 38. The Turnpike Company *v.* Myers, 6 Serg. & Rawle, 12. Woolwich *v.* Forrest, Pennington's Rep. 84. Inhabitants *v.* String, 5 Halsted's Rep. 323. First Parish in Sutton *v.* Cole, 3 Pick. Rep. 232. Angell & Ames on Corporations, 60, 61.

(*d*) Jenk. Cent. 233, case 6, 270, case 88. 10 Co. 126 a.

[1] A corporation has no power to change its name. 10 Ad. & El. N. S. 839, 844. A railway company has no power to give up the management of its line to another company. Beman *v.* Rufford, 6 Eng. L. & Eq. 106. Great Northern Co. *v.* Eastern Counties Co. 12 Eng. L. & Eq. 224. Winch *v.* Birkenhead Co. 13 Eng. L. & Eq. 506, South Yorkshire Co. *v.* Great Northern Co. 19 Eng. L. & Eq. 515. Johnson *v.* Shrewsbury Co. 19 Eng. L. & Eq. 585. Shrewsbury Co. *v.* London & N. W. Co. 21 Eng. L. & Eq. 319.

[2] Vansant *v.* Roberts, 3 Md. 119. Mere change of a corporation's name by the legislature does not affect third persons. Rosenthal *v.* Madison R. R. Co. 10 Ind. 359.

(8.) *Of the power to elect members and make by-laws.*

The same principle prevails in these incorporated societies as in the community at large, that the acts of the majority, in cases within the charter powers, bind the whole. The majority here means the major part of those who are present at a regular corporate meeting. There is a distinction taken between a corporate act to be done by a select and definite body, as by a board of directors, and one to be performed by the constituent members. In the latter case, a majority of those who appear may act; but in the former, a majority of the definite body must be present, and then a majority of the quorum may decide. This is the general rule on the subject; and if any corporation has a different modification of the expression of the binding will of the corporation, it arises from the special provisions of the act or charter of incorporation. (a) [1] The power of election, or the supplying of members in the room of such as are removed by death or otherwise, is said to be a power incident to and necessarily implied in every aggregate corpora-

(a) Rex *v.* Varlo, Cowp. Rep. 248. 1 Kyd on Corp. 308, 400, 424. 1 Blacks. Com. 478. The King *v.* Bellringer, 4 Term Rep. 810. The King *v.* Miller, 6 Term Rep. 268. The King *v.* Bower, 1 Barnew. & Cress. 492. Rex *v.* Whitaker, 9 B. & Cress. 648. *Ex parte* Willcocks, 7 Cowen's Rep. 402. Field *v.* Field, 9 Wendell's Rep. 394, 403. Gibson, J., in St. Mary's Church, 7 Serg. & Rawle, 517. See the subject of the legality and organization of corporate meetings, and all cases relating thereto, examined in Angell & Ames on Corporations, ch. 14, 452, 3d edit. The New York Revised Statutes, vol. ii. p. 555, sec. 27, have declared, that when any power, authority, or duty is confided by law to three or more persons, or whenever three or more persons or officers are authorized or required to perform any act, the power may be exercised by a majority, upon a meeting of *all* the persons so intrusted or empowered, unless special provision be otherwise made. It is also a general principle of law, of which this statute provision is partly declaratory, that in a case of mere private authority and confidence, unless provision be made to the contrary, the whole body must meet and agree in the decision; but that in matters of public concern, or in some respects of a general nature, and all meet, the act of the majority will bind. Commonwealth *v.* Canal Com. 9 Watts's Rep. 466. Green *v.* Miller, 6 Johns. Rep. 39. *Vide infra*, p. 633. On a reference to three arbiters, if all meet, the award of two is valid. Meiklejohn *v.* Young, Stuart's Lower Canada Rep. 43. But this is contrary to the general rule.[2]

[1] See Beck *v.* Hanscom, 9 Fost. 213.

[2] Kirk *v.* Bell, 12 Eng. L. & Eq. 385. See the general responsibility and powers of directors discussed in York Co. *v.* Hudson, 19 Eng. L. & Eq. 361.

tion, from the principle of self-preservation. (*a*) But it seldom happens that an opportunity is afforded for the application of this principle, because the power of election must be *294 exercised *under the modifications of the charter or statute, of which the corporation is the mere creature, and which usually prescribes the time and manner of corporate elections, and defines the qualifications of the electors. If this be not done to the requisite extent in the act or charter creating the corporation, it is in the power of the corporation itself, by its by-laws, to regulate the manner of election, and the requisite proof of the qualifications of the electors, in conformity with the principles of the charter. (*b*)

It was decided, in the case of *Newling* v. *Francis*, (*c*) that when the mode of electing corporate officers was not regulated by charter or prescription, the corporation might make by-laws to regulate the elections, provided they did not infringe the charter. (*d*) And in the case of the *Commonwealth of Pennsylvania* v. *Woelper*, (*e*) it was held, that a corporation might, by a by-law, give to the president the power of appointing inspectors of the corporate elections, and also define by by-laws the nature of the tickets to be used, and the manner of voting. All such regulations rest in the discretion of the corporation, provided no chartered right or privilege be infringed, or the law of the land

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(*a*) Hicks *v.* Town of Launceston, 1 Rol. Abr. 513, 514. 8 East's Rep. 272, n. S. C.

(*b*) 2 Kyd on Corp. 20, 30. Though the charter gives to a select body the power to make by-laws, it does not divest the body of corporations at large of the same right. King *v.* Westwood, 4 Barnew. & Cress. 781. Lovell *v.* Westwood, 2 Dow & Clark, 21. There is this distinction on the subject, that if the power of making by-laws be committed to the corporate body at large, they may delegate that power to a select body representing them; but if the power be given to a select body, they cannot delegate that power.[1]

(*c*) 3 Term Rep. 189.

(*d*) See, also, Rex *v.* Spencer, 3 Burr. Rep. 1827; 2 Kyd on Corp. 26, 31; King *v.* Westwood, 7 Bingham's Rep. 1.

(*e*) 3 Serg. & Rawle, 29.

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[1] See note (1), p. [296]. But where the power is vested in a select body, an act done by the persons composing that body, in a mass-meeting of all the corporators, is not a valid corporate act. Cammeyer *v.* United German L. Churches, 2 Sandf. Ch. R. 187. See, also, Conro *v.* Port Henry Iron Co. 12 Barb. 27, 63.

violated. It is settled that a by-law cannot exclude an integral part of the electors, nor impose upon them a qualification inconsistent with the charter, or unconnected with their corporate character. (*a*) Though in the case of elections in public and municipal corporations, and in all other elections of a public nature, every vote must be personally given; (*b*) yet, in the case of moneyed corporations, instituted for private purposes, it has been held * that the right of voting by proxy might be delegated by the by-laws of the institution when the charter was silent. (*c*) * 295

It is a question not definitely settled, whether the officers of a corporation, who are directed to be annually elected, can continue in office after the year, and until others are duly elected, in cases where the time of election under the charter has elapsed, either through mistake, accident, or misfortune; and there is no provision in the charter for the case. In the case of public officers, who are such *de facto* acting under color of office by an election or appointment not strictly legal, or without hav-

(*a*) Rex *v.* Spencer, 3 Burr. Rep. 1827. The general law on the subject of valid by-laws is well digested in 1 Woodd. Lec. 495–500. No director can be excluded by the board of directors of a banking institution from inspecting the books of the bank; and the court will, in a proper case, enforce the right by mandamus. It must, however, be in a case of a clear right, and for some just or useful purpose. The People *v.* Throop, 12 Wendell's Rep. 183. Hatch *v.* City Bank of New Orleans, 1 Robinson's L'a Rep. 470.[1] The right in this last case was considered as belonging to the individual stockholders.

(*b*) Case of The Dean and Chapter of Fernes, Davies's Rep. 129. Attorney-General *v.* Scott, 1 Vesey, 413.

(*c*) The State *v.* Tudor, 5 Day's Rep. 329. In New York, (R. S. vol. i. 604,) at the election of corporate officers in corporations of a private nature, except library, religious, and moneyed corporations, stockholders may vote by proxy. In Phillips *v.* Wickham, 1 Paige's Rep. 598, the chancellor doubts the validity of the right of voting by proxy, when the power is not given, either expressly or impliedly, in the act creating the institution. And in Taylor *v.* Griswold, 2 Green's N. J. Rep. 223, in the Supreme Court of New Jersey, after a full and learned discussion, it was held to be a principle of the common law, that where an election depended upon the exercise of judgment, the right could not be deputed; and that it required legislative sanction, before any corporate body could make a valid by-law authorizing members to vote by proxy. The authority of the case of The State *v.* Tudor, may, therefore, be considered as essentially shaken.

[1] See *infra*, p. 296, note *a*.

ing qualified themselves by the requisite tests, or by holding over after the period prescribed for a new appointment, as in the case of sheriffs, constables, &c.; their acts are held valid as respects the rights of third persons who have an interest in them, and as concerns the public, in order to prevent a failure of justice. (*a*)

This general principle has been applied to the officers of a private moneyed corporation, so far as concerns the rights of others; (*b*) and the sounder and better doctrine, I apprehend to be, that where the members of a corporation are directed to be annually elected, the words are only directory, and do not take away the power incident to the corporation to elect afterwards, when the annual day has, by some means, free from design or fraud, been passed by. (*c*)[1]

(*a*) The King *v.* Lisle, Andrew's Rep. 163. The People *v.* Collins, 7 Johns. Rep. 549. Jones *v.* Gibson, 1 N. H. Rep. 266. Johnston *v.* Wilson, 2 Ibid. 202. Anon. 12 Mod. Rep. 256. In the matter of The M. & H. Railroad Co. 19 Wendell, 135, 145. Plymouth *v.* Painter, 17 Conn. Rep. 585. The State *v.* Allen, 2 Iredell's N. C. Rep. 183. Sprague *v.* Bailey, 19 Pick. Rep. 436. In this last case it was held, that a collector of taxes was not responsible for the regularity of the town meeting, or the validity of the votes at the meeting at which the tax was granted. It is a usual and wise provision in public charters, that the officers directed to be annually appointed shall continue in office until other fit persons shall be appointed and sworn in their places.[2] This was the case in the charter granted to the city of New York, in 1686, and again in 1730. By the English statute of 1 Victoria, ch. 78, *for the regulation of municipal corporations*, it was declared that the election of persons to corporate offices should not be questioned for want of title in the persons presiding at such elections, provided such persons were in actual possession of, and had taken upon themselves the execution of the duties of such office.

(*b*) Baird *v.* Bank of Washington, 11 Serg. & Rawle, 411. Bank of the United States *v.* Dandridge, 12 Wheaton, 64. Lehigh Bridge Co. *v.* Lehigh Coal Company, 4 Rawle, 1.

(*c*) Hicks *v.* Town of Launceston, 1 Rol. Abr. 513. Foot *v.* Prowse, Mayor of Truro, Str. Rep. 625. 3 Bro. P. C. 167, S. C. The Queen *v.* Corporation of Durham, 10 Mod. Rep. 146. The People *v.* Runkel, 9 Johns. Rep. 147. Trustees of Vernon Society *v.* Hills, 6 Cowen's Rep. 23. McCall *v.* Byram Manufacturing Co.

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1 Cahill *v.* Kalamazoo Mutual Ins. Co. 2 Doug. Mich. R. 124. An election will not be annulled for prior irregularities in the election of officers *de facto*, who have acted. Smith *v.* Erb, 4 Gill R. 437. Every reasonable intendment is in favor of the regularity of the proceedings of a private corporation. M'Daniels *v.* Flower Brook M. Co. 22 Vermont R. 274.

2 R. S. of Maine, (1857,) c. 46, sec. 7. Without such a provision corporation officers do not hold over. Beck *v.* Hanscom, 9 Fost. 213.

* The statute of 11 Geo. I. c. 4, was made expressly *296 to prevent the hazard and evils of a dissolution of the corporation, from the omission to elect on the day; and it seems to admit of a question whether the statute was not rather declaratory, (for so it has been called,) and introduced to remove doubts and difficulty. (*a*) The election, when it does take place, must be had, and the assent of a majority of the corporation to any transaction concerning the corporation must be given, when the members of the corporation are duly assembled *collegialiter;* and they must act *simul et semel*, and not scatteringly, and at several times and places. (*b*)

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6 Conn. Rep. 428. Nashville Bank *v.* Petway, 3 Humph. Tenn. Rep. 522. But see Rex *v.* Poole, 7 Mod. Rep. 195; Cases temp. Hardw. 23; 2 Barnard. Rep. K. B. 447, S. C. *contra;* and the opinion of the chancellor, in Phillips *v.* Wickham, 1 Paige's Rep. 590, seems also to be *contra.* In the case of Rex *v.* Poole, (Cases temp. Hardw. 23,) Lord Hardwicke speaks doubtfully of the common law on this point: though he refers to the case of Lansdown, in Rolle's Abridgment, where an election eight days after the charter day was held good, for that the day was only directory. But he admitted that the mention of hours on the election day was merely directory, and not restrictive. In the case *Ex parte* Heath and others, 3 Hill, 42, it was held, that where a statute required an official act to be done by *a given day*, for a public purpose, it was merely *directory* as to time, and the act done on a succeeding day was held valid.

(*a*) The King *v.* Pasmore, 3 Term Rep. 238, 245, 246. By the N. Y. Revised Statutes, if any corporation shall not organize and commence the transaction of its business within one year from the date of its incorporation, its corporate powers shall cease.

(*b*) The Dean and Chapter of Fernes, Davies's Rep. 130-132. Peirce *v.* New Orleans Building Co. 9 L'a Rep. 397. In like manner, the acts of joint arbitrators, as well as all other judicial acts, must take place in the presence of each other. Stalworth *v.* Inns,[1] 13 Meeson & Welsby, 466. Moore *v.* Ex'rs of Moore, Coxe's N. J. R. 144. When a corporation election has been irregularly or illegally conducted, the regular and established common-law remedy is by motion for leave to file a *quo warranto* information. *Ex parte* Murphy, 7 Cowen, 153. Regina *v.* Alderson, 11 Adolph. & Ellis, 1. In New York, by statute, (sess. 48, ch. 325, sec. 9, and which provision was afterwards incorporated in the N. Y. R. S. vol. i. 603, sec. 5,) a more summary and easy remedy was provided. Any person aggrieved by any such corporate elections, may, on giving reasonable notice, apply to the Supreme Court, who are to proceed forthwith, and in a summary way, to hear the affidavits, proofs, and allegations of the parties, and to establish the election, or order a new election, or make such order and give such relief as right and justice may require. See the case *Ex parte* Holmes, 5 Cowen, 426, to that effect.

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1 The decision is not so strong as is said above. The court rather declined to make a decision.

The power to make by-laws is either expressly given or tacitly annexed, as being necessarily incident to corporate bodies to enable them to fulfil the purposes of their institution; and when the objects of the power and the persons who are to exercise it, are not specially defined in the charter, it is necessarily limited in its exercise to those purposes, and resides in the body politic at large.[1] It is usual, however, in the charter creating the corporation, to vest the power of making by-laws in a select body, as for instance in a board of trustees or directors. (*a*) These corporate powers of legislation must be exercised reasonably,[2] and in sound discretion, and strictly within the limits of the charter, and in perfect subordination to the constitution and general law of the land, and the rights dependent thereon. Subject to these limitations, the power to make by-laws may be sustained and enforced by just and competent pecuniary penalties. (*b*)

(*a*) Angell & Ames on Corporations, 3d edit. ch. 10.

(*b*) See the opinions of the judges in the case of The King *v.* Westwood, 7 Bing. Rep. 1, and the very elaborate opinion of the assistant vice-chancellor of New York, in Westervelt *v* Corporation of the City of New York, 2 Hoffman's Ch. Rep.; and see Angell & Ames on Corporations, ch. 10, 3d edit, where this branch of the subject is treated, and with great and exhausting research. Every corporate body has a right at common law, and without statute, to make by-laws needful for the management of the business and property of the corporation, and to regulate the duties and conduct of its officers and agents. Savage, Ch. J., in The People *v.* Throop, 12 Wendell's R. 183. Child *v.* Hudson's Bay Company, 2 P. Wms. 209. In the case of The State of Louisiana, *ex relat.* Hatch *v.* The City Bank of New Orleans, decided on appeal to the Supreme Court of Louisiana, March, 1842, it was adjudged that a stockholder and director, without a resolution of the board, had no right to inspect the stock leger or transfer-book containing the list of the stockholders.[3] See Rex *v.* Bank of England, 2 B. & Ald. 620; Rex *v.* Merchant Tailors' Company, 2 B. & Adolph. 115, cited in support of the decision; and the case of The People *v.* Throop, in 12 Wend., was cited in support of the decision of the court below. But a corporation cannot, by a *by-law*, subject to forfeiture shares of stockholders for non-payment of instalments, unless the power be expressly granted by the charter.[4] Corporations

[1] Power to suppress a house, &c., will not authorize its demolition. Welch *v.* Stowell, 2 Doug. (Mich.) R. 332. But a power given to directors to pass by-laws, will authorize a majority of them to pass by-laws. Cahill *v.* Kalamazoo Mut. Ins. Co. 2 Doug. (Mich.) R. 124, *ante*, p. [295], note (1).

[2] The reasonableness of a by-law is a question of law and not of fact. State *v.* Overton, 4 Zabr. 435.

[3] But see *contra*, *ante*, p. [295], note a.

[4] Nor impose upon them a personal liability. Trustees of Free Schools, &c. *v.* Flint, 13

*(9.) *Of the power of removal.* *297

The power of amotion or disfranchisement of a member for a reasonable cause, is a power necessarily incident to every corporation. It was, however, the doctrine formerly, that no freeman of a corporation could be disfranchised by the act of the corporation itself, unless the charter expressly conferred the power, or it existed by prescription. (*a*) But Lord Ch. B. Hale held (*b*) that every corporation might remove a member for good cause; and in *Lord Bruce's case*, (*c*) the K. B. declared the modern opinion to be that a power of amotion was incident to a corporation. At last, in the case of *The King* v. *Richardson*, (*d*) the question was fully and at large discussed in the K. B.; and the court decided that the power of amotion was incident and necessary for the good order and government of corporate bodies, as much as the power of making by-laws. But this power of amotion, as the court held in that case, must be exercised for good cause; and it must be for some offence that

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cannot impose penalties, and take redress into their own hands. Kirk *v.* Nowill, 1 Term Rep. 118. In the matter of the Long Island R. R. 19 Wendell, 37. How far and when it is in the power of the corporation to enforce by suit the payment of subscriptions for corporate stock, and make and recover assessments for the same, is fully considered, and the cases critically examined in Angell & Ames on Corporations, 3d edit. ch. 15. In Tuttle *v.* Walton, 1 Kelley's Geo. R. 43, a by-law of a corporation creating a lien on the stock of the members for their corporate debts, is valid and binding between the corporators, and even as against a purchaser at execution of the stock, *with notice of the lien*, and when the lien was *prior* in time to the lien acquired under the judgment.[1]

A *certificate of corporate stock* is transferable by a blank indorsement, which may be filled up by the holder, by writing an assignment and power of attorney over the signature indorsed. Kortright *v.* Buffalo Commercial Bank, 20 Wendell, 91.[2]

(*a*) Bagg's case, 11 Co. 99 a, 2d resolution. See, also, Sty. Rep. 477, 480; 1 Lord Raym. 391; 2 Ibid. 1566.

(*b*) Tidderly's case, 1 Sid. Rep. 14.

(*c*) 2 Str. Rep. 819.

(*d*) 1 Burr. Rep. 517.

Met. R. 539. See, also, Downing *v.* Potts, 3 Zabr. 66; Winter *v.* R. R. Co. 11 Geo. 438; K. & P. R. R. Co. *v.* Kendall, 31 Me. 470.

[1] The effect of subscriptions absolute and conditional was discussed in P. & K. R. R. *v.* Dunn, 39 Me. 587.

[2] See Dunn *v.* Com. Bank of Buffalo, 11 Barb. R. 580. As to the effect of merely formal transfers, see Sabin *v.* Bank of Woodstock, 21 Vt. 353.

has an immediate relation to the duties of the party as a corporator; for as to offences which have no immediate relation to his corporate trust, but which render a party infamous and unfit for any office, they must be established by indictment and trial at law before the corporation can expel for such a cause. In the case of *The Commonwealth* v. *St. Patrick Society*, (a) while it was admitted to be a tacit condition annexed to the corporate franchise that the members would not oppose or injure the interests of the corporate body; and that expulsion might follow a breach of the condition; yet it was adjudged, that without an express power in the charter, no member could be disfranchised unless he *had been guilty of some offence which either affected the interests or good government of the corporation, or was indictable by the law of the land, and of which he had been convicted. If there be no special provision on the subject in the charter, the power of removal of a member for just cause resides in the whole body. (b) But a select body of the corporation may possess the power, not only when given by charter, but in consequence of a by-law made by the body at large; for the body at large may delegate their powers to a select body as the representative of the whole community. (c)[1]

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The cases do not distinguish clearly between *disfranchisement* and *amotion.* The former applies to members, and the latter only to officers; and if an officer be removed for good cause, he may still continue to be a member of the corporation. (d) Disfranchisement is the greater power, and more formidable in its application; and in joint stock or moneyed corporations no stockholder can be disfranchised, and thereby deprived of his property or interest in the general fund by any act of the corporators, without at least an express authority for that purpose; (e) and unless an officer be elected and declared to hold during

(a) 2 Binney's Rep. 441. See, also, to S. P., Willcock on Mun. Corporations, 271.
(b) The King v. Lyme Regis, Doug. Rep. 149. Willcock on M. C. 246.
(c) Ibid. and 3 Burr. Rep. 1837.
(d) Angell & Ames on Corporations, 404, 3d edit.
(e) Ibid. 405. Bagg's case, 11 Co. 99.

[1] People v. Higgins, 15 Ill. 110.

pleasure, the power of amotion, as well as of disfranchisement, ought to be exercised in a just and reasonable manner, and upon due notice and opportunity to be heard. (*a*)

(10.) *Corporate powers strictly construed.*

The modern doctrine is to consider corporations as having such powers as are specifically granted by the act of incorporation, or as are necessary for the purpose of carrying into effect the powers expressly granted, and as not * having any other.[1] The Supreme Court of the United States declared this obvious doctrine, (*b*) and it has been repeated in *299

(*a*) The Commonwealth *v.* Penn. Beneficial Institution, 2 Serg. & Rawle, 141. But the power of disfranchisement and amotion is to be exercised by the corporation at large, unless it be by charter expressly confided to a particular person or select body. Angell & Ames on Corporations, 423, 3d edit. In this last edition of Messrs. Angell & Ames, the cases in which the power of amotion or disfranchisement may be or be not exercised, are collected and reviewed, pp. 408, 424, ch. 12. The acceptance of another incompatible office does not operate as an absolute avoidance of the former, in any case where the party could not devest himself of that office by his own act, without the concurrence of another. King *v.* Patteson, 4 Barnw. & Adol. 1.

(*b*) Head & Amory *v.* The Providence Insurance Company, 2 Cranch, 167. Marshall, Ch. J., 4 Wheaton, 636. Beaty *v.* Lessee of Knowler, 4 Peters's U. S. Rep. 163. Taney, Ch. J., in the case of the Bank of Augusta *v.* Earle, 13 Peters, 587. Runyon *v.* Coster, 14 Ibid. 122. Story, J., in the case of the Bank of the U. S. *v.* Dandridge, 12 Wheaton, 68.

[1] Plank Road Co. *v.* Douglass, 5 Seld. 444. Commonwealth *v.* E. & N. E. R. R. 27 Penn. 339. Russell *v.* Topping, 5 McL. 194. Perrine *v.* C. & D. Canal Co. 9 How. U. S. 172. And the powers of a corporation are strictly confined to the jurisdiction creating it; and therefore, if one state authorized the erection of a bridge, one end of which extends into another state, the corporation cannot collect toll of those who pass only the part of the bridge situated in the other state. Middle Bridge Corporation *v.* Marks, 26 Maine R. 326. See, also, Miller *v.* Ewer, 27 Maine R. 509; Freeman *v.* Machias W. P. & M. Co. 38 Me. 343. In these cases it was held, that all the proceedings of a meeting of the corporators held out of the state were void. An agreement by a Plank Road Co. in N. Y. to purchase its own stock, was held against public policy and void. Barton *v.* Pl. Rd. Co. 17 Barb. 397. The right of a corporation to subscribe to stock in another corporation, organized for a different purpose, was denied in Savings Bank *v.* Meriden Agency Co. 24 Conn. 159. See, also, Hodges *v.* N. E. Screw Co. 1 R. I. 312; 3 Ibid. 9; Sumner *v.* Marcy, 3 W. & M. 105. But a corporation may enter into a partnership with an individual for purposes connected with its legitimate business. Catskill Bank *v.* Gray, 14 Barb. 471. Charters of private corporations are to be construed strictly. Auburn and Cato Plank Road Co. *v.* Douglass, 5 Selden, (N. Y.) 444. And see Commonwealth *v.* Erie & N. E. R. R. Co. 27 Penn. State R. 339; Mead *v.* Keeler, 24 Barb. (N. Y.) 20; Berry *v.* Yates, Ibid. 199.

the decisions of the state courts. (a) No rule of law comes with a more reasonable application, considering how lavishly charter privileges have been granted. As corporations are the mere creatures of law, established for special purposes, and derive all their powers from the acts creating them, it is perfectly just and proper that they should be obliged strictly to show their authority for the business they assume, and be confined in their operations to the mode, and manner, and subject-matter prescribed. (b)[1] The modern language of the English courts is

(a) The People v. Utica Insurance Company, 15 Johns. Rep. 358, 383. 19 Id. 1, S. P. The N. Y. Firemen Insurance Company v. Ely, 5 Conn. Rep. 560. The N. Y. Firemen Insurance Company v. Sturges, 2 Cowen's Rep. 664, 675. The N. R. Ins. Co. v. Lawrence, 3 Wendell, 482 Savage, Ch J., N. R. F. Ins. Co. v Ely, 2 Cowen, 709. Life and Fire Ins. Co. v. Mechanic Fire Ins. Co. 7 Wendell, 31. First Parish in Sutton v. Cole, 3 Pick. Rep. 232. The State v. Stebbins, 1 Stewart's Ala. Rep. 299. Berlin v. New Britain, 9 Conn. Rep. 180. Angell & Ames on Corporations, 239, 2d edit. The New York Revised Statutes, vol. i p. 600, sec. 3, have declared that no corporation shall possess or exercise any corporate powers not expressly given by statute, or by its charter, except such as shall be necessary to the exercise of the powers so enumerated and given. The case of Sharp v. Speir, and Sharp v. Johnson, 4 Hill's N. Y. Rep. 76, 92, are samples of the very strict and even stringent construction of the powers and proceedings of municipal corporations in respect to assessments, taxation, and sales of private property.[2] By the New York Revised Statutes, 3d edit., vol. i. pp 893, 894, all associations for banking purposes, and all banking operations unauthorized by law, are prohibited under a penalty. The prohibition extends equally to foreign corporations exercising business of banking in this state.[3]

(b) Corporate acts must not only be authorized by the charter, but those acts must be done by such officers or agents, and in such manner as the charter authorizes. Taney, Ch. J., in the Bank of Augusta v. Earle, 13 Peters, 587.

[1] In the matter of Flatbush Avenue, &c. 1 Barb. S. C. Rep. 286. 3 Id. 275.

A power to erect a bridge will authorize the purchase of one already erected. Thompson v. The N. Y. & H. R. R Co. 3 Sandf. Ch. R. 625. See, also, Halstead v. Mayor of N. Y. 5 Barb. S. C. Rep. 218. In this case, a draft drawn by the Corporation of N. Y., was held void in the hands of a *bonâ fide* holder; the power to draw being conditional, and the charter a *public act*. S. C. 3 Const. R. 430.

[2] If the officers have unreasonably neglected to compel an assessment, the general funds of the corporation will be liable, otherwise not. Cumming v. The Mayor of Brooklyn, 11 Paige, R. 596. Lake v. The Trustees of Williamsburgh, 4 Denio's R. 520.

[3] As to what will amount to keeping an office for banking purposes by a foreign corporation, see Taylor v. Bruen, 2 Barb. Ch. R. 301. *It seems* that the negotiable securities of foreign corporations, valid on their face, will be upheld in the hands of *bonâ fide* holders, without notice, though put in circulation in violation of the charter of the corporation, and of the laws of the state where issued. Stoney v. American L. Ins. Co. 11 Paige, R. 635.

to the same effect; (a) and in a recent case (b) it was observed, that a corporation could not bind themselves for purposes foreign to those for which they were established.[1] Where a corporation was created for purposes of trade, it resulted necessarily that they must have power to accept bills and issue notes.[2] But if a company be formed, not for the purposes of trade, but for other purposes, as, for instance, to supply water, the nature of their business does not raise a necessary implication that they should have power to make notes and issue bills; and it seemed to be doubted whether there must not be an express authority to enable them to do it.[3] The acts of corporation agents are construed with equal strictness; and it is the doctrine, that though a deed be signed by the president and cashier of a corporation, and be sealed with its corporate seal, yet the courts may look beyond the seal, *and if it be affixed without the authority of the directors, and that fact be made affirmatively to appear, the instrument is null and void. (c)[4] *300

(a) Dublin Corporation v. Attorney-General, 9 Bligh, N. S. 395.
(b) Broughton v. The Manchester Water Works Company, 3 Barnw. & Ald. 1.
(c) The Mayor and Commonalty of Colchester v. Lowten, 1 Ves. & Beames's Rep.

[1] But power to execute works incidental to main purpose will be presumed if exercised *bonâ fide*. Wright v. Scott, 34 E. L. & Eq. 1.

[2] See Clarke v. School District, 3 R. I. 199. But a bank may not make an accommodation indorsement. Bank of Genesee v. Patchin Bank, 3 Kern. 309.

[3] Mining companies have no implied authority to borrow money. Hawtayne v. Bourne, 7 M. & W. 595. Ricketts v. Bennett, 4 Com. B. R. (56 Eng. C. L.) 686. Law J. R. (N. S.) C. P. 17. *Aliter* as to banking companies. Bank of Australasia v. Bank of Australia, 12 Jurist R. 189. Burmester v. Norris, 8 Eng. L. & Eq. 487. But the manager of a mine has authority to incur debts for wages and goods necessary to carry on the mine; and shareholders making *bonâ fide* advances of money, necessary to carry on the mine, will be allowed such advances. German Mining Company, *in re*, 19 Eng. L. & Eq. 591. Moss v. McCullough, 7 Barb. 279. Sacket's Harbor Bank v. Lewis County Bank, 11 Barb. 213. N. Y. L. I. & T. Co. v. Beebe, 3 Seld. 364. Mead v. Keeler, 24 Barb. (N. Y.) 20. Berry v. Yates, 24 Barb. (N. Y.) 199. A plank-road company has no implied authority to loan money. Madison, &c. Plank Road Co. v. Watertown, &c. P. R. Co. 5 Wisc. 173. A power to purchase, carries with it a power to purchase on credit and give acknowledgments therefor. Ketchum v. Buffalo, 4 Kernan, 14 (N. Y.) 356.

[4] It is held, in 1 Selden, R. 320, Hoyt v. Thompson, (reversing the decision of the court below, 3 Sandf. S. C. R. 416,) that where the charter intrusts the management of a corporation to a board of directors, the president and cashier, unless specially authorized, have no power to assign the choses in action of the company as security for a precedent debt. Nor can the stockholders act, the power being by the charter placed in the directors. Conroy v. Port Henry Iron Co. 12 Barb. R. 27.

IV. *Of the visitations of corporations.*

I proceed next to consider the power and discipline of visitations to which corporations are subject. It is a power applicable only to ecclesiastical and eleemosynary corporations; (*a*) and it is understood that no other corporations go under the name of eleemosynary but colleges, schools, and hospitals. (*b*) The visitation of civil corporations is by the government itself, through the medium of the courts of justice. And in the case of the failure or want of a visitor over a private eleemosynary foundation, the duties of a visitation devolve, in England, upon the crown, and is exercised at the present day, not by the K. B., but by the lord chancellor in his visitorial capacity. (*c*) As it has been determined in New York, (*d*) that the chancellor cannot act in a visitorial character, the jurisdiction in such a case would revert to the courts of law, according to the ancient English practice, to be exercised under common-law process. (*e*)

To eleemosynary corporations, a visitatorial power is attached as a necessary incident. The nature and extent of this power were well explained by Lord Holt, in his celebrated judgment in the case of *Philips* v. *Bury*. (*f*) If the corporation be public, in the strict sense, the government *301 *has the sole right, as trustee of the public interest, to

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245. Tilghman, Ch. J., in the case of St. Mary's Church, 7 Serg. & Rawle, 530. Leggett v. N. J. Man and Banking Co., Saxton's R. 541. Every act of a public body acting under statute authority, which is to devest an owner of his property, for any public purpose, without his consent, is to be strictly and rigidly construed. Van Wickle v. Railroad Company, 2 Green's N. J. Rep. 162. The King v. Bagshaw, 7 Term Rep. 363. The King v. Mayor of Liverpool, 4 Burr. 2244. Rex v. Croke, Cowp. 26. Westervelt v. Corporation of New York, 2 Hoffman's Ch. Rep. See, also, *ante*, p. 301, the cases of Sharp v. Speir, and of Sharp v. Johnson. There is a very valuable discussion on the nature, power, and restriction of the transfer of corporate stock in ch. 16 of Angell & Ames on Corporations, 3d edit. p. 499, and the numerous American cases are there cited and examined. The subject is rather of too practical a nature to admit, in a work of this character, of a digest of the many and nice distinctions, and I must refer the student to the treatise itself

(*a*) 1 Blacks. Com. 480. 2 Kyd on Corp. 174.

(*b*) 1 Woodd. Lec. 474.

(*c*) The Attorney-General v. Dixie, 13 Ves. 519. The Same v. Clarendon, 17 Idem 491.

(*d*) Auburn Academy v. Strong, 1 Hopkins's Ch. Rep. 278.

(*e*) Rex v. Bishop of Chester, Str. Rep. 797.

(*f*) Skinner's Rep. 447. 1 Lord Raym. 5. S. C. 2 Term Rep. 346.

inspect, regulate, control, and direct the corporation, and its funds and franchises, because the whole interest and franchises are given for the public use and advantage. Such corporations are to be governed according to the laws of the land. The validity and justice of their private laws are examinable in the courts of justice; and if there be no provision in the charter how the succession shall continue, the law supplies the omission, and says it shall be by election. But private and particular corporations, founded and endowed by individuals for charitable purposes, are subject to the private government of those who are the efficient patrons and founders. If there be no visitor appointed by the founder, the law appoints the founder himself, and his heirs, to be the visitors. This visitatorial power arises from the property which the founder assigned to support the charity; and as he is the author of the charity the laws give him and his heirs a visitatorial power; that is, an authority to inspect the actions and regulate the behavior of the members that partake of the charity. This power is judicial and supreme, but not legislative. He is to judge according to the statutes and rules of the college or hospital; and it was settled, by the opinion of Lord Holt, in the case of *Philips* v. *Bury*, (and which opinion was sustained and affirmed in the House of Lords,) that the decision of the visitor (whoever he might be) was final, and without appeal, because the doctrine is, that the founder reposes in him entire confidence that he will act justly. (*a*) In most cases of eleemosynary establishments, the founders do not retain this visitatorial power in themselves, but assign or vest it in favor of some certain specified trustees or governors of the institution. It may even be inferred, from the nature of the duties to be performed by the corporation or trustees for the persons interested in the bounty, that the founders or donors of the charity meant to vest the power of visitation in such trustees. This was the case with Dartmouth Col-

(*a*) In Shipley's case, who was expelled from his college in Oxford University for publishing a libel and being guilty of general immorality, he appealed to the king as visitor, and the appeal was heard before Lord Chancellor Camden. The judgment of the chancellor was most masterly, and the decree of the dean and chapter was reversed as most arbitrary and unjust, and contrary to the "first principles of common justice." Campbell's Lives of the Lord Chancellors, vol. v. 364.

lege, according to the opinion of the Supreme Court *302 *of the United States, in the case of *Dartmouth College* v. *Woodward.* (*a*) Where governors or trustees are appointed by a charter, according to the will of the founder, to manage a charity, (as is usually the case in colleges and hospitals,) the visitatorial power is deemed to belong to the trustees in their corporate character. (*b*)

The visitors of an incorporated institution are a domestic tribunal, possessing an exclusive jurisdiction, from which there is no appeal. It is an ancient and immemorial right given by the common law to the private founders of charitable corporations, or to those whom they have nominated and appointed to visit the charities they called into existence. The jurisdiction is to be exercised within the bosom of the corporation, and at the place of its existence. (*c*) Assuming, then, (as is almost universally the fact in this country,) that the power of visitation of all our public charitable corporations is vested by the founders and donors of the charity, and by the act of incorporation, in the governors or trustees who are the assignees of the rights of the founders, and stand in their places, it follows that the trustees of the college may exercise their visitatorial power in sound discretion, and without being liable to any supervision or control so far as respects the government and discipline of the institution, and so far as they exercise their powers in good faith, and within the limits of the charter. They may amend and repeal the by-laws and ordinances of the corporation, remove its officers, correct abuses, and generally superintend the management of the trust. (*d*)

(*a*) 4 Wheaton, 518.

(*b*) Story, J., in 4 Wheaton, 674, 675. 1 Blacks. Com. 482. Case of Sutton's Hospital, 10 Co. 33 a, b. Philips *v.* Bury, *supra.* Green *v.* Rutherforth, 1 Ves. 462. Attorney-General *v.* Middleton, 2 Ves. 327.

(*c*) The visitor is to proceed, whether, upon a general visitation or a particular appeal *summarie, simpliciter, et de plano sine strepitu aut figura judicii,* per Lord Mansfield, in The King *v.* The Bishop of Ely, 1 Blacks. Rep. 82.

(*d*) The visitatorial power is applied to control and correct abuses, and to enforce a due observance of the statutes of the charity; and it is not a power to revoke the gift, or change its uses, or to devest the rights of the parties to the bounty. Where the power is vested in trustees, it is an hereditament founded in property, and there can be no amotion of them from their corporate capacity, or interference with the

This power of visitation Lord Hardwicke admits to be a power salutary to literary institutions; and it arose from the right which every donor has to dispose, direct, and regulate his own property as he pleases; *cujus est dare ejus est disponere.* * Though the king or the state be the incipient *303 founder, (*fundator incipiens,*) by means of the charter or act of incorporation, yet the donor or endower of the institution with funds is justly termed the perficient founder, (*fundator perficiens;*) and it was deemed equitable and just at common law that he should exercise a private jurisdiction as founder in his *forum domesticum* over the future management of the trust. (*a*)[1] But as this visitatorial power was in its nature summary and final, and therefore liable to abuse, Lord Hardwicke was not disposed to extend it in equity. It is now settled that the trustees or governors of a literary or charitable institution, to whom the visitatorial power is deemed to vest by the incorporation, are not placed beyond the reach of the law. As managers of the revenues of the corporation, they are subject to the general superintending power of the Court of Chancery, not as itself pos-

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just exercise of their power, unless it be reserved by the statutes of the foundation or charter, except in chancery for abuse of trust. Allen *v.* McKeen, 1 Sumner, 276.

(*a*) The case of Sutton's Hospital, 10 Co. 33 a. Green *v.* Rutherforth, 1 Ves. 472. The institution of Sutton's Hospital Lord Coke extolled as a work of charity surpassing any foundation "that ever was in the Christian world, or that was ever seen by the eye of time." (Pref. to 10 Co.) The founder was Thomas Sutton, and his object was to establish a *hospital* for the relief of such poor, aged, maimed, needy, and impotent military men, and captives in war, and other persons, as should be deemed fit objects; and to establish a *free school* for the maintenance and education of poor children in good literature; and provision was likewise to be made for the maintenance of religious instruction in the hospital, under the superintendence of a grave and learned divine. His real estate appropriated consisted of the charter-house in the county of Middlesex, and twenty acres of land, yielding when Lord Coke reported the case, an annual income of £3,500 sterling, and which he said would shortly be £5,000. This charitable purpose was aided and carried into effect by a liberal charter from King James; and the most illustrious names in England were nominated by the founder, and inserted in the charter, as governors; and the charter received, on discussion, the sanction of all the judges in the Exchequer Chamber. Such a case reflected lustre on that age; and, considering it under all its circumstances, it was preëminent for the benevolence of its object as well as for the munificence of the donation.

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[1] If the property is given *absolutely*, unless the donors are *actually* the founders, they will have no right of visitation. Kemper *v.* Trustees of Lane Seminary, 17 Ohio R. 293.

sessing a visitatorial power or right to control the charity, *304 *but as possessing a general jurisdiction in all cases of an abuse of trust, to redress grievances, and suppress frauds. Where a corporation is a mere trustee of a charity, a court of equity will yet go further; and though it cannot appoint or remove a corporator, it will, in a case of gross fraud, or abuse of trust, take away the trust from the corporation, and vest it in other hands. (*a*)

There is a marked and very essential difference between civil and eleemosynary corporations on this point of visitation. The power of visitors, strictly speaking, extends only to the latter; for though in England it is said that ecclesiastical corporations are under the jurisdiction of the bishop as visitor, yet this is not that visitatorial power of which we have been speaking, and which is discretionary, final, and conclusive. It is a part of the ecclesiastical polity of England, and does not apply to our religious corporations. The visitatorial power, therefore, with us, applies only to eleemosynary corporations. Civil corporations, whether public, as the corporations of towns and cities, or private, as bank, insurance, manufacturing and other companies of the like nature, are not subject to this species of visitation. They are subject to the general law of the land, and amenable to the judicial tribunals for the exercise and the abuse of their powers. (*b*) The way in which the courts exercise common-law jurisdiction over all civil corporations, whether public or private, is by writ of *mandamus*, and by information in the nature of *quo warranto*. (*c*) It is also well understood, that

(*a*) Attorney-General *v.* Governors of the Foundling Hospital, 2 Vesey, Jr. 42. *Ex parte* Greenhouse, 1 Madd. Ch. Rep. 92. Story, J., 4 Wheaton, 676. The strict principles and watchful care of chancery, in respect to corporations acting as trustees of charities and charitable funds, and in respect to free schools and all other charitable foundations, are announced with much force in the late English cases, as, see Attorney-General *v.* Atherstone Free School, 3 Mylne & Keen, 544; Attorney-General *v.* Mayor of Newbury, Ibid. 647.

(*b*) 1 Blacks. Com. 480, 481.

(*c*) 2 Kyd on Corporations, 174. The remedies against private corporations aggregate for neglect or breach of duty, by the writ of *mandamus*, and by *information in the nature of a quo warranto*, are treated at large, and with the most full and satisfactory reference to authorities, ancient and modern, English and American, in Angell & Ames on Corporations, ch. 20 and 21, 3d edit.

the Court of Chancery has a jurisdiction over charitable corporations for breaches of trust. It has been much questioned whether it had any such jurisdiction over any other corporations than such as were held to charitable uses. The better opinion seems, however, to be, that any corporation, *chargeable with trusts, may be inspected, controlled, *305 and held accountable, in chancery, for an abuse of such trusts. With that exception, the rule is understood to be, that all corporations are amenable to the courts of law, and there only, according to the course of the common law, for nonuser or misuser of their franchises. (*a*) [1]

V. *Of the dissolution of corporations.*

A corporation may be dissolved, it is said, by statute; by the natural death or loss of all the members, or of an integral part; by surrender of its franchises; and by forfeiture of its charter, through negligence or abuse of its franchises. (*b*) [2]

(*a*) Attorney-General *v.* Utica Insurance Company, 2 Johns. Ch. Rep. 384–390. 1 Ves. 468. 2 Atk. Rep. 406, 407. 3 Merivale's Rep. 375. 4 Wheaton, App. 20, 21. Attorney-General *v.* Mayor of Dublin, 1 Bligh's Rep. N. S. 312. Sanderson *v.* White, 18 Pickering, 328. Angell & Ames on Corporations, 3d edit. ch. 19. The New York Revised Statutes, vol. ii. p. 462, have given to the chancellor jurisdiction over the directors and other trustees of corporations, to compel them to account, and to suspend their powers when abused, and to remove any trustee or officer for gross misconduct, and to restrain and set aside alienations of property made by them contrary to law or the purposes of their trust. The power may be exercised as in ordinary cases, on bill or petition, at the instance of the attorney-general, or a creditor, director, or trustee of the corporation; and these equity powers exist in the Court of Chancery, notwithstanding the like visitatorial powers may reside elsewhere. Ibid. sec. 34.

(*b*) 1 Blacks. Com. 485. Angell & Ames on Corporations, ch. 22, 3d edit. In this country, to dissolve a private corporation (1.) by statute, there must be a power for that purpose reserved in the statute or charter creating it; (2.) If by surrender, there must be an acceptance; (3.) A loss of an integral part of the corporation, so that the exercise of corporate power cannot be restored, will work a dissolution; (4.) A forfeiture for nonuser or misuser must be by the judgment of a court of law. Penobscot Boom Corporation *v.* Lamson, 16 Maine Rep. 224. Hodsdon *v.* Copeland, Ibid. 314.

[1] As to the rights of visitors, and the power of the Court of Chancery over them, see Nelson *v.* Cushing, 2 Cush. 519.

[2] In Mass., by Stat. 1852, c. 55, a majority in number of the corporation may petition the Supreme Court, which, after notice to all parties interested, may, for reasonable cause, dissolve the corporation.

This branch of the subject affords matter for various and very interesting inquiries.

In respect to public or municipal corporations, which exist *only* for public purposes, as counties, cities, and towns, the legislature, under proper limitations, have a right to change, modify, enlarge, restrain, or destroy them; securing, however, the property for the uses of those for whom it was purchased. (*a*) A public corporation, instituted for purposes connected with the administration of the government, may be controlled by the legislature, because such a corporation is not a contract within the purview of the constitution of the United States. In those public corporations, there is, in reality, but one *306 *party, and the trustees or governors of the corporation are merely trustees for the public. A private corporation, whether civil or eleemosynary, is a contract between the government and the corporators; and the legislature cannot repeal, impair, or alter the rights and privileges conferred by the charter, against the consent, and without the default of the corporation, judicially ascertained and declared.[1] This great principle of constitutional law was settled in the case of *Dartmouth College* v. *Woodward;* (*b*) and it had been asserted and declared by the Supreme Court of the United States, in several other cases, antecedent to that decision. (*c*) But it has become quite

(*a*) Story, J, 9 Cranch's Rep. 52. Greenleaf's Evidence, sec. 331. The People *v.* Wren, 4 Scammon, 269.

(*b*) 4 Wheaton, 518.

(*c*) Fletcher *v.* Peck, 6 Cranch's Rep. 88. The State of New Jersey *v.* Wilson, 7 Idem. 164. Terret *v.* Taylor, 9 Idem. 43. The Town of Pawlet *v.* Clark, Ibid. 292. Grants of property and of franchises, coupled with an interest, to public or political corporations, are beyond legislative control, equally as in the case of property of private corporations. Story, J., in Dartmouth College *v.* Woodward, 4 Wheaton, 697–700. Town of Pawlet *v.* Clark, 9 Cranch's Rep. 292. See, also, *supra*, p. 275. If a charter or act of incorporation be procured from the legislature, upon some fraud-

[1] In Toledo Bank *v.* Bond, 1 Ohio St. 622, this doctrine was not acknowledged, and the charter of a corporation was declared to be a mere *law*, which the legislature might repeal or amend at pleasure. The assent of a corporation to a change in its charter may be implied from its action. Blandford *v.* Gibbs, 2 Cush. 39. Commonwealth *v.* Cullen, 13 Penn. 130. See, on the subject of legislative control over corporations, Thorpe *v.* R. & B. R. R. Co. 1 Wms. 140; R. R. Co. *v.* Harris, 27 Miss. 517. As to the obligation on the part of the corporation to accomplish the purposes for which it was chartered, see Y. & M. L. R. R. *v.* Winans, 17 How. U. S. 30, and cases cited.

the practice, in all the recent acts of incorporations for private purposes, for the legislature to reserve to themselves a power to alter, modify, or repeal the charter at pleasure;[1] and though the validity of the alteration or repeal of a charter, in consequence of such a reservation, may not be legally questionable, (a)[2] yet it may become a matter of serious consideration in many cases, how far the exercise of such a power could be consistent with justice or policy. If the charter be considered as a compact between the government and the individual corporators, such a reservation is of no force, unless it be made part and parcel of the contract. If a charter be granted, and accepted, with that reservation, there seems to be no ground to question the validity and efficiency of the reservation; and yet it is easy to perceive that if such a clause, inserted as a *formula in every charter and grant of the government, *307 be sufficient to give the state an unlimited control, at its mere pleasure, of all its grants, however valuable the consideration upon which they may be founded, the great and salutary provision in the constitution of the United States, so far as concerns all grants from state governments, will become of no moment. These legislative reservations of a right of appeal ought to be under the guidance of extreme moderation and discretion. An absolute and unqualified repeal, at once, of a charter of incorporation of a money or trading institution, would be attended with most injurious and distressing consequences. According to the old settled law of the land, where there is no

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ulent suggestion or concealment of a material fact, made by or with the consent or knowledge of the persons incorporated, it may be vacated or annulled upon *scire facias*, upon the relation of the attorney-general. N. Y. Revised Statutes, vol. ii. p. 579, sec. [illegible]

(a) Parsons, Ch. J., 2 Mass. Rep. 146. Story, J., 4 Wheaton, 708-712. McLaren v. Pennington, 1 Paige's Rep. 102.

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[1] For construction of such clauses and the results of legislative action upon them, see Suydam v. Moore, 8 Barb. 358; Miller v. New York & E. R. R. 21 Barb. 513; E. & N. E. R. R. v. Casey, 26 Penn. 287.

[2] It is no defence to an action by the corporation against a subscriber for his subscription to the stock, that an act of the legislature, passed since the subscription, has increased the responsibility of the stockholders. South Bay M. D. Co. v. Gray, 30 Maine R. (17 Shep.) 547. See Palmer v. Lawrence, 3 Sandf. S. C. R. 161; Northern Railroad v. Miller, 10 Barb. R. 260.

special statute provision to the contrary, upon the civil death of a corporation, all its real estate, remaining unsold, reverts back to the original grantor and his heirs. (*a*) The debts due to and from the corporation are all extinguished.[1] Neither the stockholders, nor the directors or trustees of the corporation, can recover those debts, or be charged with them, in their natural capacity. All the personal estate of the corporation vests in the people, as succeeding to this right and prerogative of the crown at common law. (*b*) A very guarded and moderate ex-

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(*a*) Co. Litt. 13 b. 1 Blacks. Com. 484. So, where title to land is vested in an incorporated turnpike company, for the purpose of a road, and the road is abandoned, the land, said Ch. J. Nelson, reverts to the original owner. Hooker *v.* Utica Turnpike Company, 12 Wendell, 371. The decision in the case of State *v.* New Boston, 11 N. H. Rep. 407, is to the same effect; and a turnpike road under a charter only gives an easement or right of way, subject to the toll. The right of soil does not pass, except as an easement. Shaw, Ch. J., S. P., in 8 Metcalf, 266. The statute law of Massachusetts is to the same effect. Act of 1804, and Revised Statutes of 1836. But in New York, by statute of April 18th, 1838, ch. 262, whenever a turnpike corporation becomes dissolved, or the road discontinued by the company, the road becomes a public highway. By the N. Y. Revised Statutes, vol. i. 3d edit. 712, it would seem, that only upon the dissolution of a turnpike corporation *by the legislature*, the rights and property of the corporation vest in the people. Though trustees of a charity under a will, and afterwards incorporated, are guilty of breaches of trust, it is held that *the heirs of the donor* have no resulting trust or beneficial interest accruing therefrom, and that they could not sustain an application in chancery to compel the trustees to execute the trust. Sanderson *v* White, 18 Pickering, 328.[2]

(*b*) Edmunds *v.* Brown & Tillard, 1 Lev. Rep. 237. Co Litt. 13 b. 3 Burr. Rep. 1868, arg. 1 Blacks. Com. 484. 2 Kyd on Corp. 516. State Bank *v.* The State, 1 Blackford's Ind. Rep. 267. Fox *v.* Horah, 1 Iredell's Eq. R. 358. President of Port Gibson *v.* Moore, 13 S & M 157. In this case in N. C. the rigorous rule of the common law was declared by Mr. Justice Gaston in behalf of the Supreme Court, but he observed that, by the Revised Statutes of N. Carolina of 1831, the law received very important alterations, and on the forfeiture or dissolution of a corporation, a receiver is to be appointed to take possession of the corporate property, and collect the

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[1] See Moultrie *v.* Smiley, 16 Geo. 289. Iron Works *v.* Smith, 4 Duer, 362. Robinson *v.* Lane, 19 Geo. 337.

[2] On the dissolution of a corporation holding lands acquired by application of the eminent domain of the state, the lands do not revert, but remain in the hands of the state to make any public use of which it may choose. Heyward *v.* Mayor, &c. of New York, 3 Seld. 314. E. & N. E. R. R. *v.* Casey, 26 Penn. 287. See, also, Curran *v.* Arkansas, 15 How. U. S. 304. Bacon *v.* Robertson, 18 How. U. S. 480. From these cases it appears that on the dissolution of a corporation its property is liable in equity, first to the payment of its debts, and then to be distributed among the stockholders who have an equitable claim upon it, as it was originally contributed by them.

ample of these legislative reservations annexed to a charter, is that contained in the Act of the legislature of New York of February 25th, 1822, ch. 50, where it is declared, by way of express proviso, that the legislature may, after the expiration of five years, alter and modify, and expunge the Act, upon condition, nevertheless, that no alteration or modification shall annul or invalidate the contracts made by or with the corporation, and that the corporation may still continue a *corporation, so far as to collect and recover, and dispose of their estate, real and personal, and pay their debts, and divide the surplus. (a) *308

debts for the benefit of creditors and stockholders. The rule of the common law has in fact become obsolete and odious. It never has been applied to insolvent or dissolved money corporations in England. The sound doctrine now is, as shown by statutes and judicial decisions, that the capital and debts of banking and other moneyed corporations constitute *a trust fund and pledge* for the payment of creditors and stockholders; and a court of equity will lay hold of the fund and see that it be duly collected and applied. The death of a corporation no more impairs the obligation of contracts than the death of a private person. Story, J., in Wood *v.* Dummer, 3 Mason R. 309. Lord Redesdale, in Adair *v* Shaw, 1 Scho. & Lef. 261, 262. Mumma *v.* The Potomac County, 8 Peters's R. 281. Buckner, Ch., in Wright *v.* Petrie, 1 Smedes & Marshall, Ch. R. 319. Read *v.* The Frankfort Bank, 23 Maine R. 318. The Act of the legislature of Mississippi, of July 26, 1843, making provision for proceeding against incorporated banks for violation of their franchises, declares that upon a judgment of forfeiture the debtors shall not thereby be released, but the court is to appoint trustees to take charge of the books and assets of the bank, and to sue and collect the debts, and sell the property of the bank, and apply the proceeds to the payment of the debts of the bank. This just and reasonable provision was sustained, as a constitutional provision, by the court of errors and appeals in Mississippi, in the case of Nevitt *v.* Bank of Port Gibson, (6 Smedes & Marshall's R. 513,) after a masterly consideration of the case. In the state of Louisiana, by statute of 1842, the legislature provided for the distribution among the creditors of the property of insolvent corporations *whose charters had become forfeited;* and this was held to be a constitutional exercise of legislative power. Mudge *v.* Commissioners, &c., 10 Robinson, 460. The statute law of Georgia makes a permanent provision for the appropriation of the assets of insolvent banks, who shall thereby forfeit their charters to the payment of their debts. Hotchkiss's Codification of the Statute Law of Georgia, pp. 362-3. The statute law of New Jersey, R. S. 1847, p. 138, recognizes a distribution of the stock on the dissolution of a corporation after payment of its debts. White *v.* Campbell, 5 Humphrey's Tenn. R. 38.

(a) By the New York Revised Statutes, vol. i. p. 600, sec. 9, upon the dissolution of a corporation, the directors or managers existing at the time (when no other persons are specially appointed for the purpose), are declared to be trustees for the creditors and stockholders, with power to settle the concerns of the corporation, pay the debts, and divide the surplus property among the stockholders. This is a just and wise provision,

A corporation may also be dissolved when an integral part of the corporation is gone, without whose existence *309 *the functions of the corporation cannot be exercised, and when the corporation has no means of supplying that integral part, and has become incapable of acting. The incorporation becomes then virtually dead or extinguished. (a) But in the case of *The King* v. *Pasmore*, (b) in which this subject was most extensively and learnedly discussed, the K. B. seemed to consider such a dissolution not entirely absolute, but only a dissolution *to certain purposes.* (c) The king could interfere and grant a new charter, and he could renovate the corporation either with the old or with new corporators. If renovated in the sense of that case, all the former rights would revive and attach on the new corporation, and, among others, a right to sue on a bond given to the old corporation. But if not renovated, then the dissolution becomes absolute, because the corporation has become incapable of acting. In the case of a new incorporation, upon the dissolution of an old one, the title to the lands belonging to the old corporation does not revive in the new corporation, except as against the state. In England, it would require an act of parliament to revive the title as against the original grantor, or his heirs; (d) but it would be at least questionable whether any statute with us could work such an entire renovation, because vested rights cannot be divested by statute. When a corporation has completely ceased to exist, there is no ground for the theory of a continuance of the former

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and gets rid altogether of the inequitable consequences of the rule of the common law. And in Indiana, also, whenever a corporation is dissolved, all its property vests in the state in trust to pay its debts and discharge its contracts, and the residue, if any, is to be paid over to the stockholders. Revised Statutes of Indiana, 1838, p. 149. In North Carolina, a similar provision is made as to the payment of debts and the distribution of the surplus when a corporation is dissolved. Revised Statutes of North Carolina, 1837, p. 120.

(a) 1 Rol. Abr. 514, I. 1. (b) 3 Term Rep. 199.

(c) So, in the case of the Lehigh Bridge Company v. The Lehigh Coal Company, 4 Rawle's Rep. 1, the loss of an integral part of a corporation was held to work a dissolution for certain purposes only, and that an entire dissolution was the result of a permanent incapacity to restore its deficient part, and did not happen when the legitimate existence of the part was not indispensable to a valid election.

(d) 1 Preston on Abstract of Titles, 273.

corporation under a new name or capacity. It becomes altogether a new institution, with newly created rights and privileges.

It is said that a corporation may be dissolved by a voluntary surrender of its franchises into the hands of government, as well as by involuntary forfeiture of them, through a total neglect of using them, or using them illegally and *unjustly.(a) But in the case of *The King* v. *The City of London*, Sir George Treby (afterwards Lord Ch. J.) very forcibly contended, that a corporation could not be dissolved by a voluntary surrender of its property, because a corporation might exist without property; and upon that argument he shook, if not destroyed, the authenticity of the *note* at the end of the case in Dyer, of *The Archbishop of Dublin* v. *Bruerton*, (b) in which it was stated that a religious corporation might be legally dissolved and determined by a surrender of the dean and chapter, even without the consent of the archbishop. So, also, in the case of *The Corporation of Colchester* v. *Seaber*, (c) the corporation consisted of a mayor, eleven aldermen, eighteen assistants, and eighteen common council; and though the mayor and aldermen were judicially ousted in 1740, and those offices continued vacant until 1763, when a new charter was granted and accepted, it was held by the K. B. that the corporation was not dissolved by all these proceedings, including the natural death of the mayor and aldermen, subsequent to their ouster. This case shows that a corporation possesses a strong and tenacious principle of vitality, and that a judgment of ouster against the mayor and aldermen, notwithstanding they were integral parts of the corporation, was not an ouster, though a judgment against the corporation itself might be. It was held, in argument in that case, that a corporation could not be dissolved but in three ways: 1. By abuse or misuser, and a consequent judicial forfeiture; 2. By surrender accepted on record; 3. By the death of all the members. It was admitted, on the other side, that the corporation in that case was not dissolved, though it had become incapable of enjoying and exercising its

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(a) 1 Woodd. Lec. 500. Salk. Rep. 191.
(b) Dyer's Rep. 282 b. (c) 3 Burr. Rep. 1866.

franchises; and the court held, that the loss of the magistracy did not dissolve the corporation. The better opinion would *311 seem to be, that a corporation aggregate may *surrender, and in that way dissolve itself; but then the surrender must be accepted by government, and be made by some solemn act to render it complete.[1] This is the general doctrine, (*a*) but in respect to the private corporations, which contain a provision rendering the individual members liable for corporate debts due at the time of dissolution, a more lax rule has been indulged. It was held, in the Court of Errors of New York, in *Slee* v. *Bloom*, (*b*) that the trustees of a private corporation may do what would be equivalent to a surrender of their trust, by an intentional abandonment of their franchises, so as to warrant a court of justice to consider the corporation as in fact dissolved. But that case is not to be carried beyond the precise facts on which it rested. It ought only to be applied to a case where the debts due at the time of the dissolution are chargeable on the individual members, and then it becomes a safe precedent. It amounts only to this, that if a private corporation suffer all their property to be sacrificed, and the trustees actually relinquish their trust, and omit the annual election, and do no one act manifesting an intention to resume their corporate functions, the courts of justice may, *for the sake of the remedy and in favor of creditors*, who, in such case, have their remedy against the individual members, presume a virtual surrender of the corporate rights, and a dissolution of the corporation.

(*a*) Boston Glass Manufactory v. Langdon, 24 Pick. 49. Angell & Ames on Corporations, p. 656, 2d ed. In the case of the charter of Connecticut, where there had been for some time an involuntary nonuser of its privileges, by submission to the authority of Sir Edmund Andross, the ablest counsel in England, consisting of Mr. Ward, John (afterwards Lord Chancellor) Somers, and George (afterwards Lord Ch. J.) Treby, were of opinion, that the charter remained good and valid in law, inasmuch as there was no surrender duly made and enrolled, nor any judgment of record against it. See the opinion at large, in 1 Trumbull's Hist. of Connecticut, 407. Hutchinson's Hist. of Massachusetts, vol. i. p. 406.

(*b*) 19 Johns. Rep. 456. It was decided, in that case, that a by-law of a corporation, allowing the stockholders, on paying 30 per cent. on their shares, to forfeit them, was void as to creditors. See, to the same point, Hume v. Wynyaw, Carolina Law Journal, No. 2, p. 217.

[1] Town v. Bank of R. Raisin, 2 Doug. Mich. R. 530.

This is the utmost extent to which the doctrine was * carried; and in such a case it is a safe and reasonable doctrine. So, in *Briggs* v. *Penniman*, (*a*) where a manufacturing corporation, established under the general act of 22d March, 1811, (*b*) for twenty years, became insolvent within the time, and incompetent to act by the loss of all its funds, and under the provision, that "for all debts which shall be due and owing by the company at the time of its dissolution, the persons then composing the company should be individually responsible to the extent of their respective shares of stock in the company, and no further," it was decided that the corporation was to be deemed dissolved for the purpose of the remedy by the creditors against the stockholders individually, and that the statute contemplated a dissolution as an event which might happen in this way *at any time within the twenty years*, and any mode of dissolution, *in fact*, was sufficient to afford this special remedy to the creditor. (*c*) But the old and well-established principle of law remains good as a general rule, that a corporation is not to be deemed dissolved by reason of any misuser or nonuser of its franchises, until the default has been judicially ascertained and declared. (*d*) [1] It was adjudged, in South Carolina, (*e*) that the *312

(*a*) 1 Hopkins, 300. S. C. 8 Cowen, 387.

(*b*) Laws of N. Y. sess. 34, ch. 67.

(*c*) The right of forfeiture of a stockholder's share to the company does not take away the common-law remedy by suit for non-payment of instalments due on his subscription.[2] D. & S. Canal Com. *v.* Sansom, 1 Binney, 70. Worcester T. Corporation *v.* Willard, 5 Mass. R. 80. Goshen T. Company *v.* Hurtin, 9 Johnson, R. 217. Gratz *v.* Redd, 4 B. Monroe, 193. Hightower *v.* Thornton, 8 Geo. R. 486. Northern Railroad *v.* Miller, 10 Barb. R. 260.

(*d*) Peter *v.* Kendal, 6 Barnew. & Cressw. 703. Slee *v.* Bloom, 5 Johns. Ch. Rep.

(*e*) Smith *v.* Smith, 3 Desauss. Rep. 557.

[1] Therefore, a breach of a corporation charter, in making a contract, cannot be set up as a *defence* by an individual in an action on such contract. Grand Gulf Bank *v.* Archer, 8 Smedes & Marsh. R. 151. Neither can the fact that a corporation has forfeited its charter by a failure to comply with the statutory provisions and is not a corporation *de jure*. Mechanics' Building Association *v.* Stevens, 5 Duer, (N. Y.) 676. And see Jones *v.* Dana, 24 Barb. (N. Y.) 395. Wright *v.* Shelby R. R. Co., 16 B. Mon. (Ky.) 4. But it has been held, that a corporation cannot *enforce* a mortgage which it has obtained by a transfer, taken contrary to the express provisions of its charter. Green *v.* Seymour, 3 Sandf. Ch. R. 285.

[2] Great Northern Railway *v.* Kennedy, 4 Exch. 417. D. & N. R. R. *v.* Wilson, 22 Conn.

officers of a corporation could not dissolve it without the assent of the great body of the society. (a)

379. 6 Cowen, 26, S. P. Story, J., 9 Cranch, 51. 4 Wheaton, 698. The Atchafalaya Bank v. Dawson, 13 L'a Rep. 497, 506. It was declared, in this last case, that a cause of forfeiture of a corporation charter could not be taken advantage of or enforced except by a direct proceeding for that purpose by the government, notwithstanding the charter was to be *ipso facto* forfeited in the case alleged. In Wilde v. Jenkins, 4 Paige's Rep. 481, it was held, that an incorporated manufacturing society was not dissolved, though all its property and effects, *together with its charter*, were sold by the trustees and stockholders, and purchased by three partners with partnership funds, and who elected themselves trustees of the corporation. The stock of the corporation became partnership property, and the legal title in the corporate property was still in the corporation for the benefit of the copartners. And in Russell v. M'Lellan, 14 Pick. 63, it was held, that though a corporation had been without officers for more than two years, and had done no corporate act in that time, it was not thereby dissolved. So, again, in the case of The State v. The Bank of South Carolina, it was adjudged, in the court of general sessions at Charleston, in the summer of 1841, by Judge Butler, after an elaborate argument, and upon full consideration, that a suspension of specie payment by the bank was not *per se* such a nonuser or misuser of the franchises as to work a forfeiture of its charter. But in Planters' Bank of Mississippi v. The State, 7 Smedes & Marshall, Miss. R. 163, it was adjudged, that the failure of a bank to redeem its notes in specie, is a cause of forfeiture of its charter. It ceases to answer the ends of its institution, and the state may resume its grant.[1]

(a) In the case of Ward v. Sea Insurance Company, 7 Paige, 294, it was declared,

435. In New York, the Court of Appeals has recently decided, that where a corporation has forfeited a subscriber's stock for the non-payment of an instalment due, it cannot maintain an action for the recovery of any part of such subscription. Small v. The Herkimer M. & H. Co. 2 Comst. R. 330. By this decision, the previous decisions of the Supreme Court, in the same case were overruled. 21 Wend. 273. 2 Hill, 127; so, also, Allen v. Montgomery Railroad Co. 11 Ala. R. 437; but see Freeman v. Winchester, 10 S. & M. Rep. 577. See, further, on the liability of a subscriber for his subscription. Banet v. Alton & S. R. Co. 13 Ill. 504. Klein v. Alton & S. R. Co. Id. 514. Ryder v. Alton & S. R. Co. Ib. 516. C. & P. R. R. v. Bailey, 24 Vt. 465. K. & P. R. R. v. Kendall, 31 Me. 470. Pl. Rd. Co. v. Lapham, 18 Barb. 312. Same v. Snediker, Ib. 317. T. & B. R. R. Co. v. Warren, Ib. 310. T. & R. R. R. v. Kerr, 17 Barb. 581. Pl. Rd. Co. v. Payne, Ib. 567, where the cases are reviewed and shown to differ in circumstances rather than in principle. Carr v. Lefevre, 27 Penn. 413. Mann v. Pentz, 3 Comst. 415. Hotel Co. v. Coyle, 35 Me. 405. A call for subscription, payable by instalments, is valid. London & N. W. R. Co. v. M'Michael, 4 Eng. L. & Eq. 459. It is settled, by numerous cases, that where the number of shares of a corporation is fixed either by its charter or by its own vote, no assessment on the stock is valid till the whole is subscribed for. Salem Mill Corporation v. Ropes, 6 Pick. 23. Littleton Man. Co. v. Parker, 14 N. H. 543. Stoneham Br. R. R. v. Gould, 2 Gray, 277. And if an act be passed after the subscriptions have been made, reducing the required capital to the amount subscribed, the subscribers are not thereby rendered liable for assessments. R. R. Co. v. Veasie, 39 Me. 571. See, however, R. R. v. Jarvis, 34 Me. 360. R. R. v. Johnson, 10 Fost. 390.

[1] See Commonwealth v. Turnpike Association, 5 Cush. 509. Hurlbut v. Carter, 21 Barb. 221.

The subject of the forfeiture of corporate franchises by nonuser or misuser, was fully discussed in the case of *The King v. Amery*; (*a*) and it was held, that though a corporation may be dissolved, and its franchises lost, by nonuser or neglect, yet it was assumed as an undeniable proposition, that the default was to be judicially determined in a suit instituted for the purpose. The ancient doubt was, whether a corporation could be dissolved at all for a breach of trust. It is now well settled that it may, but then it must be first called upon to answer. (*b*) No advantage can be taken of any nonuser or misuser on the part of a corporation, by any defendant, in any collateral action. (*c*) In the great case of *The quo warranto against the City of London*, in the 34 Charles II., (*d*) it was *a point incidentally mooted, whether a corporation could surrender and dissolve itself *by deed*; and it was conceded that

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that the directors of a corporation, even with the consent of the stockholders, were not authorized to discontinue the corporate business, and distribute the stock, unless specially authorized by statute or a decree in chancery.[1] By the N. Y. Revised Statutes, vol. ii. 466, the majority of the directors or trustees of a corporation may, at any time, voluntarily apply by petition to the Court of Chancery for a decree dissolving the corporation; and the court, upon investigation, may decree a dissolution of it, if it appears that the corporation is insolvent, or that, under the circumstances, a dissolution would be beneficial to the stockholders, and not injurious to the public. Ibid. sec. 58–65. One or more receivers of the estate and effects of the corporation are to be appointed, with large and specific powers and duties, in respect to the settlement and distribution of the estates and effects. Ibid. 468–472.

(*a*) 2 Term Rep. 515. Canal Company *v.* Railroad Company, 4 Gill & Johnson, 1, S. P.

(*b*) Slee *v.* Bloom, 5 Johns. Ch. Rep. 380. Story, J., in 9 Cranch, 51. All franchises, said Lord Holt, in the case of the City of London *v.* Vanacre, 12 Mod. Rep. 271, are granted on condition that they shall be duly executed according to the grant, and if they neglected to perform the terms, they may be repealed by *scire facias*.[2]

(*c*) Trustees of Vernon Society *v.* Hills, 6 Cowen's Rep. 23. All Saints' Church *v.* Lovett, 1 Hall's N. Y. Rep. 191. Canal Company *v.* Railroad Company, 4 Gill & Johnson, 1. Cooper *v.* Curtis, 30 Maine R. 488.

(*d*) Howell's State Trials, vol. viii. p. 1039.

[1] And a corporation has no right to take a surrender of its capital stock, unless upon the reissue of an equal amount with like security. Johnson *v.* Bush, 3 Barb. Ch. R. 207.

[2] See, In the matter of The Jackson Marine Ins. Co. 4 Sandf. Ch. R. 559. Mason *v.* Fearson, 9 How. U. S. 249. In this last case, the *very unqualified* proposition is laid down, "that what a public corporation or officer is empowered to do for others, and it is beneficial to them to have done, the law holds he ought to do." Id. 259. See Hutson *v.* Mayor, &c., of N. Y. 5 Seld. 163.

it might be dissolved *by refusal to act*, so as not to have any members requisite to preserve its being. There are two modes of proceeding judicially to ascertain and enforce the forfeiture of a charter for default or abuse of power. The one is by *scire facias;* and that process is proper where there is a legal existing body, capable of acting, but who have abused their power. The other mode is by information in the nature of a *quo warranto;* which is in form a criminal, and in its nature a civil remedy; and that proceeding applies where there is a body corporate *de facto* only, but who take upon themselves to act, though, from some defect in their constitution, they cannot legally exercise their powers. (*a*) Both these modes of proceeding against corporations are at the instance and on behalf of the government. The state must be a party to the prosecution, for the judgment is that the parties be ousted, and the franchises seized into the hands of the government. (*b*) This remedy must be pursued at law, and there only; and by the statutes of New York, the mode of prosecution by information is directed, where there has been a misuser of the charter, or the franchises of the company are forfeited. (*c*) A court of chancery never deals with the

(*a*) Lord Kenyon and Ashhurst, J., in Rex *v.* Pasmore, 3 Term Rep. 199. The case against the *city of London* was by information in the nature of a *quo warranto*, charging the city with usurpation of its franchises, and requiring it to show by what warrant it claimed to exercise and enjoy its liberties, &c. So, also, in the greatly contested and elaborately discussed case of Thompson *v.* The People, 23 Wendell, 537, 591–594.

(*b*) Rex *v.* Staverton, Yelv. Rep. 190. King *v.* Ogden, 10 Barnw. & Cress. 230, Bayley, J. Commonwealth *v.* Union Insurance Company, 5 Mass. Rep 230. Centre and K. T. Road *v.* M'Conaby, 16 Serg. & Rawle, 140. The judgment in such cases, according to the New York Revised Statutes, vol. ii. p. 585, sec. 49, is, that the corporation be ousted, and altogether excluded from its corporate rights and franchises, and be dissolved. In Indiana, it is held, that a judgment against a corporation, in the case of a forfeiture of its charter, is, that the franchises be seized into the hands of the state, and that when its franchises are seized by execution on the judgment, then, and not till then, the corporation is dissolved. State Bank *v.* The State, 1 Blackford's Ind. Rep. 267.

(*c*) The New York Revised Statutes, vol. ii. pp. 581, 583, provide, that an information in the nature of a *quo warranto*, be filed by the attorney-general, upon his own relation, or upon the relation of others, when any person or association usurps or unlawfully holds any public office or franchise, or against any corporate body for misuser or nonuser of its franchises, or which does or omits acts which amount to a surrender thereof, or whenever they shall exercise any privilege not conferred by law. So the

*question of forfeiture. It may hold trustees of a cor- *314 poration accountable for abuse of trust, but the court cannot, without special statute authority, divest corporations of their corporate character and capacity. It has no ordinary jurisdiction in regard to the legality or regularity of the election or amotion of corporators. These are subjects exclusively of common-law jurisdiction. (a)

The mode of redress in New York, when incorporated companies abuse their powers, or become insolvent, has been the subject of several statute regulations, which have committed the cognizance of such cases to the court of chancery. (b) The Acts of 1817 and 1821, (c) provided for the dissolution of incorporated insurance companies, by order of the chancellor, upon application of the directors, and for good cause shown; and the court of chancery, when it decreed a dissolution of the cor-

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chancellor, on a bill filled by the attorney-general, may restrain, by injunction, any corporation from assuming powers not allowed by its charter, as well as restrain any individuals from exercising corporate rights or privileges not conferred by law.[1] The neglect or refusal of a corporation to perform the duties enjoined by the statute creating it, is a cause of forfeiture, though the neglect or refusal should not proceed from a bad or corrupt motive.[2] The People v. Kingston and Middleton T. R. Co. 23 Wendell's Rep. 193. And the information lies for any cause of forfeiture, and the remedy is not limited to *scire facias*. The People v. Bristol & R T. Co. Ibid. 222. Thompson v. The People, 23 Wendell, 537. If only a single act of *nonfeasance* be relied on as a cause of forfeiture, it must be averred and proved to be a wilful neglect, but not so if there be a general state of neglect or default. The People v. Hillsdale & C. T. Co. Ibid. 254.

(a) Van Ness, J., 3 Johns. Rep. 134. Slee v. Bloom, 5 Johns. Ch. Rep. 380. Attorney-General v. Earl of Clarendon, 17 Vesey, 491. Attorney-General v. Reynolds, 1 Eq. Cas. Abr. 131, pl. 10. Attorney-General v. Utica Insurance Company, 2 Johns. Ch. Rep. 376, 378, 388. The King v Whitwell, 5 Term Rep. 85.

(b) The provisions in the N. Y. Revised Statutes, relative to proceedings in equity against corporations, received a minute analysis and judicial construction by the vice-chancellor of New York, in the case of Mann, Receiver, &c. v. Pentz, 2 Sandford's Ch. Rep. 257, and again at p. 301; but such local regulations can only be referred to in a work of so general a nature as the present one.

(c) L. N. Y. sess. 40, ch. 146, and sess. 44, ch. 148.

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[1] See also, N. C. Rev. Code, p. 137. In Mass. (Stat. 1852, c. 312, § 42,) *any person* whose rights are endangered by the exercise of a franchise, not conferred by law, may apply to the Supreme Court for leave to file an information in the nature of a *quo warranto*. See Goddard v. Smithett, 3 Gray, 116.

[2] See *ante*, p. [312,] notes.

poration, was to direct a due distribution of the funds, and to appoint trustees for that purpose. The Act of April 21st, 1825, (a) was much broader in its provisions. It contained many directions calculated to check abuses in the management of all moneyed incorporations, and to facilitate the recovery of debts against them. All transfers, by incorporated companies, in contemplation of bankruptcy, were declared void; and if any incorporated bank should become insolvent, or violate its *315 charter, the *chancellor was authorized, by process of injunction, to restrain the exercise of its powers, and to appoint a receiver, and cause the effects of the company to be distributed among the creditors. This was a state of bankruptcy, in relation to incorporated banks; and it was an unusual provision, for the English bankrupt laws or the general insolvent laws of the several states never extended to corporations. (b) The New York Revised Statutes (c) have continued and enlarged the provision. When any incorporated company shall have remained insolvent for a year, or for that period of time neglected or refused to pay its debts, or suspended its ordinary business, it shall be deemed to have surrendered its franchises, and to be dissolved. (d) [1] And whenever any corporation,

(a) Sess. 48, ch. 325. See, also, to S P. 1 N. Y. R. S. 603

(b) There is a statute of bankruptcy in New Jersey, passed as early as 1810, in relation to insolvent banks and other corporations, with similar powers conferred upon the chancellor in respect to them. Elmer's Digest, p. 31. So also in Michigan, by Act of 1837, and by R. S. of New Jersey, 1847, p. 129.

(c) Vol. i. p. 603, sec. 4. Vol. ii. p. 462, sec. 31; p. 463, sec. 38.

(d) N. Y. Revised Statutes, vol. ii. p. 463, sec. 38. So, by a general law in North Carolina, (see their Revised Statutes, tit. Corporations,) when any corporation shall, for two years together, cease to act as a body corporate, such disuse of their corporate powers and privileges shall be considered and taken as a forfeiture of the charter. The statutes of Louisiana of 1842 and 1843 have provided for the facilities of the

[1] Such acts or neglect do not work a dissolution *ipso facto*, but entitle any stockholder or creditor to take proceedings to have its dissolution judicially declared. A judgment recovered against the corporation, at any time before the institution of such proceedings, and a sale of the corporate property, will be valid. Mickles *v.* Rochester City Bank, 11 Paige's R. 118. A lease made by a corporation of its works, with the intention of discontinuing its ordinary business for more than one year, and so subjecting the corporation to dissolution, is "an act of self-destruction which the law will not tolerate," and is *void.* Conro *v.* Port Henry Iron Co. 12 Barb. 27.

having banking powers, or power to make loans on pledges, or to make insurances, shall become insolvent, or violate any of the provisions of its charter, the court of chancery may restrain the exercise of its powers by injunction, and appoint a receiver. (a)[1] If the corporation proves, on investigation, to be insolvent, its effects are to be distributed among the creditors ratably, subject to the legal priority of the United States, and to judgments. (b) And whenever any incorporated company shall become insolvent, or it shall appear to the trustees or directors thereof that a dissolution of the corporation would be beneficial, application may be made voluntarily to the chancellor by petition, for a dissolution; and all sales, assignments, transfers, mortgages, and conveyances of any part of their corporate estate, real or personal, made after filing such petition, or any judgments confessed after that time, are declared to be void, as against the receivers to be appointed, and as against the creditors. (c) This last provision is to be taken as a qualification and limitation of the generality of a similar provision already mentioned in the Act of 1825. (d)

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liquidation of banks solvent or insolvent, and whether their liquidation be forced or voluntary.

(a) New York Revised Statutes, vol. ii. pp. 463, 464, sec. 39, 41.

(b) Ibid. vol. ii. p. 465, sec. 48.

(c) Ibid. vol. ii. p. 469, sec. 71. In Missouri, by statute, upon the dissolution of any corporation, the president and directors, or managers thereof, at the time of its dissolution, are made *ex officio* trustees to settle its concerns. R. S. of Missouri, 1835.

(d) Under the English bankrupt system, a voluntary payment to a creditor, under circumstances which must reasonably lead the debtor to believe bankruptcy *probable*, is deemed a fraud upon the other creditors, within the meaning of the bankrupt law, and the money can be recovered back by the assignees. Poland *v.* Glyn, 2 Dowling & Ryland, 310. The New York provision falls far short of the English rule in the check given to partial payments, but it has the merit of giving a clear and certain test of an act of insolvency. In Indiana, it has been held that a bank forfeited its charter, 1. When it contracts debts to a greater amount than double that of the deposit; 2. For the issuing of more paper, with a fraudulent intention, than the bank could redeem; 3. When it made large dividends of profits, while the bank refused to pay specie for its notes; 4. Embezzling large sums of money deposited in bank for safe-keeping. State Bank *v.* The State, 1 Blackford's Ind. R. 267.

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[1] But the statute must, in all its requisitions, be strictly construed, or the court has no jurisdiction, and the appointment of the receiver will be void. Bangs *v.* McIntosh, 23 Barb. (N. Y.) 591.

A corporate body, as well as a private individual, when in failing circumstances, and unable to redeem its paper, may, without any statute provision, and upon general principles of equity, assign its property to a trustee, in trust, to collect its debts and pay debts, and distribute as directed. It has unlimited power over its property to pay its debts.[1] A corporation may also, like an individual, give preferences among creditors, when honestly and fairly intended and done.[2] The doctrine is well established in equity. Union Bank of Tennessee *v.* Ellicott, 6 Gill & Johnson's Rep. 363. The State of Maryland *v.* Bank of Maryland, Id. 205. Revere *v.* Boston Copper Co. 15 Pick. Rep. 351. Catlin *v.* Eagle Bank of New Haven, 6 Conn. Rep. 233. See, also, *infra*, p. 532. Conway, *ex parte*, 4 Arkansas Rep. 302. Flint *v.* Clinton Company, 12 N. H. Rep. 430. Dana *v.* The Bank of the United States, 5 Watts & Serg. 223. Bank of U. S. *v.* Huth, 4 B. Monroe, 423. In Robins *v.* Embry, 1 Smedes & Marshall, Miss. Ch. R. 207, the chancellor admits that a corporate body may make an assignment of the corporate property in trust, equally and ratably, to pay its debts; but as their assets are a trust fund for all the creditors, he ably examined and opposed the doctrine that corporations, like individuals, may give preference among creditors. Ib. pp. 259–266.

I have, in this lecture, gone as far into the law of corporations as was consistent with the plan and nature of the present work; and for a more full view of the subject, I would refer to the Treatise on Private Corporations Aggregate, by Messrs. Angell & Ames, as containing an able and thorough examination of every part of the learning appertaining to this head, and as being a performance which deserves and will receive the respect and patronage of the profession. A new and enlarged 3d edition of that Treatise appeared in 1846, and the work is vastly improved and admirably digested.

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[1] De Ruyter *v.* St. Peter's Church, 3 Comst. R. 238. S. C. 3 Barb. Ch. R. 119. But *it seems* that the franchise itself cannot be passed by assignment. It was so held in Arthur *v.* Commercial, &c. Bank, 9 Smedes & Marshall, 394. The assignment of a bank is not, under the statutes of Mississippi, a dissolution of the corporation; yet if it prevents the bank from fulfilling the purposes of its charter, it may work a forfeiture for nonuser. State *v.* Commercial Bank, 13 S. & M. 569. Cooper *v.* Curtis, 30 Maine R. 488.

[2] And stockholders taking advantage of their position to obtain security for debts due themselves from the corporation, are not guilty of fraud. Whitwell *v.* Warner, 20 Vt. 425–444.

PART V.

OF THE LAW CONCERNING PERSONAL PROPERTY.

LECTURE XXXIV.

OF THE HISTORY, PROGRESS, AND ABSOLUTE RIGHTS OF PROPERTY.

Having concluded a series of lectures on the various rights of *persons*, I proceed next to the examination of the law of *property*, which has always occupied a preëminent place in the municipal codes of every civilized people. I purpose to begin with the law of *personal* property, as it appears to be the most natural and easy transition from the subjects which we have already discussed. This is the species of property which first arises, and is cultivated in the rudest ages; and when commerce and the arts have ascended to distinguished heights, it maintains its level, if it does not rise even superior to property in land itself, in the influence which it exercises over the talents, the passions, and the destiny of mankind.

To suppose a state of man prior to the existence of any notions of separate property, when all things were common, and when men throughout the world lived without law or government, in innocence and simplicity, is a mere dream of the imagination. It is the golden age of the poets which forms such a delightful picture in the fictions, adorned by the muse of Hesiod, Lucretius, Ovid, and Virgil. It has been truly observed, that the first * man who was born into the world killed the second; and when did the times of simplicity begin? And yet we find the Roman historians and *318

philosophers, (*a*) rivalling the language of poetry in their descriptions of some imaginary state of nature, which it was impossible to know and idle to conjecture. No such state was intended for man in the benevolent dispensation of Providence; and in following the migrations of nations, apart from the book of Genesis, human curiosity is unable to penetrate beyond the pages of genuine history; and Homer, Herodotus, and Livy, carry us back to the confines of the fabulous ages. The sense of property is inherent in the human breast, and the gradual enlargement and cultivation of that sense, from its feeble force in the savage state, to its full vigor and maturity among polished nations, forms a very instructive portion of the history of civil society. Man was fitted and intended by the author of his being for society and government, and for the acquisition and enjoyment of property. It is, to speak correctly, the law of his nature; and by obedience to this law, he brings all his faculties into exercise, and is enabled to display the various and exalted powers of the human mind. (*b*)

Occupancy, doubtless, gave the first title to property, in lands and movables. It is the natural and original method of *319 acquiring it; and upon the principles of universal *law, that the title continues so long as occupancy contin-

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(*a*) Sallust, Cat. sec. 6. Jugur. sec 18. Tacit. Ann. lib. 3, sec. 26. Cic. Orat. pro P. Sextio, sec. 42. Justin. lib. 43, ch. 1.

(*b*) Selden, in his Uxor Ebraica, lib. 1, ch. 1, gives the following definition of the law of nature: *Naturale jus appellamus, quod ab ipso naturæ auctore seu numine sanctissimo in ipsis rerum primordiis cordi humano inditum præscriptumque est; adeoque posteritati universæ regulariter perpetuo erat semperque est observandum ac immutabile.* Lord Kames considers the sense of property to be a natural appetite, and, in its nature, a great blessing. Sketches of the History of Man, b. 1, sk. 2. The institution of marriage and the institution of private property, and of government and law, have been considered by the wisest statesmen and philosophers of every age, as the foundation of all civilization among mankind.

"The voice of LAW," said Hooker, in his Ecclesiastical Polity, b. 1, "is the harmony of the world; all things in heaven and earth do her homage; the very least as feeling her care, and the greatest as not exempted from her power." The greatest of the ancient sages, Aristotle, Plato, and Cicero, expressed the same idea. The essence of freedom, said Plato, (De Leg.,) consisted in the supremacy of law over personal will, whether it be the will of the one, the few, or the many. So, Aristotle (Politics, b. 1,) declared that *government* pertained to man in his most perfect state, and entered into the very constitution of human nature. Man could not strictly be man without it. Existence in *the state* was requisite to the completion of his humanity, and essential to his protection against his own wants and vices.

ues. (*a*) There is no person, even in his rudest state, who does not feel and acknowledge, in a greater or less degree, the justice of this title. The right of property, founded on occupancy, is suggested to the human mind by feeling and reason prior to the influence of positive institutions. (*b*) There have been modern theorists who have considered separate and exclusive property, and inequalities of property, as the cause of injustice, and the unhappy result of government and artificial institutions. But human society would be in a most unnatural and miserable condition if it were possible to be instituted or reorganized upon the basis of such speculations. The sense of property is graciously bestowed on mankind for the purpose of rousing them from sloth, and stimulating them to action; and so long as the right of acquisition is exercised in conformity to the social relations, and the moral obligations which spring from them, it ought to be sacredly protected. The natural and active sense of property pervades the foundations of social improvement. It leads to the cultivation of the earth, the institution of government, the establishment of justice, the acquisition of the comforts of life, the growth of the useful arts, the spirit of commerce, the productions of taste, the erections of charity, and the display of the benevolent affections. (*c*)

(*a*) Grotius, Jure B. & P. b. 2, ch. 3, sec. 4. Mare Liberum, ch. 5. All the writers on international law concur in the doctrine that occupancy is essential to the title to land newly discovered and vacant. Puff. Droit de la Nat. liv. 4, ch. 4. Vattel, Droit des Gens, liv. 1, ch. 18.

(*b*) *Quod enim nullius est id ratione naturali occupanti conceditur.* Dig. 41, 1, 3.

(*c*) M. Toullier, in his account of the origin and progress of property, in his Droit Civil Français, tom. iii. 40, insists that a primitive state of man existed before the establishment of civil society, when all things were common, and temporary occupancy the only title; but he gives no sufficient proof of the fact. The book of Genesis, which he justly regards as the most ancient and venerable of histories, does not show any such state of the human race. The first man born was a tiller of the ground, and the second a keeper of sheep. The earliest accounts of Noah and his descendants, after the flood, in Genesis ix. x. xiii., prove that they were husbandmen, and planted vineyards, built cities, established kingdoms, and abounded in flocks and herds, and gold and silver. I observe, however, with pleasure, that M. Toullier has freely and liberally followed Sir William Blackstone in his elegant dissertation on the rise and progress of property. President Goguet, in his most learned work, De l'Origine des Lois, des Arts, des Sciences, et de leurs progres chez les anciens Peuples, b. 2, ch. 1, art. 1, considers agriculture as flourishing before the dispersion at Babel, though after that event mankind relapsed into the most deplorable barbarity.

*320 *The exclusive right of using and transferring property follows, as a natural consequence, from the perception and admission of the right itself. (a) But, in the infancy and earlier stages of society, the right of property depended almost entirely upon actual occupancy; and it is a general law of property in all systems of jurisprudence, that actual delivery of possession is necessary to consummate the title. (b) Property, without possession, is said to be too abstract an idea for savage life; and society had made some considerable advances towards civilization, and the improvements resulting from order and subordination must have existed to some certain extent, before the temporary right of occupancy was changed into a permanent and solid title, under the sanction of positive law. Property in land was first in the nation or tribe; and the right of the individual occupant was merely usufructuary and temporary. (c) It then went by allotment, partition, or grant, from the chiefs or prince of the tribe to individuals; and, whatever may have been the case in the earliest and rudest state of mankind beyond the records of history, or whatever may be the theory on the subject, yet, in point of fact, as far as we know, property has always been the creature of civil institutions. By the ancient law of all the nations of Europe, the *bonâ fide* possessor of goods had a good title as against the real owner in whatever way, whether by force, fraud, or accident, the owner may have been divested of the possession. It was the law in several parts of Germany, so late as the middle of the last century, according to Heineccius, (d) that if one person should lend, or hire, or deposit his goods with another, and they should come to the possession of a third person, he would be entitled to hold them as against the original owner. By the Roman law, in its early state, property stolen and sold was lost to the real owner, and the only remedy was by an action (*conductio furtiva*) against the thief. But when the Roman law advanced to maturity, it was held that theft did not deprive a man of his

(a) Grotius, b. 2, ch. 6, sec. 1.

(b) Ibid. b. 2, ch. 6, sec. 1. Puff. b. 4, ch. 9, sec. 8. Barbeyrac's, note, Ibid. Sir William Scott, case of The Fama, 5 Rob. Adm. Rep. 114.

(c) Cæsar de Bel. Gal. lib. 4, ch. 2. Ibid. lib. 6, ch. 20.

(d) Opera, tom. v. part 2, pp. 180, 181.

title to property; and the action of *rei vindicatio* was, in effect, given against the * *bonâ fide* purchaser. (*a*) The *321 law of the twelve tables, by which the possession of one year was a good title by prescription to movables, shows that a feeble and precarious right was attached to personal property out of possession.

The ancient laws of Europe, confiscating stolen goods on conviction of the thief, without paying any regard to the right of the real owner, is another instance to prove the prevalence of a very blunt sense of the right of property distinct from the possession. The English doctrine of wrecks was founded on this imperfect notion of the right of property, when it had lost the evidence of possession. By the common law, as it was laid down by Sir William Blackstone, (*b*) goods wrecked were adjudged to belong to the king, and the property was lost to the owner. This, he admits, was not consonant to reason and humanity; and the rigor of the common law was softened by the statute of West. I. 3 Edw. I. ch. 4, which declared, that if anything alive escaped the shipwreck, be it man or animal, it was not a legal wreck, and the owner was entitled to reclaim his property within a year and a day. Upon this statute the legal doctrine of wrecks has stood to this day. St. Germain, the author of the Doctor and Student, did not seem to think that even the law under this statute stood with conscience; (*c*) for why should the owner forfeit the shipwrecked goods, though it should happen that no man, dog, or cat, (to use the words of the statute,) should come alive unto the land out of the ship? The only rational ground of the claim on the part of the crown is, that the true owner cannot be ascertained. The imperial edict of the Emperor Constantine was more just than the English statute, for it gave the wrecked goods, in every event, to the owner; (*d*) and * Bracton, who wrote before the *322 statute of 3 Edw. I., and who was acquainted with the edict of Constantine, lays down the doctrine of wreck upon

(*a*) This was by the perpetual edict extending the *actio metus*, which differed in nothing but its name from the *rei vindicatio*. Inst. 2, 6, 2. Lord Kames's Historical Law Tracts, tit. Property.

(*b*) Com. vol. i. pp. 318, 323.

(*c*) Doctor and Student, 267, 268.

(*d*) Code, 11, 5, 1.

perfectly just principles. (*a*) He makes it to depend, not upon the casual escape of an animal, but upon the absence of all evidence of the owner. The statutes of New York, Massachusetts, and other American states, are like the edict of Constantine and the declaration of Bracton; for they declare that nothing that shall be cast by the sea upon the land shall be adjudged a wreck, but the goods shall be kept safely for the space of a year for the true owner, to whom the same is to be delivered on his paying reasonable salvage; and if the goods be not reclaimed within that time, they shall be sold, and the proceeds accounted for to the state. (*b*) In the case of *Hamilton & Smith* v. *Davis*, (*c*) the very question arose in the K. B., whether the real owner was entitled to reclaim his shipwrecked goods, though no living creature had come alive from the ship to the shore. The grantee under the crown claimed the goods as a wreck, because the ship was totally lost, and no living animal was saved; and his very distinguished counsel, consisting of Mr. Dunning, (afterwards Lord Ashburton,) and Mr. Kenyon, (afterwards Lord Chief Justice of the K. B.,) insisted that, according to all the writers, from the Mirror to Blackstone inclusive, it was a lawful wreck, as no living creature had come to the shore, and that Bracton stood unsupported by any other writer. But Lord Mansfield, with a sagacity and spirit that did him infinite honor, reprobated the doctrine urged on the part of the defendant, and declared that there was no case adjudging that the goods *323 were forfeited, because no * dog or cat, or other animal, came alive to the shore; that any such determination would be contrary to the principles of law and justice; that the very idea was shocking; and that the coming ashore of a dog or a cat alive, was no better proof of ownership than if they should come ashore dead; that the whole inquiry was a question of ownership; and that, if no owner could be discovered,

(*a*) Lib. 3, 120, sec. 5.

(*b*) N. Y. Revised Statutes, vol. i. p. 690. Mass. Revised Statutes, 1836, part 1, tit. 14, ch. 57, sec. 12. The Colony Laws of Massachusetts also preserved all wrecks for the owner, and did not follow the English law. Dane's Abr. vol. iii. 144. Probably the statute law of other states is equally just. The Acts of North Carolina of 1801, 1805, 1817, 1818, on this subject, are founded, said Mr. Justice Story, in 5 Mason's Rep. 477, on the principles of justice and humanity.

(*c*) 5 Burr. Rep. 2732.

the goods belonged to the king, and not otherwise; and that the statute of 3 Edw. I. was not to receive any construction contrary to the plain principles of justice and humanity.

After reading this interesting case, it appears rather surprising that any contrary opinion should have been seriously entertained in Westminster Hall, at so late a period as the year 1771; and especially that Sir William Blackstone should have acquiesced, without any difficulty, in a different construction of the statute of West. I.

But to return to the history of the law of property. The title to it was gradually strengthened, and acquired great solidity and energy, when it came to be understood that no man could be deprived of his property without his consent, and that even the honest purchaser was not safe under a defective title.

The exceptions to this rule grew out of the necessities and the policy of commerce; and it was established as a general rule, that sales of personal property in market overt would bind the property, even against the real owner. The markets overt in England depend upon special custom, which prescribes the place, except that in the city of London every shop, in which goods are exposed publicly to sale, is market overt for those things in which the owner professes to trade. If goods be stolen, and sold openly in such a shop, the sale changes the property. But if the goods be not sold strictly in market overt, or if there be not good faith in the buyer, or there be anything unusual or irregular in the sale, it will not affect the validity of it as * against the title of the real owner. (*a*) *324 The common law, according to Lord Coke, (*b*) held it to be a point of great policy, that fairs and markets overt should be well furnished; and, to encourage them, did ordain that all sales and contracts, of anything vendible in markets overt, should bind those who had a right; but, he adds, that the rule had many exceptions, and he proceeds to state the several exceptions, which show the precision and caution with which

(*a*) 5 Co. 83. 12 Mod. Rep. 521. Bacon's Use of the Law, 157. Com. Dig. tit. Market, E. Shelley *v.* Ford, 5 Carr. & Payne, 313. Markets overt were derived from the Saxon laws, which would not allow a transfer of goods to be valid unless made before witnesses.

(*b*) 2 Inst. 713.

the sale was to be conducted so as to bind the property. It is the settled English law that a sale out of the market overt, or not according to the usage and regulations of the market overt, will not change the property as against the real owner. (*a*) Thus we find, in the case of *Wilkinson* v. *King*, (*b*) that where the owner of goods had sent them to a wharf in the borough of Southwark, where goods of that sort are usually sold, and the wharfinger, without any authority, sold the goods to a *bonâ fide* purchaser, this was considered not to be a sale in market overt so as to change the property, but a wrongful conversion, for the wharf was not a market overt; and the purchaser was held liable in trover to the true owner.[1] So it is said to be a general rule that goods obtained by a tort or criminal fraud, under color of a contract, may be taken by the vendor out of the hands of the purchaser, or even of a purchaser from the tortious vendee. (*c*)

It is understood that the English custom of markets overt does not apply to this country;[2] and the general principle applicable to the law of personal property throughout civilized Europe is, that *nemo plus juris in alium transferre potest quàm ipse habet.* This is a maxim of the common and of the civil law; (*d*) and a sale *ex vi termini*, imports nothing more than

(*a*) 2 Blacks. Com. 449. Foxley's case, 5 Co. 109 a. Peer v. Humphrey, 4 Neville & Manning, 430. S. C. 1 Harr. & Woll. Rep. 28. But a sale in market overt will not bar the original owner of stolen goods, if he prosecute the thief to conviction, and sue the person in whose possession they were at the time of the conviction. This is by the statute of 21 Henry VIII c. 11, and which was adopted in Virginia, in 1792. Horwood v. Smith, 2 Term Rep. 750. Peer v. Humphrey, ub. sup. Coke, 2 Inst. 714. Burgess v. Coney, Trem. P. C. 315. But trover will lie against the innocent purchaser of stolen goods, although no steps have been taken to prosecute the thief to conviction. White v. Spettigue, 13 Meeson & Welsby, 603. S. C. 1 Carr. & Kirwan, 673.

(*b*) 2 Campb. N. P. 335.

(*c*) Long on Sales, by Rand, pp. 167, 168.

(*d*) Co. Litt. 309. Dig. 41, 1, 20. Pothier Traité du Contrat de Vente, 1, n. 7. Ersk. Inst. 418. 1 Bell's Com. 281.

[1] A public sale of a horse at a repository for the sale of horses is not a sale in market overt in England. Lee v. Robinson, 37 Eng. Law & Eq. 406.

[2] It has been decided that there are no markets overt in Vermont. The subject was fully discussed, and the reasoning is strong against their existence in any of the States in the Union. Griffith v. Fowler, 18 Vermont R. 390. And in Carmichael v. Buck, 10 Rich. Law, (S. C.) 332, the court said there was no market overt in South Carolina.

that the *bonâ fide* purchaser succeeds to the rights of the vendor. It has been frequently held in this country, (*a*) that the English law of the market overt * had not been adopted; *325 and consequently, as a general rule, the title of the true owner cannot be lost without his own free act and consent. How far that consent, or a due authority to sell is to be inferred, in many cases, for the encouragement and safety of commerce, may be discussed in our future inquiries. (*b*) A radical defect

(*a*) Dame *v.* Baldwin, 8 Mass. Rep. 518. Wheelwright *v.* Depeyster, 1 Johns. Rep. 479. Hosack *v.* Weaver, 1 Yeates's Rep. 478. Easton *v.* Worthington, 5 Serg. & Rawle, 130. Browning *v.* Magill, 2 Harr. & Johns. 308. M'Grew *v.* Browder, 14 Martin's L'a Rep. 17. Roland *v.* Gundy, 5 Hammond's O. Rep 202. Lance *v.* Cowen, 1 Dana's Ken. Rep. 195. Ventress *v.* Smith, 10 Peters's U. S. Rep. 161. Hoffman *v.* Carow, 22 Wendell's Rep. 285. In that case it was adjudged in the Court of Errors, that an auctioneer who sold stolen goods was liable to the owner in trover, though the goods were sold by him, and the proceeds paid over to the thief, without notice of the felony. It was declared, by statute in Pennsylvania, in 1780, that no sale of a stolen horse should operate to change the property. This was before it was settled that we had no markets overt in this country in the sense of the English common law. In Scotland, the true owner may reclaim his property, even from the *bonâ fide* purchaser in market overt. Bell's Princip. sec. 527.

(*b*) The doctrine that possession carries with it the evidence of property, so as to protect a person acquiring property in the usual course of trade, is said to be limited to cash, bank bills, and bills and checks payable to bearer. Saltus *v.* Everett, 20 Wendell, 267.[1] By statute 6 Geo. IV. c. 94, the consignee of goods from the shipper is entitled to a lien in respect to money or negotiable securities advanced for the shipper, without notice that the shipper was not the *bonâ fide* owner. And any person intrusted with a bill of lading, or order for the delivery of the goods, was to be deemed the true owner of the goods, so far as to give validity to any sale or disposition thereof by deposit or pledge, if the buyer or pawnee had not notice that such person was not the true owner. So, any person taking goods on deposit or pledge for a pre-existing debt from the party in possession, without notice that he was not the owner, acquires the right that was in the person making the deposit or pledge. Any person may accept goods on any such document, on deposit or pledge from any factor or agent, with knowledge that he was a factor or agent, and he will acquire the title or interest of the factor or agent. And any person may contract for the purchase of goods from any factor, agent, or consignee in possession thereof, and make payment thereof with knowledge of such agency, provided the contract be made in the usual course of business, and without notice of any want of authority in the agent to sell and receive payment. The true owner, prior to the sale or pledge, may recover from the factor or agent, or his assignees, and from the buyer, the price of the goods, subject to his right of set-off against the agent, and may recover the goods deposited or pledged on repayment of the money or restoration of the negotiable paper advanced on security thereof, and on payment of the money or restoration of the negotiable

[1] See, on this subject. Kingsbury *v.* Smith, 13 N. Hamp. R. 109. Robinson *v.* Dauchy, 8 Barb. S. C. Rep. 20. McMahon *v.* Sloan, 12 Penn. 229.

of title in the possessor is, by the general jurisprudence of Europe, available to the true owner against creditors and purchasers; and there is such a defect, when the person from whom the property was acquired was incapable of consent, or when the thing had been stolen, or obtained by violence. The true owner, in those cases, may vindicate his title. If goods be stolen, no title passes from the felon to the *bonâ fide* purchaser. (a) But this is not the place to pursue further this inquiry. My object, at present, is only to show how the right of the true owner to property kept increasing in consideration and vigor, with the progress of law from rudeness to refinement.

Title to property, resting originally in occupany, ceased, of course, upon the death of the occupant. Sir William Blackstone considers the descent, devise, and transfer of property, political institutions, and creatures of the municipal law, and not natural rights; and that the law of nature suggests, that on the death of the possessor, the estate should become common, and be open to the next occupant. He admits, however, that for the sake of peace and order, the universal law of almost every nation gives to the possessor the power to continue his

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paper advanced by the factor or agent. So, he may recover from any person any balance in hand, being the produce of the sale of the goods, after deducting the money or negotiable paper advanced on the security thereof.

(a) Fraud and breaches of trust are said not to be among the radical defects which will absolutely annul the title of the subsequent *bonâ fide* purchaser; and Mr. Brown has, though I think mistakingly, contended, that cases of force and fear stand on the same footing, for I apprehend that force and fear will destroy the contract entirely. Brown on Sales, 395. 1 Bell's Com. 281, 286, 287, 289. Mr. Bell shows, from the cases which he cites, that it is not clearly settled in what cases a sale by a person in lawful possession will bind the real owner, if the sale be founded on a breach of trust. *Vide infra*, p. 514, note. If a bailee of property for a special purpose, sells it, the *bonâ fide* purchaser does not acquire a valid title. Wilkinson *v.* King, 2 Campb. Rep. 335. Hartop *v.* Hoare, 3 Atk. 44. Hardman *v.* Willcock, 9 Bingham, 382, note. Galvin *v.* Bacon, 2 Fairfield, 28. Story on Bailments, p. 79, 2d edit. But if the vendor delivers goods with the intention that the property as well as the possession shall pass, a *bonâ fide* purchaser from a fraudulent vendee will hold the goods. Andrew *v.* Dietrich, 14 Wendell, 31. It is sufficient for the purpose of protecting a *bonâ fide* purchaser, that the owner of personal property confers an apparent *right of property* upon the vendor, as when he sells goods and delivers possession, although the goods were obtained from him fraudulently; and he confers an apparent *right of disposal*, when he furnishes the vendor with the external *indicia* of such right, or where a bill of lading is sent to a consignee with a power of transfer. Saltus *v.* Everett, 20 Wendell, 267.

property by will; and if it be not disposed of in that way, that the municipal law steps *in and declares who shall *326 be heir of the deceased. (*a*) As a mere speculative question, it may be doubted whether this be a perfectly correct view of the law of nature on this subject. The right to transmit property by descent, to one's own offspring, is dictated by the voice of nature. (*b*) The universality of the sense of a rule or obligation, is pretty good evidence that it has its foundation in natural law. (*c*) It is in accordance with the sympathies and reason of all mankind, that the children of the owner of property which he acquired and improved by his skill and industry, and by their association and labor, should have a better title to it at his death than the passing stranger. It is a continuation of the former occupancy in the members of the same family. This better title of the children has been recognized in every age and nation, and it is founded in the natural affections, which are the growth of the domestic ties, and the order of Providence. (*d*) But the particular distribution among the heirs of the blood, and the regulation and extent of the degrees of consanguinity, to which the right of succession should be attached, do undoubtedly depend upon positive institution; and it seems to be the general doctrine, founded on the history of all nations and ages, that property in land, when such property began to exist and to be recognized, was originally vested in the state or sovereign, and derived by grant to individuals. (*e*)

The power of alienation of property is a necessary incident to the right of property, and was dictated by mutual convenience and mutual wants. It was first applied to movables; and a notion of separate and permanent property in land could not have arisen until men had advanced beyond the hunter and shepherd states, and become husbandmen and farmers. Property in land would naturally take a faster hold of the affections; and, from the very nature of the subject, it would *not be *327

(*a*) Com. vol. ii. ch. 1, 10–13. (*b*) Grotius, b. 2, ch. 7, sec. 5.

(*c*) *Omni in re consensio omnium gentium lex naturæ putanda est.* Cic. Tuscul. Quæst. lib. 1, ch. 13.

(*d*) Christian's notes to 2 Blacks. Com. ch. 1. Taylor's Elements of the Civil Law, 519. Toullier, Droit Civil Français, tom. iii. pp. 121–128.

(*e*) Grotius, b. 2, ch. 2, sec. 4. Ibid. ch. 3, sec. 4.

susceptible of easy transfer, nor so soon as movable property be called into action as an article of commerce.

Delivery of possession was, anciently, necessary to the valid transfer of land. When actual delivery became inconvenient, symbolical delivery supplied its place; and as society grew in cultivation and refinement, writing was introduced, and the alienation of land was by deed.

The gratuitous disposition of land by will was of much slower growth than alienations, in the way of commerce, for a valuable consideration; because the children were supposed to have a right to the succession on the death of the parent; though Grotius considers disposition by will to be one of the natural rights of alienation. (*a*) In the early periods of the English law, a man was never permitted totally to disinherit his children, or leave his widow without provision. (*b*) Testaments were introduced by Solon into the Athenian commonwealth, in the case in which the testator had no issue; and the Roman law would not allow a man to disinherit his own issue, *sui et necessarii hæredes*, his natural and domestic heirs or children, and their descendants, without assigning some just cause in his will. The reason of the rule in the civil law was, that the children were considered as having a property in the effects of the father, and entitled to the management of the estate. The *querela inofficiosi testamenti* was an action introduced in favor of the children, to rescind wills made to their prejudice, without just cause. (*c*) But the father could charge his estate with his debt, and so render the succession unprofitable; and the children could, in that case, abandon the succession, and so escape the obligation of the debts.

In England the right of alienation of land was long checked by the oppressive restraints of the feudal system, and the doctrine of entailments. All those embarrassments have been effectually removed in this country; and the right to acquire, to hold, to enjoy, to alien, to devise, and to * transmit property by inheritance, to one's descendants, in

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(*a*) De Jure Belli, b. 2, ch. 6, sec. 14.

(*b*) 1 Reeves's Hist. of the English Law, 11. *Vide infra*, vol. iv. p. 503.

(*c*) Dig. 29, 2, 12. *Vide infra*, vol. iv. p. 503.

regular order and succession, is enjoyed in the fulness and perfection of the absolute right. Every individual has as much freedom in the acquisition, use, and disposition of his property, as is consistent with good order and the reciprocal rights of others. The state has set bounds to the acquisition of property by corporate bodies; for the creation of those artificial persons is a matter resting in the discretion of the government, who have a right to impose such restrictions upon a gratuitous privilege or franchise, as the sense of the public interest or convenience may dictate. With the admission of this exception, the legislature has no right to limit the extent of the acquisition of property, as was suggested by some of the regulations in ancient Crete, Lacedæmon, and Athens; (a) and has also been recommended in some modern utopian speculations. A state of equality as to property is impossible to be maintained, for it is against the laws of our nature; and if it could be reduced to practice, it would place the human race in a state of tasteless enjoyment and stupid inactivity, which would degrade the mind and destroy the happiness of social life. (b)

(a) Arist. Politics, by Gillies, b. 2, ch. 8. Potter's Antiq. of Greece, vol. i. p. 167.

(b) Harrington, in his Oceana, declared an Agrarian law to be the foundation of a commonwealth; and he undoubtedly alluded to the common interpretation and popular view of the Agrarian laws in ancient Rome, and not to the new and just idea of M. De Niebuhr, that those laws related only to leases of the public lands belonging to the state. History of Rome, vol. ii. 116–131. The public lands belonging to the state in ancient Rome, and which kept enlarging with every conquest, were, in the early periods of its history, leased out, and mostly for pasturage, to occupiers who were tenants at will to the state. And as large accessions of new citizens accrued, there would be new allotments, which necessarily involved the sacrifice of many existing interests. The burghers or patricians had the exclusive use of these lands while unallotted, not exceeding 500 jugera to each individual; but when they were divided by Agrarian laws into small lots for cultivation, the plebeian commoners took them, and this gave the Agrarian law such great and just popularity. Dr. Arnold (History of Rome, vol. i. 160) concludes that "if amongst Niebuhr's countless services to Roman history any single one may claim our gratitude beyond the rest, it is his explanation of the true nature and character of the Agrarian laws." Montesquieu, in his Spirit of Laws, b. 5, ch. 3, 4, 5, 6, frequently suggests the necessity of laws in a democracy establishing equality and frugality. All schemes of that kind are essentially visionary, though they may not be quite as extravagant as some of the reveries of Rousseau, Condorcet, or Godwin. In the code of laws compiled by King James, in 1606, for the new colonies in America, a community of property and labor, for five years from the settlement of each colony, was established. This was a temporary expedient; but the experiment upon this theory, in the colony of Virginia, proved it

*329 *When the laws allow a free circulation to property by the abolition of perpetuities, entailments, the claims of primogeniture, and all inequalities of descent, the operation of the steady laws of nature will, of themselves, preserve a proper equilibrium, and dissipate the mounds of property as fast as they accumulate.

Civil government is not entitled, in ordinary cases, and as a general rule, to regulate the use of property in the hands of the owners, by sumptuary laws, or any other visionary schemes of frugality and equality. The notion that plain, coarse, and abstemious habits of living are requisite to the preservation of heroism and patriotism, has been derived from the Roman and classical writers. They praised sumptuary laws, and declaimed vehemently against the degeneracy of their countrymen, which they imputed to the corrupting influence of the arts of Greece, and of the riches and luxury of the world, upon the freedom and spirit of those "lords of human kind," who had attained universal empire by means of the hardy virtues of the prim- *330 itive ages. (*a*) But *we need only look to the free institutions of Britain and her descendants, and the

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to be an intolerable restriction, leading to idleness and immorality, and to be destructive of all the ordinary motives to human industry. (Stith's History of Virginia. Robertson's America, b. 9. Bancroft's History, vol. i. p. 161.) The experiment of a community of lands, goods, and labor at New Plymouth, made in the first years of the colony, was found to be injurious even with that small, simple, and pious band of emigrants; and the institution of separate property, in 1623, had a sudden and very beneficial effect in exciting a spirit of industry. (Morton's New England Memorial, 93. Baylie's Historical Memoir, vol. i. pp. 120, 158.) The state of equality does not suit the present condition of man, and whenever it has been attempted, it has checked civilization and led to immorality, and destroyed freedom of action and enjoyment. Mr. Young, the learned editor of the "Chronicles of the Pilgrim Fathers," Boston, 1841, says (p. 84) that the joint-stock association of the pilgrims was a partnership, forced upon them by necessity, and dissolved as soon as possible, and that there never was any community of goods among them, as that phrase is commonly understood.

(*a*) No author was more distinguished than Sallust for his eloquent invectives against riches, luxury, and the arts, which he considered as having corrupted and destroyed the Roman republic. Among other acquired vices, he says, the Romans had learned to admire statues, pictures, and fine-wrought plate. Sal. Cat. c. 11. Juvenal painted the mighty evils of luxury with the hand of a master. In a satire devoted to the delineation of extreme profligacy, he relieves himself for a moment by a brief but lively sketch of the pure and rustic virtues of the old Romans. He recurs again to

prosperity and freedom which they cherish and protect, to be satisfied that the abundant returns of industry, the fruits of genius, the boundless extent of commerce, the exuberance of wealth, and the cultivation of the liberal arts, with the unfettered use of all these blessings, are by no means incompatible with the full and perfect enjoyment of enlightened civil liberty. No such fatal union necessarily exists between prosperity and tyranny, or between wealth and national corruption, in the harmonious arrangements of Providence. Though Britain, like ancient Tyre, has her "merchants who are princes, and her traffickers the honorable of the earth," she still sits "very glorious in the midst of the seas, and enriches the kings of the earth with the multitude of her riches and of her merchandise." Nor have the polished manners and refined taste for which France has been renowned in modern ages, or even the effeminate luxury of her higher classes and of her capital, been found to damp her heroism, or enervate her national spirit. Liberty depends essentially upon the structure of the government, the administration of justice, and the intelligence of the people, and it has very little concern with equality of property and frugality of living, or the varieties of soil and climate. (*a*)

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the desolations of wealth and luxury, and rises to the loftiest strains of patriotic indignation:

Sævior armis
Luxuria incubuit, victumque ulciscitur orbem.
Sat. 6, v. 291, 292.

(*a*) The sumptuary laws of ancient Rome had their origin in the twelve tables, which controlled the wastefulness of prodigals, and unnecessary expenditure at funerals. The appetite for luxury increased with dominion and riches, and sumptuary laws were from time to time enacted from the 566th year of the city down to the time of the emperors, restraining, by severe checks, luxury and extravagance in dress, furniture, and food. They were absurdly and idly renewed by the most extravagant and dissipated rulers; by such conquerors as Sylla, Julius Cæsar, and Augustus. The history of those sumptuary laws is given in Aulius Gellius, b. 2, ch. 24. See, also, Suet. J. Cæsar, sec. 43. And T. Arnold's History of the later Roman Commonwealth, ch. 4.

During the middle ages, the English, French, and other governments were, equally with the ancient Romans, accustomed to limit, by positive laws, the extent of private expenses, entertainments, and dress. Some traces of these sumptuary laws existed in France as late as the beginning of the last century, and in Sweden in the latter part of it. Hallam on the Middle Ages, vol. ii. p. 287, (406, 8th edit.) Catteau's View of Sweden. Dodsley's Annual Register, 1767. The statute of 10 Edw. III. entitled

*331 * Every person is entitled to be protected in the enjoyment of his property, not only from invasions of it by individuals, but from all unequal and undue assessments on the part of government. It is not sufficient that no tax or imposition can be imposed upon the citizens, but by their representatives in the legislature. The citizens are entitled *332 * to require that the legislature itself shall cause all public taxation to be fair and equal in proportion to the value of property, so that no one class of individuals, and no one species of property, may be unequally or unduly assessed. (a) [1]

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statutum de cibariis utendis, was the most absurd that ever was enacted. It prescribed the number of dishes for dinner and supper, and the quality of the dishes. Dr. Adam Smith, in his Wealth of Nations, justly considers it to be an act of the highest impertinence and presumption for kings and rulers to pretend to watch over the economy and expenditure of private persons. The wages of labor, and the prices of commodities and economy in dress, were regulated by law in the earliest settlement of Massachusetts. Winthrop's Hist. of New England, by Savage, vol. i. p. 31, note. Ibid. vol. i. pp. 116, 140, 143. Laws of Massachusetts, 1641, 1647, and published in the digest of colony statutes, 1675. Such "good orders," says Hubbard, "expired with the first golden age in this world." But he was mistaken, for in 1777 there was a report made by a committee in Congress, recommending to the several states to regulate, by law, the price of labor, manufactures, and internal produce, and the charges of innholders. Journals of Congress, November 22d, 1777. In pursuance of the suggestion, it appears, that, in 1778, there were Acts of the legislature of Connecticut and New York, (and probably of other states,) limiting the price of labor, and the products of labor and tavern charges. The statute of New York was suspended within three months after it was passed, and repealed within the same year. Corporation ordinances, in some of our cities, have frequently regulated the price of meat in the market. Such laws, if of any efficacy, are calculated to destroy the stimulus to exertion; but in fact they are only made to be eluded, despised, and broken. And yet the regulation of prices in inns and taverns is still the practice in New Jersey and Alabama, and perhaps in other States; and the rates of charges, are, or were until recently, established in those states by the county court, and affixed up at inns, in like manner as the rates of toll at toll-gates and bridges.

(a) Property taken and appropriated to public uses or easements, as highways,

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[1] The right of the legislature to delegate the power of taxation for local purposes to municipal corporations seems well settled. Stein *v.* Mayor, &c. of Mobile, 17 Ala. 234. S. C. 24 Ala. 591. People *v.* Mayor, &c. of Brooklyn, 4 Comst. 419. "*Domicil*" and "*residence*" are not synonymous. A person can have two places of residence, but he can have but one domicil. Where a person resides part of the year in the country, and part of the year in the city of New York, and has his place of business in the city, he was properly assessed as a resident of the city, under the Act of 25th March, 1850. Bartlett *v.* The Mayor, 5 Sandf. S. C. R. 44. See, also, Douglass *v.* Mayor, &c. of New York, 2 Duer, 110. Hood's Estate, 21 Penn. 106.

A just and perfect system of taxation is still a *desideratum* in civil government; and there are constantly existing well-founded complaints, that one species of property is made to sustain an unequal, and, consequently, an unjust pressure of the public burdens. The strongest instance in New York, and probably in other states, of this inequality, was in the assessments of taxes upon waste and unproductive lands; and the oppression upon this description of real property has been so great as to diminish exceedingly its value. This property is assessed in each town, by assessors residing in each town, and whose interest it is to exaggerate the value of such property, in order to throw as great a share as possible of the taxes to be raised within the town upon the non-resident proprietor. The unreclaimed lands, which the owner finds it impossible to cultivate or even to sell, without great sacrifice, and which produce no revenue, are assessed, not only for such charges as may be deemed directly beneficial to the land, such as making and repairing roads and bridges, but for all the wants and purposes of the inhabitants. The lands are made auxiliary to the maintenance of the poor, and the destruction of wild animals; and the inhabitants of each town have been left to judge, in their discretion, of the extent of their wants. Such a power vested in the inhabitants of each town, of raising money for their own use, on the property of others, has produced, in many instances, very great abuses and injustice. It has corrupted the morals of the people, and led to the plunder of the property of non-resident landholders. This was carried to such an enormous extent in

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bridges, turnpikes, railroads, and the erections necessary or incident thereto, and buildings for public uses, as court-houses, churches, school-houses, &c., are not a proper subject for taxation, and are generally exempt as being works for public use and benefit. Inhabitants of W. *v.* W. R. R. Corp. 4 Metcalf, R. 564. The constitution of Arkansas declares a sound principle, in saying that all property subject to taxation shall be taxed according to its value, and the value to be ascertained by laws making the same equal and uniform, and no one species of property should be taxed higher than another species of property of equal value. Art 9. In New Hampshire, the law gives a very efficient power to the collector of taxes. The collector is not bound to search for property on which to distrain, but if the party does not pay the tax on due notice, the collector may arrest his person, unless he produces property sufficient, and with an indemnity as to title, if required. Kinsley *v.* Hall, 9 N. H. Rep. 190.

the county of Franklin as to awaken the attention of the legislature, and to induce them to institute a special commission to inquire into the frauds and abuses committed under this power, and also to withdraw entirely from the inhabitants of new towns the power of raising money by assessments upon *333 property for * the destruction of noxious animals. (*a*) The ordinance of Congress of July 13th, 1787, (*b*) passed for the government of the northwestern territory, anticipated this propensity to abuse of power, and undertook to guard against it by the provision, that in no case should any legislature within that territory tax the lands of non-resident proprietors higher than those of residents. There is a similar provision in the constitution of Missouri, and one still broader in that of the state of Illinois. It is declared, generally, in that of the latter state, that the mode of levying a tax shall be by valuation, so that every person should pay a tax in proportion to the value of his property in possession.

The duty of protecting every man's property, by means of just laws, promptly, uniformly, and impartially administered, is one of the strongest and most interesting of obligations on the part of government, and frequently it is found to be the most difficult in the performance. Mr. Hume (*c*) looked upon the whole apparatus of government as having ultimately no other object or purpose but the distribution of justice. The appetite for property is so keen, and the blessings of it are so palpable and so impressive, that the passion to acquire is incessantly busy and active. Every man is striving to better his condition; and in the constant struggles and jealous collisions between men of property and men of no property, the one to acquire and the other to preserve; and between debtor and creditor, the one to exact and the other to evade or postpone payment; it is to be expected, especially in popular governments, and under the influence of the sympathy which the poor and unfortunate naturally excite, that the impartial course of justice, and the severe duties of the lawgiver, should, in some degree, be dis-

(*a*) L. N. Y. sess. 45, ch. 26, sec. 9, 10, ch. 126.
(*b*) Journals of the Confederation Congress, vol. xii. p. 58.
(*c*) Essays, vol. i. p. 35.

turbed. One of the objects of the constitution of the United States was to *establish justice;* and this it has done by the admirable distribution of its powers, and the *checks *334 which it has placed on the local legislation of the states. These checks have already, in their operation, essentially contributed to the protection of the rights of property.

Government is bound to assist the rightful owner of property, in recovery of the possession of it, when it has been unjustly lost. Of this duty there is no question. But if the possessor of land took possession in good faith, and in the mistaken belief that he had acquired a title from the rightful owner, and makes beneficial improvements upon the land, it has been a point of much discussion, whether the rightful owner, on recovery, was bound to refund to him the value of the improvements. This was the question in the case of *Green* v. *Biddle*, (*a*) which was largely discussed in the Supreme Court of the United States, and which had excited a good deal of interest in the state of Kentucky. The decision in that case was founded upon the compact between the states of Virginia and Kentucky, made in 1789, relative to lands in Kentucky, and therefore it does not touch the question I have suggested. The inquiry becomes interesting, how far a general statute provision of that kind is consistent with a due regard to the rights of property. The Kentucky Act of January 31st, 1812, declared, that the *bonâ fide* possessor of land should be paid, by the successful claimant, for his improvements, and that the claimant must pay them, or elect to relinquish the land to the occupant on being paid its estimated value in its unimproved state. (*b*)

(*a*) 8 Wheaton, 1.

(*b*) This Act, or occupant law, was held by the Supreme Court of the United States to be unconstitutional. The legislature of Kentucky then passed the Act of January 7th, 1824, with a view to counteract the decision in Green *v* Biddle; and it subjected to forfeiture, without office found, or judgment, all patented lands of more than one hundred acres, unless the owner, by the 1st of August, 1825, caused a ratable portion of the land to be cultivated, and, on forfeiture, the title was to vest in the occupant. This Act was held by the Kentucky courts to impose an arbitrary, unjust, oppressive, and illegal condition upon the patentees, and was in violation of their grants, and unconstitutional and void. Gaines *v.* Buford, 1 Dana's Ken. Rep. 481.[1]

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[1] In Ohio, an Act giving the *real owner* his choice whether to take the land and pay for

By the English law and the common law of this country, the owner recovers his land by ejectment, without being subjected to the condition of paying for the improvements which may have been made upon the land. The improvements are considered as annexed to the freehold, and passed with the recovery. Every possessor makes such improvements at his peril. (a) But if the owner be obliged to resort to chancery for assistance in the recovery of the rents and * profits, Lord Hardwicke once intimated, in *Dormer* v. *Fortescue*, (b) that the rule of the civil law, which is more equitable on that point than the English law, would be adopted; and consequently the *bonâ fide* possessor would be entitled to deduct the amount of his expense for lasting and valuable improvements, from the amount to be paid, by way of damages, for the rents and profits. The same intimation was given in the Court of Errors in New York, *Murray* v. *Governeur;* (c) and that in the equitable action at law for the mesne profits, the defendant might have the value of his improvements deducted by way of set-off. These were extra-judicial *dicta;* and there is no adjudged case, professing to be grounded upon common-law principles, and declaring that the occupant of land was, without any special contract, entitled to payment for his improvements, as against the true owner, when the latter was not chargeable with having intentionally laid by and concealed his title. (d) We have a statute in New

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(a) Frear *v.* Hardenbergh, 5 Johns. Rep. 272. This is the rule in the Scotch law, as to improvements made by a tenant for his accommodation. Lord Stair's Institutions, vol. i. 137, edit. 1832.

(b) 8 Atk. Rep. 134.

(c) 2 Johns. Cases, 441.

(d) The suggestions in the cases referred to in the text have been considered as forming just ground for mitigation of damages in an action for the mesne profits; and the value of permanent improvements, made in good faith, has been allowed, to the extent of the rents and profits claimed by the plaintiff. Hylton *v.* Brown, 2 Wash. C. C. 165, April, 1808. Wharton's Dig. tit Ejectment, H. Jackson *v.* Loomis, 4 Cowen's Rep. 168. Ruffin, Ch. J., in Dowd *v.* Fawcet, 4 Dev. N. C. Rep. 95. A

improvements, or to release the land on being paid its value, was held to be constitutional, though changing the common law. But an *amendment* giving to the *tenant* the choice whether to keep the land or surrender it, was held invalid, as an unjustifiable taking of private property. McCoy *v.* Grandy, 3 Ohio St. 463. See, also, Arrowsmith *v.* Burlingim, 4 McLean, 489. Albee *v.* May, 2 Paine, C. C. 74.

York relative to lands, in what was formerly called the military tract, which declares that the settler on those lands, under color of a *bonâ fide* purchase, should not be divested of his possession on recovery by the real owner, until the former had been paid the value of his improvements made on the land, after deducting thereout a reasonable compensation to the owner for the use and occupation of the land. (a) This Act is as broad, and liable to the same objections that have been made against the Kentucky statute. There are similar statute provisions in Maine, Massachusetts, * New Hampshire, Vermont, *336 Virginia, Alabama, Ohio, and Illinois. (b) So far as the

court of equity, on a bill for rents and profits, after a recovery at law against a *bonâ fide* possessor, for valuable consideration, will allow for beneficial improvements.[1] Green *v.* Biddle, 8 Wheaton's Rep. 77–81. Bright *v.* Boyd, 1 Story's Rep. 478, 495. Mathews *v.* Davis, 6 Humphrey's Tenn. R. 324. Judge Green, in this last case, said, that the case of Bright *v.* Boyd was the first case in which the *bonâ fide* purchaser was allowed compensation against the true owner for his beneficial improvements.

(a) L. N. Y. April 8th, 1813, ch. 80.

(b) Jones *v.* Carter, 12 Mass. Rep. 314. Stat. of Mass. 1807, ch. 75. Withington *v.* Corey, 2 N H. Rep. 115. Brown *v* Storm, 4 Vermont Rep. 37. Gaige *v.* Ladd, 5 Ibid. 266. Statutes of Ohio, 1831, p. 261. Bank of Hamilton *v.* Dudley's Lessee, 2 Peters's U. S. Rep. 492. The statute law in Massachusetts, New Hampshire, and Vermont,[2] is called the *Betterment Law*, and it is admitted in 2 Pick. Rep. 507, to have altered the common law in this respect. In the Massachusetts Revised Statutes of 1836, part 3, tit. 3, ch. 101, it is provided generally in the writ of entry upon disseisin for the recovery of any estate or freehold, that the tenant shall be entitled, in case of judgment against him, to compensation for the value of buildings or improvements made by him, or those under whom he claims, provided he, or those under whom he claims, had been in possession for six years before suit brought, or for a less time, if he held them under a title which he had reason to believe good.[3] The amount is to be assessed by the jury on suggestion on record of the claim. The amount allowed may be set off against the rents and profits. The demandant may also require to have the value of the land, without the improvements, ascertained, and he may relinquish the land on being paid the price, and which the tenant must pay, or lose the value of his improvements. In Maine it is held that *betterments* are not an interest in land, within the statute of frauds, and they pass by a parol assignment. Lombard *v.* Ruggles, 9 Greenl. R. 62. The statute law of the several states, allowing the *bonâ fide* occupants entering, under the idea that they had purchased a title in fee, confines the claim to the value of the increase of the land by reason of the improvements made. The statutes of Ohio, under the occupying claimant law, allow a defendant possessing lands under claim of title, as well for his improvements made before his title commenced as for those made after. Lessee of Davis *v.* Powell, 13

1 See Lamar *v.* Minter, 13 Ala. R. 31.

2 See Strong *v.* Hunt, 20 Vt. R. 614.

3 See Baggot *v.* Fleming, 10 Cush. 451.

statute in New Hampshire was retrospective, and extended to past improvements made before it was passed, it has been ad-

Ohio R. 308. The statute of Virginia of 1832, is confined to the case of lands lying west of the Alleghany Mountains, and it is confined to the *bonâ fide* occupants of land under government grants. So, the claim on the part of the defendant to have the improvements assessed, and paid before execution issues, on recovery in ejectment, is confined, in Alabama, to defendants deriving title under the United States or a Spanish grant. Toulmin's Dig. 1823, p. 470. In Tennessee they continue to adhere to the sterner English rule; and, in the case of Nelson *v.* Allen and Harris, (1 Yerger, 360,) it was held that a statute of 1813, giving to the defendant in ejectment, as against the rightful owner, the value of improvements made upon the land, was unconstitutional and void. But it was admitted, that upon a bill in equity for mense profits, after a judgment in ejectment, the defendant might avail himself of a *bonâ fide* possession, and limit the account to the commencement of the suit, provided he was ignorant of all the facts and circumstances relating to his adversary's title.[1] See the provisions of the Act of 1813, Statute Laws of Tennessee, 1836, pp. 267, 381; and see the Acts of 1797 and 1805, giving to the *bonâ fide* possessor, under color of title, and duly evicted by better title, a right to recover the value of his improvements. Statute Laws of Tennessee, p. 380. On the other hand, the commissioners appointed to revise the civil code of Pennsylvania, in their Report in January, 1835, proposed, that on a recovery in ejectment of lands against a defendant, who entered and held and improved the same under color of title and with good faith, he might suggest upon record, in the nature of a bill in equity, his claim to allowance for his improvements; and if the court should deem the facts alleged sufficient in equity to entitle him to the relief sought, they should have power to afford and enforce it, and provision is made for the case. The Revised Statutes of Illinois, edit. 1833, p. 416, and of Indiana, 1838, p. 261, exempt the person evicted from land to which his record title appeared plain, from any action for mense profits prior to notice of adverse claims, and they allow him, on eviction, for lasting and valuable improvements made before due notice, first deducting damages (if any) for waste, &c. See Jones *v.* Jones, 4 Gill, R. 87. Held, in Ohio, that where an agent, without sufficient power, sold land, his vendee cannot claim compensation for improvements. Reynolds *v.* Cordery, 4 McLean, 159. In Georgia, a vendee legally evicted may recover in equity the value of his improvements. Bryant *v.* Hambrick, 9 Geo. R. 133. The claim of a sub-vendee for the value of his improvements is superior to that of the vendee for repayment of the purchase-money. Madeira *v.* Hopkins, 12 B. Monroe, R. 595.

To constitute a person occupant of lands so as to entitle him to the notice pre-

[1] In Humphreys *v.* Holtsinger, 3 Sneed, 228, the Supreme Court of Tennessee held that the vendee, in a conditional sale of land which the vendor afterwards annulled, might be allowed, *in equity*, the value of improvements made in the mean time. See, also, Pope *v.* Henry, 24 Vt. 560. In Iowa, improvements are allowed to be set off against damages; but nothing can be allowed for them where the plaintiff waives all claim to damages. Daniels *v.* Bates, 2 Greene, (Iowa,) 151. Wright *v.* Stevens, 3 Iowa, 63. Iowa R. S. 526. See further on the subject of betterments, Wendell *v.* Moulton, 6 Fost. 41. Flanders *v.* Davis, 19 N. H. 149. Drew *v.* Towle, 10 Fost. 531. Remick *v.* Butterfield, 11 Fost. 70. Thomas *v.* Thomas, 16 B. Mon. (Ky.) 420. Pratt *v.* Churchill, 42 Maine, 471. Lawrence *v.* Grout, 12 La. An. 835. Ford *v.* Holton, 5 Cal. 319.

judged in the Circuit Court of the United States for the district of New Hampshire, to be unconstitutional, inasmuch as it devested the real owner of a vested title to the possession, and vested a new right in the occupant, upon considerations altogether past and gone. (*a*) The statute in New Hampshire applied only to cases of a *bonâ fide* possession of more than six years' standing, and only to the increased value of the land by means of the improvements; and the real owner is allowed the mesne profits. The justice of that statute has been ably vindicated in the case of *Withington* v. *Corey*, (*b*) in cases not within the reach of the decision in the Circuit Court of the United States.

The rule of the civil law was, that the *bonâ fide* possessor was entitled to be reimbursed, by way of indemnity, the expenses of beneficial improvements, so far as they augmented the property in value; and the rule was founded on the principle of equity, that *nemo debet locupletari aliena jactura.* (*c*) It is not the amount of the expenses, strictly so considered, but only the amount so far as they *augmented* the property in value, that the claimant ought, in equity, to refund. But there are difficulties in the execution of this rule. The expenses may have been very costly, and beyond the ability of the claimant to refund, and he may have a * just affection for the property, *337 and it might have answered all his wants and means in its original state without the improvements. The Roman law allowed the judge to modify the rule, according to circumstances, and permitted the occupant to withdraw from the land the materials by which it was improved. (*d*) In many, and indeed in most cases, that mode of relief would be impracticable; and Pothier (*e*) proposes to reconcile the interests of the several parties by allowing the owner to take possession, upon condition

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scribed by law, on sales for taxes, he must hold the land with intention to enjoy it. Smith *v.* Sanger, 4 Comst. R. 576.

(*a*) Society for the Propagation of the Gospel *v.* Wheeler, 2 Gall. Rep. 105.

(*b*) 2 N. Hamp. Rep. 115.

(*c*) Dig 6, 1, 48, 65. Inst. 2, 1, 30, 32. Dig. 50, 17, 206. Grotius, b. 2, ch. 10, sec. 1, 2, 3. Puff. b. 4, ch. 7, sec. 6. Bell's Com p. 139, sec. 538.

(*d*) Dig. 6, 1, 38.

(*e*) Traité du Droit de Propriété, No. 347.

that the repayment of those expenditures, by instalments, should remain a charge upon the land. (*a*) There are embarrassments and difficulties in every view of this subject; and the several state laws to which I have alluded, do not indulge in any of these refinements. They require the value of the improvements to be assessed, and, at all events, to be paid; and they are strictly encroachments upon the rights of property, as known and recognized by the common law of the land. There were, however, peculiar and pressing circumstances which were addressed to the equity of the lawgiver, and led to the passage of those statutes in reference to waste and uncultivated lands in a new country, and where the occupant was not liable to any imputation of negligence or dishonesty. The titles to such lands had, in many cases, become exceedingly obscure and difficult to be ascertained, by reason of conflicting locations, and a course of fraudulent and desperate speculation; and it is impossible not to perceive and feel the strong equity of those provisions. But in the ordinary state of things, and in a cultivated country, such indulgences are unnecessary and pernicious, and *338 invite to careless intrusions upon the * property of others. There are but very few cases in which a person may not, with reasonable diligence and cautious inquiry, discover whether a title be clear or clouded; and *caveat emptor* is a maxim of the common law which is exceedingly conducive to the security of right and title. No man ought to be entitled to these extraordinary benefits of a *bonâ fide* possession of land, unless he entered and improved, in a case which appeared to him, after diligent and faithful inquiry, to be free from suspicion. There is no moral obligation which should compel a man to pay for improvements upon his own land, which he never authorized, and which originated in a tort. (*b*) The provisions of the Napoleon Code on this subject have been adopted in Louisiana; but it has been decided, by the Supreme Court of that state, that a *bonâ fide* possessor ceases to be one, as soon as the defects in

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(*a*) The rule in the Roman law, allowing to the *bonâ fide* possessor of land compensation for his beneficial repairs and meliorations expended upon his estate, as against the rightful claimant, is very fully and learnedly discussed in the American Jurist and Law Magazine, No. 4, art. 9, (vol. ii.)

(*b*) 4 Peters's U. S. Rep. 101, S. P.

his title are *made known to him.* He is not necessarily in bad faith from the time a suit be commenced, for he still may have a confidence in the goodness of his title. (*a*)

But there are many cases in which the rights of property must be made subservient to the public welfare. The maxim of law is, that a private mischief is to be endured rather than a public inconvenience. On this ground rest the rights of public necessity. If a common highway be out of repair, a passenger may lawfully go through an adjoining private enclosure. (*b*) So, it is lawful to raze houses to the *ground to prevent *339 the spreading of a conflagration. (*c*)[1] These are cases of

(*a*) In Louisiana the principle of compensation, according to the doctrine of the Roman law, has been adopted, and if the owner evicts a *bonâ fide* possessor, he has his election to pay the person evicted the value of the materials and workmanship employed in putting improvements on the property, or to reimburse him the enhanced value which they confer on it. Civil Code, art. 495; and until they are reimbursed, he has a right to retain the property. Id. 3416. Porter, J., in Daquin *v.* Coiron, 20 Martin's La. Rep. 609, 615-620 Packwood *v.* Richardson, 13 (1 N. S.) Ibid. 405. It is stated in Pearce *v.* Frantum, 16 La. Rep. 423, that by the Spanish law of the Partida, the party evicted, *whether he possessed in good or bad faith,* was not bound to deliver up the premises to the owner until he was reimbursed for necessary repairs;[2] and Merlin (1 Répertoire de Jurisprudence verbo amélioration) lays down the same as a settled rule. The Code Napoleon, art. 1633, declares, that if at the time of the eviction the property sold has risen in value, even *without the buyer having contributed thereto,* the seller is bound to pay him, not only the original price and the profits, but the amount of the value above the price of the sale, even though the event which had quadrupled the value was not and could not be foreseen. Toullier, title 3 des contrats, No. 285. This was also the law of Louisiana, under the code of 1808. Succession of Dunford, 11 Rob. La. Rep. 183.

(*b*) Absor *v.* French, 2 Show. Rep. 28. Young's case, 1 Lord Raym. 725. This principle does not apply to the case of a private way. The right is confined to public highways out of repair. Taylor *v.* Whitehead, Doug. Rep. 745. So, an entry upon another's land may be justified in cases of overruling necessity, or to recover property carried on another's ground by the force of the elements, without the owner's fault or power to prevent it. Choke, J., 6 Ed. IV. 7. Domat's Civil Law, b. 2, tit. 9, sec. 2, art. 3, 4. See *infra*, p. 568.

(*c*) Dyer's Rep. 36 b. 2 Bulst. 61, Arg., and several cases from the Year Books,

[1] Sorocco *v.* Geary, 3 Cal. 69. American Print Works *v.* Lawrence, 1 Zabr. 248.

[2] And this case conceded to a settler upon the United States lands, who took possession with the hope of securing a preemption, the right of retaining such lands against a vendee or patentee of the United States government, until such patentee should reimburse the settler the increased value of the property, as resulting from improvements and expenses upon it during the settlement. But Pearce *v.* Frantum was overruled by the case of Gibson *v.* Hutchins, 12 La. An. R. 545, which case decides the law of Lousiana to be precisely as stated in the text.

urgent necessity, in which no action lay at common law by the individual who sustained the injury; but private property must, in many other instances, yield to the general interest. (*a*) The right of eminent domain, or inherent sovereign power, gives to the legislature the control of private property for public uses, and for public uses only. (*b*) Roads may be cut through the

there cited. Case of the King's Prerogative *v.* Saltpetre, 12 Co. 13. Mouse's case, 12 Coke, 63. 1 Dallas's Rep. 363, M'Kean, Ch. J. Buller, J., in Governor, &c. *v.* Meredith, 4 Term Rep. 797.

(*a*) In the city of New York, by statute, (2 R L. 368,) in case a building be destroyed by order of the city magistracy, to stop a conflagration, the city must indemnify the owner, unless it be a case in which the building would have been inevitably destroyed by the fire if it had not been pulled down or blown up. Mayor of New York *v.* Lord, 17 Wendell, 285. But the remedy of the owner is said to be limited to the amount of the assessment made *according to the statute* and the corporation of New York is not liable to an action *at common law* for compensation for the loss of property so destroyed by order of the magistracy. Russell *v.* The Mayor of New York, 2 Denio, 461. The remedy under the Act does not extend to allow a recovery in damages for merchandise in the building when destroyed, and being the property of a third person. Stone *v.* The Mayor, &c. of New York, 25 Wendell, 157.[1]

(*b*) Grotius, b. 1, ch. 1, sec. 6. Ibid. b. 2, ch. 14, sec. 7. Ibid. b. 3, ch. 19, sec. 7; ch. 20, sec. 7. Puff. b. 8, ch. 5, sec. 7. Bynk Quæst. Jur. Pub. b 2, ch. 15 Vattel, b. 1, ch. 20, sec 244. Esprit des Lois, tom. iii. 203. Gardner *v.* Village of Newburgh, 2 Johns Ch Rep. 162. Louisville C. & C Railroad *v.* Chappell, 1 Rice's S. C. Rep. 383. Ce Domain Eminent, n'a lieu que dans une nécessité de l'état. Puff. par Barbeyrac, Ibid. Biens publics qui appartiennent à l'état, qui doivent servir pour la conservation de l'état, s'appellent le Domain de l'Etat. Puff. Ibid. sec. 8. Here the distinction is clearly marked between the *eminent domain* and the *public domain*, or *domain of the state*; and for the rights of the latter as vested in the United States, see vol. i. 257. But M. Proudhon, in his Traité du Domain Public, makes a material subdivision of this second branch of domain, and applies the *public domain* to that

[1] The right to destroy property in cases of extreme emergency, as to prevent the spread of a conflagration, is not the exercise of the right of eminent domain, nor the taking of it for public use; but is a right existing at common law, founded on the plea of necessity, and may be exercised by individuals. The American Print Works *v.* Lawrence, 1 Zabr. (N. J.) R. 248. Sorocco *v.* Geary, 3 Cal. 69. But it was held by the Court of Errors that a statute authorizing the destruction of property by the municipal officers under such circumstances was not a regulation of the common-law right, but an act of eminent domain, and consequently *void* so far as it neglected to provide compensation. Hale *v.* Lawrence, 1 Zabr. 714. See, however, same parties, 3 Zabr. 590. A municipal corporation has not the right to tear down a dam, lawfully erected, under pretence that it was a nuisance, endangering the health of the city. Clark *v.* Mayor of Syracuse, 13 Barb. R. 32. Parham *v.* The Justices, &c., 9 Georgia R. 341. On taking land, in the exercise of the right of eminent domain, payment to a husband of the full value of his land, vests the title in the public, discharged from the wife's inchoate right of dower. Moore *v.* Mayor, 4 Sandf. S. C. R. 456.

cultivated lands of individuals without their consent; but in New York, and generally in the other states, it must be done by town officers of their own appointment, upon the previous application of twelve freeholders; and the value of the lands and amount of the damages must be assessed by a jury, and paid to the owner. (*a*) So lands adjoining the New York canals were made liable to be assumed for the public use, so far as was necessary for the great object of the canals; and provision was made for compensation to the individuals injured, by the assessment and payment of the damages. (*b*)[1] In these and other instances which might be enumerated, the interest of the public is deemed paramount to that of any private individual; and yet, even here, the constitution of the United States,[2] and of most of the states of the Union, have imposed a great and valuable check upon the exercise of legislative power, by de-

kind of property which the government holds as mere trustees for the use of the public, such as public highways, navigable rivers, salt springs, &c., and which are not as of course, alienable; and the *domain of the state*, which applies only to things in which the state has the same absolute property as an individual would have in like cases. See the American Jurist, No. 37, p. 121, (vol. xix.)

(*a*) N. Y. Revised Statutes, vol. i. pp. 514, 515.

(*b*) The damages may be assessed in any equitable and fair mode, to be provided by law, without the intervention of a jury, inasmuch as trial by jury is only required on issues in fact, in civil and criminal cases in courts of justice. Beekman *v.* Saratoga and Schenectady Railroad Co. 3 Paige, 45. Bonaparte *v* C. & A. Railroad Co. 1 Baldwin's C. C. U. S. Rep. 205. Railroad Company *v.* Davis, 2 Dev. & Batt. N. C. Sup. C. Rep. 451, 464. Willyard *v.* Hamilton, 7 Ohio Rep. (Part 2,) 115. Louisville C. & C. Railroad *v.* Chappell, 1 Rice's S. C. Rep. 383.[3]

[1] It was held in Wadsworth *v.* Buffalo H. Association, 15 Barb. 83, that lands held by the Indians with a right of preëmption in other parties are subject to eminent domain. Where land taken and used for the canal was afterwards abandoned by the state, and the canal diverted: held, that the land reverted to the original owner. People *v.* White, 11 Barb. R. 26. Where, however, the land was appropriated by the state to another similar servitude, no further compensation could be claimed. Chase *v.* Manufacturing Co. 4 Cush. 152. In Williams *v.* New York C. R. R. 16 N. Y. (2 Smith) 97, it was decided that when a railroad is built on an existing highway the abutters acquire a right to further compensation for the new easement taken in the land, and that the state and municipal authorities combined cannot give the railroad company the right to lay their rails in the street without making such compensation. The contrary was held in R. R. *v.* Newark, 2 Stockt. (N. J.) 352.

[2] This provision of the Constitution of the United States applies only to the general government, and not to the states. Withers *v.* Buckley, 20 How. U. S. 84.

[3] Petition of the Mount Washington Road Co. 35 N. H. 134.

claring that private property should not be taken for public use without just compensation. A provision for compensation is a necessary attendant on the due and constitutional exercise of the power of the lawgiver to deprive an individual of his property without his consent; and this principle in American constitutional jurisprudence is founded on natural equity, and is laid down by jurists as an acknowledged principle of universal law. (*a*)

(*a*) Grotius, De Jure, B. & P. b. 3, ch. 19, sec. 7; ch. 20, sec. 7. Puff. De Jure Nat. et Gent b. 8, ch. 5, sec. 3, 7. Bynk. Quæst Jur. Pub. b. 2, ch. 15. Vattel, b. 1, ch. 20, sec. 244 Heinecc. Elem. Jur. et Nat. b. 2, ch. 8, sec. 170. The better opinion is, that the compensation, or offer of it, must precede or be concurrent with the seizure and entry upon private property under the authority of the state. The government is bound, in such cases, to provide some tribunal for the assessment of the compensation or indemnity, before which each party may meet and discuss their claims on equal terms, and if the government proceed without taking these steps, their officers and agents may and ought to be restrained by injunction. The process of injunction was granted by the court of chancery in Gardner *v.* Village of Newburgh, and it was also sustained by the Supreme Court of Louisiana in a like case. 2 Johns. Ch. Rep. 162. Henderson *v.* Mayor, &c. of New Orleans. 5 La. Rep. 416 The Civil Code of Louisiana, art. 489, had declared that there must be the *previous* indemnity, and so did the Code Napoleon, art. 545, and the constitutional charter of Louis XVIII. The provision in our American constitutions is essentially the same, though not in the same words precisely, and it would seem to require the same construction. Several of them declare that private property shall not be taken for public use *without full compensation being made.* The settled and fundamental doctrine is, that government has *no right* to take private property for public purposes without giving a *just compensation;* and it seems to be necessarily implied, that the indemnity should, in cases which will admit of it, be previously and equitably ascertained, and be ready for reception concurrently in point of time with the actual exercise of the right of eminent domain. This point was ably discussed in Thompson *v.* Grand Gulf R. R. and Banking Company, 3 Howard, Miss. R. 240, and the decision was, that the compensation must precede the seizure of private property for public uses. This was also the opinion of Chancellor Walworth, of New York, in Lyon *v.* Jerome, 26 Wendell, 497. But it is not to be understood that a statute assuming private property for public purposes, without compensation, is absolutely void, so as to render all persons acting in execution of it trespassers. Some of the judicial *dicta* seem to go that length, but others do not. 12 Serg & Rawle, 366, 372. 20 Johns. Rep. 745. In Case *v.* Thompson, 6 Wendell, 634, it was held that neither the payment nor the assessment need precede the opening of a road over the land of an individual. The compensation may have been provided for without constituting part and parcel of the Act itself, and I think the more reasonable and practical construction to be, that the statute would be *primâ facie*, good and binding, and sufficient to justify acts done under it, until a party was restrained by judicial process, founded on the paramount authority of the constitution.[1]

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[1] A statute, enacting that, unless compensation be claimed within a year, the lands shall

* It undoubtedly must rest, as a general rule, in the *340 wisdom of the legislature, to determine when public

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In Bonaparte *v.* C. & A. Railroad Co. 1 Baldwin's C. C. U. S. Rep. 205, it was held that a law taking private property for public use, without providing for compensation, was not void, for it may be done by a subsequent law. But the execution of the law will be enjoined until the provision be made, and the payment ought to be simultaneous with the actual appropriation of the property. It is admitted that even a statute franchise, as a toll-bridge or road, must yield to the sovereign right of eminent domain, and may be impaired or taken away, and appropriated to public uses whenever the public exigencies require it, for a franchise is fixed and determined property; but it must be on the condition of making just compensation to the proprietors.[1] Even if the damage be merely *consequential* or *indirect*, as by the creation of a new and rival franchise in a case required by public necessities, the same compensation is due, and the cases of Thurston *v.* Hancock, 12 Mass. Rep. 220, and Callender *v.* Marsh, 1 Pick. Rep. 418, are erroneous, so far as they contravene such a palpably clear and just doctrine.[2] If A be the owner of a mill, and the legislature authorize a diversion of the watercourse which supplies it, whereby the mill is injured or ruined, is not that a consequential damage to be paid for? The solid principle is too deeply rooted in law and justice to be shaken. Gardner *v.* Village of Newburgh, 2 Johns. Ch. Rep. 162. Story, J., in Charles River Bridge *v.* Warren Bridge, 11 Peters's Rep. 638, 641. The *just compensation* to the owner for taking his property for public uses without his consent, means the actual value of the property in money, without any deduction for estimated profit or advantages accruing to the owner from the public use of his property. Speculative advantages or disadvantages, independent of the intrinsic value of the property from the improvement, are a matter of set-off against each other, and do not affect the dry claim for the intrinsic value of the property taken.[3] Jacob *v.* City of Louisville, 9 Dana's Rep. 114. In Symonds *v.* City of Cincinnati, 14 Ohio R. 147, it was adjudged that it was a competent matter of defence in a suit for compensation for the value of private property taken for public use, to show the increased benefit conferred on the owner by the appropriation, as a set-off against the value of the property taken. The case was ably discussed, and Mr. Justice Read, who dissented from the decision, contended that the owner was entitled to the value of his property taken

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vest in the state, without payment of damages, is valid, and under it the state takes a fee; not an easement determinable when the land ceases to be used for the purposes for which it was taken. Rexford *v.* Knight, 1 Kern. 308. If compensation has been provided for, but not made, and afterwards the Act of the legislature taking the property is repealed, the repeal *avoids* all proceedings under the first Act, and no compensation can be claimed. Hampton *v.* Commonwealth, 19 Penn. 329. And as to the right to seize and enter upon private property under the authority of the state, before making compensation, see Nichols *v.* R. R. Co. 43 Maine, 356, and Walther *v.* Warner, 25 Mis. (4 Jones,) 277. San Francisco *v.* Scott, 4 Cal. 114.

[1] Bridge Co. *v.* Clarksville, 1 Sneed, (Tenn.) 176.

[2] Glover *v.* Powell, 2 Stockt. (N. J.) 211.

[3] See Rogers *v.* R. R. Co. 35 Me. 319; State *v.* Miller, 3 Zabr. 383; People *v.* Mayor of Brooklyn, 6 Barb. 209; Hatch *v.* R. R. 25 Vt. 49; Moale *v.* Baltimore, 5 Md. 314. But see, also, People *v.* Mayor, &c. 4 Comst. 419; Livermore *v.* Jamaica, 23 Vt. 361; Rexford *v.* Knight, 15 Barb. 627; R. R. *v.* Doughty, 2 Zabr. 495; Powers *v.* Armstrong, 19 Geo. 427.

uses require the assumption of private property; but if they should take it for a purpose not of a public nature, as if the

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without the deduction of any reflecting advantage.[1] In Railroad Company *v.* Davis, 2 Dev. & Batt. N. C. Rep. 451, it was held that payment of the compensation and the assessment of the *quantum* might be made subsequently, and need not necessarily precede the entry and possession under the statute authority; and that the legislature was not restricted to a mere easement in the property, but might take the entire interest of the individual, if it deemed the public exigency to require it; and that though a railroad company be a private corporation, and its outlays and emoluments private property, yet the road is a public highway and for public uses, and the absolute property *may* be vested in the company. The questions in that case were ably discussed in the opinion delivered by Ch. J. Ruffin; and if the doctrine of the court should be deemed rather latitudinary in respect to the legislative right of eminent domain, it is to be observed that the constitution of North Carolina has no express provision declaring that "private property shall not be taken for public uses without just compensation." But though it be not a constitutional principle, yet the principle exists with stringent force, independent of any positive provision.

There is no such provision in the constitution of South Carolina; and it was accordingly held, after an able discussion, that the legislature had a right to cause roads to be opened, and materials taken for keeping them in repair, without the consent of the owner of the private property, and without making compensation. Several of the judges were not satisfied with the decision, as respected the absence of compensation, and especially in the delegation of such power to the commissioners of roads. The opinion of Mr. Justice Richardson, in support of the duty of making compensation, was very elaborate and powerful. The State *v.* Dawson, 3 Hill's Rep. 100.

In ancient Rome, such respect was paid to the rights of private property, that a scheme of the censors, B. C. 179, to supply the city with water by means of an aqueduct, was defeated by the refusal of a proprietor to let it be carried through his lands; and, at a subsequent period, the senate decreed that it should be lawful to take from the adjoining lands of individuals the materials requisite for the repairs of aqueducts, upon an *estimate of the value or damages to be made by good men*, and doing, at the same time, the least possible injury to the owners. When a private house was injured by a public road or aqueduct, the Emperor Tiberius paid the damage, on petition by the party to the senate. Tacit. Ann. b. 1, § 75. So, in London, by an Act of Parliament, as early as 1544, the corporation of the city was invested with the power to enter upon and appropriate private property requisite for the purpose of supplying the city with water; but the ground needed was to be appraised by three or four different persons appointed by the lord chancellor, and to be paid for within one month after possession taken. See King's Memoir on the Croton Aqueduct, with a learned and very interesting Preliminary Essay, pp. 25, 27, 51.

The exercise of the legislative power of eminent domain was learnedly discussed in the case of Bloodgood *v.* M. & H. Railroad Company, 14 Wendell, 51. S. C. 18 Ib.

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[1] But see McMicken *v.* Cincinnati, 4 Ohio, (N. S.) 394. To the same effect as Symonds *v.* City of Cincinnati, is Newby *v.* Platte County, 25 Mis. (4 Jones,) 258. Railroad Co. *v.* Simpson, 5 Ohio, (N. S.) 250. Kramer *v.* R. R. Co. 5 Ohio, (N. S.) 140.

legislature should take the property of A and give it to B, or if they should vacate a grant of property, or of a franchise,

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1, 59; and it was held by the court, in the last resort on error, that the legislature might authorize railroad companies to enter upon and appropriate private property in land for the use of the road, so far as it became indispensably necessary for the purpose of the road; *provided*, provision be made in the Act for the assessment and payment to the owner of the damages incurred. If the provision was made, it was held to be sufficient, and that the damages need not be actually ascertained and paid previous to the entry and appropriation of the property. See, also, Fletcher *v.* The Auburn & Sy. R. R. 25 Wendell, 462, 464.[1] This is the construction given to English statutes in like cases, and frequently, as Lord Denman observed, the amount of compensation cannot be ascertained until the work is done. Lister *v.* Lobley, 7 Adol. & Ellis, 124. But in Doe *v.* Georgia R. R. & B. Com. 1 Kelly, 524, it was held, that the *title* to the property assumed for the road did not pass from the original owner until the prescribed compensation was actually made. And in some of the Railway Acts in England, the company is prohibited from entering on the land without consent, until the ascertained compensation is paid or tendered. So in Mississippi, the damages for land taken for a railroad must first be paid, before the right to the use of it becomes vested. Stewart *v.* R. R. Company, 7 Smedes & M. 568. It rests with the legislature to judge of the cases which require the operation of the right of eminent domain, and it may be applied to the case of roads, turnpikes, railways, canals, ferries, bridges, &c, provided there be, in the assumption of the property, evident utility and reasonable accommodation as respects the public.[2] Cottrill *v.* Myrick, 3 Fairfield, 222. Dyer *v.* The Tuscaloosa Bridge Company, 2 Porter's Rep. 296. Harding *v.* Goodlett, 3 Yerger, 41. Chancellor Walworth, in 18 Wendell, 14, 15. The Supreme Court of Massachusetts, in Boston Water Power Co. *v.* Boston and Worcester Railroad Co, January, 1840, 23 Pick. Rep. 360, held, that the right of eminent domain might be exercised in the cases of franchise as well as of personal property, in proper cases, and on making due compensation. There is no doubt of it. Property in a franchise is not more sacred than private property in land under a patent, and the principle was declared in the case of Bonaparte, above mentioned. The doctrine of the cases in 14 and 18 Wendell appears to settle the principle of constitutional law upon a reasonable and practicable foundation. See, also, the strong and clear case of the Louisville C. & C. Railroad Co. *v.* Chappell, Rice's S. C. Rep.

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[1] Smith *v.* Helmer, 7 Barb. S. C. Rep. 416. As to the law in Indiana, see R. R. Co. *v.* Connelly, 7 Ind. 32.

[2] Swan *v.* Williams, 2 Gibbs, 427. Heyward *v.* Mayor, &c., 3 Seld. 314. Hartwell *v.* Armstrong, 19 Barb. 166. But it was held, in this case, that, to assess the expenses of draining swamps among the owners thereof, and to include among those expenses the damages paid for taking the land required, was not a fair provision for compensation for the latter. See, also, Moale *v.* Baltimore, 5 Md. 314. A general railroad law, allowing any number of persons, not less than twenty-five, to form a railroad company, and take lands for railroad purposes, on providing compensation, was held to be a proper exercise of the right of eminent domain. R. R. Co. *v.* Brainard, 5 Seld. 100. And the legislature may authorize a foreign corporation to take land in this state, belonging to citizens of this state, for the purpose of constructing a work of public improvement. Morris Canal & Banking Co. *v.* Townsend, 24 Barb. 658.

under the pretext of some public use or service, such cases would be gross abuses of their discretion, and fraudulent at-

383, and of Backus *v.* Lebanon, 11 N. H. Rep. 19, to the same point. But a statute incorporating a company to take private property without consent of the owner, for the construction of a bridge, *and making no provision for his indemnity*, is unconstitutional and void. Thatcher *v.* Dartmouth Bridge Co. 18 Pickering, 501, and in the case of Sinnickson *v.* Johnsons, 2 Harrison's N. J. Rep. 129, the erection of a dam across a navigable water by an individual, under the authority of a statute providing no remedy to the owner of a meadow overflowed by means of the dam, was held to be an injury for which the owner had his remedy by action for damages.[1] And in Taylor *v.* Porter, 4 Hill's Rep. 140, it was held, that private property could not be taken, nor a private road established for private use, not even by a legislative Act, without the consent of the owner, and that any statute doing it was unconstitutional. It can only be taken by statute for *public* uses, and not even then without just compensation to the owner. Ch. J. Nelson dissented, on the ground that the laying out private roads over the lands of others, to accommodate one or more individuals, and without the consent of the owner, was within the right of eminent domain, and justified by that principle and by immemorial usage. I apprehend that the decision of the court was founded on just principles, and that taking private property for *private* uses, without the consent of the owner, is an abuse of the right of eminent domain, and contrary to fundamental and constitutional doctrine in the English and American law.[2] See *ante*, p. 13, and note *b*, Ibid. and the cases *supra* in this note, and see the subsequent note *a*. The revised constitution of New York, of 1846, has settled this question differently, for it declares that *private roads* may be opened in the manner to be prescribed by law, but the person to be benefited must first pay the damages to be assessed. Art. 1, § 7.[3]

The principle of not taking private property for public uses, without due compensation to the owner, has become an acknowledged one in the Scotch law, and is to

[1] The legislature cannot, by declaring a river navigable which is not so, deprive the riparian proprietors of the use of the water for hydraulic purposes, without rendering them compensation. Walker *v.* The Board of Public Works, 16 Ohio R. 540. So if the state make a river actually navigable which was not so before, the riparian owner is entitled to damages. Morgan *v.* King, 18 Barb. 277. And in Wisconsin it has been held, that Acts authorizing the flowing of lands of others, by the erection of mill-dams, are constitutional, if they provide due compensation therefor, such flowing being a taking for public use. Thien *v.* Voegtlander, 3 Wis. 461.

[2] So declared in Embury *v.* Conner, 3 Comst. R. 511. But the party whose property is taken may, even by parol acts and declarations, renounce the constitutional provisions in his favor, and the property will pass, notwithstanding the statute of frauds. See Bumpus *v.* Miller, 4 Mich. 159.

[3] If in grading a public highway a hill be cut down, or an embankment raised adjacent to the premises of a citizen, whereby he suffers inconvenience, it is *damnum absque injuria;* and the same rule applies where a corporation succeeds to the rights of the public. Benedict *v.* Goit, 3 Barb. S. C. R. 459. Graves *v.* Otis, 2 Hill's N. Y. Rep. 466. 1 Pick. R. 418. Radcliff *v.* The Mayor, 4 Comst. 195. The law authorizing a municipal corporation to grade and improve streets, at the expense of the owners of lands benefited by the improvement, is valid, and within the legitimate exercise of the power of taxation. People *v.* The Mayor, 4 Comst. R. 419.

tacks on private right, and the law would be clearly unconstitutional and void. (a) Real property, and the rights and

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be found in the British statute of 1 & 2 Wm. IV. c. 43, relative to roads and highways. Bell's Principles of the Law of Scotland, pp. 173, 174.

(a) Wilkinson v. Leland, 2 Peters's U. S. Rep. 653. Hardin v. Goodlett, 3 Yerger's Rep. 41. Case of Albany street, 11 Wendell, 149. In the matter of John and Cherry streets in New York, 19 Ibid. 659. Ch. J. Parker, in Rice v. Parkman, 16 Mass. Rep. 330. Norman v. Heist, 5 Watts & Serg. 171. Varick v. Smith, 5 Paige, 146, 147, 159, 160, S. P. The opinion of the vice-chancellor in the last case contained a spirited vindication of the constitutional sanctity of private property, against the abuses of the right of *eminent domain*. See, also, the able and elaborate opinion of Chancellor Bibb, of the Louisville Chancery Court in Kentucky, in the case of Applegate and others v. Lexington and Ohio Railroad Company, decided in November, 1838, in which case an injunction was granted after argument, enjoining the defendants from running cars and carriages, by steam or otherwise, upon their railroad along the main street in the city of Louisville. It was adjudged to be a common nuisance, with special damage, a purpresture amounting to a nuisance, and a disturbance of easements annexed by grant to private estates, of privileges secured by statute; and that the right of eminent domain did not authorize the legislature to delegate to any private person or company the lawful power of disturbing private right and property for their own use and emolument. But this decree was afterwards reviewed in the Kentucky Court of Appeals, and modified, and the injunction against the running of cars on the railway on Main street, in the city of Louisville, by the Lexington and Ohio Railroad Company, dissolved. The Court of Appeals, in the strong opinion delivered by Chief Justice Robertson, declared, that upon the facts in the case, the running of railroad cars, by horses or steam, through the street, was not a nuisance, but conducive to the public interest and prosperity of Louisville — that the legislature could constitutionally exert her eminent domain, in taking private property for public use, through the instrumentality of a railroad company — that private corporations, establishing turnpikes and railroads, may, in this respect, be deemed public agents, and may take private property for public uses, on making just compensation — that no compensation was requisite in this case, as the street was dedicated to public uses, and the railroad, with locomotive steam cars, was no nuisance or *purpresture*, nor inconsistent with the object of the street, which was otherwise in full use as a public highway — that though the grant from the corporation, of the privilege of making a railway through the street, might be productive of some inconvenience, it was greatly overbalanced by the public benefit resulting from the use of the rail-cars. Lexington and Ohio Railroad v. Applegate, 8 Dana's Rep. 289. Case of Philadelphia and Trenton Railroad Company, 6 Wharton's Rep. 25, S. P. But in Cooper v. Alden, Harrington's Mich Ch. Rep. 72; an injunction to stop a railroad through a street in the city of Detroit was granted. The rule for or against such a right may be governed by the circumstances and sound discretion of the case. In the case of the Hudson and Delaware Canal Co. v. N. Y. and Erie R. R. Co. 9 Paige's Rep. 323, the remedy in chancery by injunction was admitted, if the construction of a railroad would work imminent danger to the works of a canal company previously and lawfully constructed, and to the use of them.[1]

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[1] In the case of The First Baptist Church, &c. v. Sch. & Troy R. R. Co. 5 Barb. S. C.

privileges of private corporate bodies, are all held by grant or charter from government, and it would be a violation of contract, and repugnant to the constitution of the United States, to interfere with private property, except under the limitations which have been mentioned.

But though property be thus protected, it is still to be understood that the lawgiver has a right to prescribe the mode and manner of using it, so far as may be necessary to prevent the abuse of the right, to the injury or annoyance of others, or of the public. The government may, by general regulations, interdict such uses of property as would create nuisances, and become dangerous to the lives, or health, or peace, or comfort of the citizens. Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam-power to propel cars, the building with combustible materials, and the burial of the dead, may all be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors, and that private interests must be made subservient to the general interests of the community. (a) [1]

(a) Puff. b. 8, ch. 5, sec. 3. Vattel, b. 1, ch. 20, sec. 246, 255. Cowp. Rep. 269. Com. Dig. tit. By-Laws, B. Willes's Rep. 388. Coates v. The Corporation of New York, 7 Cowen's Rep 585. The State v Tupper, Dudley's S. C. Law and Eq. Rep. 135. In the case of Tanner v. The Trustees of the Village of Albion, 5 Hill's N. Y.

Rep. 79, it was held, that an action would lie against a railroad company for a nuisance, in running cars, ringing bells, blowing off steam, &c., in the neighborhood of a church, on the Sabbath, to the disturbance of a congregation there engaged in worship. The action was brought in the name of the church in its corporate capacity. But a contrary decision was made in The First Baptist Church, &c. v. The Utica, &c. R. R. Co. 6 Barb. S. C. Rep. 313. The law on the subject must therefore be considered as unsettled in New York.

The construction of a railroad through the streets of a city does not amount to an infringement of private rights, provided the passage is left free and unobstructed to the public at large. The owners of property bounded on the streets have no private or exclusive right to, or property in, the use or enjoyment of them. It belongs to the corporation, *the owners of the legal title to the soil*, to manage and regulate the use of the streets. Drake v. Hudson River R. R. Co. 7 Barb. S. C. Rep. 508. 3 Id. 459. State v. City of New York, 3 Duer, 119, per Duer, J. Williams v. R. R. 18 Barb. 222. See *supra*, p. [339,] n.

[1] See this subject discussed especially with reference to the constitutionality of a liquor law in Fisher v. McGirr, 1 Gray, 1, per Shaw, C. J. State v. Brennan's Liquors, 25 Conn. 278.

R. 121, it was held, that a bowling-alley kept for gain or hire in the village, was a nuisance at common law, and erections of every kind, adapted to sports or amusements, having no useful end, and notoriously fitted up and continued in order to make a profit for the owner, were nuisances. They were temptations to idleness and dissipation, and apt to draw together great numbers of disorderly persons. The observations of the court were exceedingly stringent but wholesome, and the doctrine and cases of 1 Hawk. P. C. ch. 32, (or 75,) § 6; Hall's case, 1 Mod. 76; 2 Keb. 846; Rex *v.* Dixon, 10 Mod. 335; Rex *v.* Higginson, 2 Burr. 1232; Rex *v.* Moore, 3 B. & Adol. 184; Nolin *v.* Mayor and Ald. of Franklin, 4 Yerger. 163, were referred to with approbation. So if a mill-dam be a nuisance, it may be restrained by injunction. 3 Iredell's N. C. Rep. in Eq. 301. But a person may not enter upon another's land to abate a nuisance, without a previous notice or request to the owner of the land, except under special circumstances. Jones *v.* Williams, 11 Meeson & Welsby, 176.[1] As the constitution of the United States, and the constitutions of several of the states, in terms more or less comprehensive, declare the right of the people to keep and bear arms, it has been a subject of grave discussion, in some of the state courts, whether a statute prohibiting persons, when not on a journey, or as travellers, from *wearing or carrying concealed weapons*, be constitutional. There has been a great difference of opinion on the question. In Kentucky, Tennessee, and Mississippi, the decisions are understood to be against the validity of the prohibition, whereas in Indiana, Alabama, and Arkansas, they are in favor of it. (Bliss *v.* The Commonwealth, 2 Littell's Rep. 90. The State *v.* Reid, 1 Alabama Rep. N. S. 612. The State *v.* Mitchell, 3 Blackf.

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[1] Persons who commit nuisances in the lands of strangers, are liable for their continuance, even though they cannot enter and remove them without making themselves liable to an action. Smith *v.* Elliott, 9 Barr's R. 345. See, also, Waggoner *v.* Jermaine, 3 Denio's R. 306. In this case it was held that the vendor, who had erected a nuisance on his own land, prior to a sale with warranty, was liable for damage occurring subsequently. When the use of lands is in the public, an obstruction to this use by the owner of the fee, is a nuisance. State *v.* Atkinson, 24 Vt. 448.

To maintain an action on the case for nuisance, the plaintiff must show injury to himself distinct from that which he suffers with the rest of the community. Seeley *v.* Bishop, 19 Conn. R. 128. Smith *v.* Lockwood, 13 Barb. R. 209. Hatch *v.* R. R. Co. 2 Wms. (28 Vt.) 142. Building a bridge in the channel of a river is not necessarily a nuisance, unless it impedes navigation; and the question as to this is for a jury. Regina *v.* Betts, 22 E. L. & Eq. 240. See, also, Pennsylvania *v.* Wheeling Br. Co. 13 How. U. S. 518; State *v.* Freeport, 43 Maine, 198; State *v.* Dibble, 4 Jones, Law, (N. C.) 107; Barnes *v.* City of Racine, 4 Wis. 454. A bowling alley kept for gain is a nuisance at common law. State *v.* Haines, 30 Maine R. 65. As to a livery stable, see Coker *v.* Birge, 9 Geo. 425; S. C. 10 Geo. 336; Kirkman *v.* Handy, 11 Humph. 406. A powder magazine in a populous place is *per se* a nuisance. Cheatham *v.* Shearon, 1 Swan, 213. As to gas-works, see Carhart *v.* Auburn Gas Light Co. 22 Barb. 297.

The principle on which equity interferes by injunction to restrain a nuisance, is the inadequacy of the remedy at common law; and it is on the ground of injury to property that the jurisdiction of equity rests. Attorney-General *v.* Sheffield Gas Co. 19 E. L. & Eq. 639. A bill to enjoin a nuisance when the injury is not irremediable, will not be maintained till the right is established at law. White *v.* Cohen, 19 E. L. & Eq. 146. Simpson *v.* Justice, 8 Ired. Eq. 115. But see Soltau *v.* De Held, 9 E. L. & Eq. 104.

In Indiana there is not now any such thing as a common-law nuisance. Hackney *v.* State, 8 Ind. 494. But in California, the statute defining nuisances and giving a remedy by action, does not take away any common-law remedy in the abatement of nuisances, not embraced by the statute. Stiles *v.* Laird, 5 Cal. 120.

Rep. 229. The State *v.* Buzzard, 4 Arkansas Rep. 18.) In Tennessee there is a statute law of a penal character against wearing the bowie-knife, but none against carrying fire-arms. The statute in Georgia is broader and more extensive. Hotchkiss's Code of Laws, p. 739. But in Georgia the statute prohibition has been adjudged to be valid so far as it goes to suppress the wearing of arms *secretly*, but unconstitutional so far as it prohibits the bearing or carrying arms *openly*. Nunn *v.* State of Georgia, 1 Kelly, 243. As the practice of carrying concealed weapons has been often so atrociously abused, it would be very desirable, on principles of public policy, that the respective legislatures should have the competent power to secure the public peace, and guard against personal violence by such a precautionary provision.

LECTURE XXXV.

OF THE NATURE AND VARIOUS KINDS OF PERSONAL PROPERTY.

PERSONAL property usually consists of things temporary and movable, but includes all subjects of property not of a freehold nature, nor descendible to the heirs at law. (a)

The divison of property into real and personal, or movable and immovable, is too obvious not to have existed in every system of municipal law. Except, however, in the term of prescription, the civil law scarcely made any difference in the regulation

(a) It includes not only everything movable and tangible which can be the subject of property, but may include things quasi-movable, as tenants' fixtures, and quasi-tangible, as choses in action. Spontaneous productions and fruits of the earth while ungathered, are considered as belonging to the freehold, and descend to the heir. Com. Dig. tit. Biens, H.; but they are liable to distress for rent and on execution as chattels. See *infra*, vol. iii. pp. 477, 479. The products of annual planting and cultivation, or the *fructus industriæ*, as, for instance, a growing crop, are also so far deemed personal property that they may be distrained or sold by the owner, or taken on execution as such. Craddock *v.* Riddlesbarger, 2 Dana's Ken. Rep. 206, 207. *Vide infra*, vol. iv. pp. 467, 468, as to the rule on that subject between vendor and vendee. Shares in bank and other corporations, with a capital apportioned in shares assignable for public accommodation, but holding real estate, are, nevertheless, personal property, and this is the general doctrine of American law. Hilliard's Abr. ch. 1, sec. 109, and cases in Massachusetts, Rhode Island, North Carolina, and Ohio, are cited to show it. They were so made by statute in Connecticut, in 1818, though in Kentucky they have been adjudged to be real estate, as, see *infra*, vol. iii. 459, n. And so they were in Connecticut, prior to the statute of that state, as, see Welles *v.* Cowles, 2 Conn. Rep. 567. In England, shares in companies acting on land exclusively, as railroad, canal, and turnpike companies, are held to be real estate. Drybutter *v.* Bartholomew, 2 P. Wms. 127. Buckeridge *v.* Ingram, 2 Vesey, Jr. 662. In this last case the vexed question was elaborately discussed, whether such an interest was real or personal estate. Shares in canals and railroads are said to be generally, though not always, personal property, and they are in England made personal by several acts of parliament. Williams on the Principles of Real Property, int. ch. The American doctrine is the most convenient; and corporations of the nature alluded to are generally created with a declaration in the charter, that the shares are to be regarded as personal estate.

of real and personal property. But the jurisprudence of the middle ages was almost entirely occupied with the government of real estates, which were the great source of political power, and the foundation of feudal grandeur. In consequence *341 of this policy, a technical and very artificial *system was erected, upon which the several gradations of title to land depended. Chattels were rarely an object of notice, either in the treatises or reports of the times, prior to the reign of Henry VI. (*a*) They continued in a state of insignificance until the revival of trade and manufactures, the decline of the feudal tenures, and the increase of industry, wealth, and refinement, had contributed to fix the affections upon personal property, and to render the acquisition of it an object of growing solicitude. It became, of course, a subject of interesting discussion in the courts of justice; and being less complicated in *342 *its tenure, and rising under the influence of a liberal commerce and more enlightened maxims, it was regulated by principles of greater simplicity and more accurate justice. By a singular revolution in the history of property and manners, the law of chattels, once so unimportant, has grown into a system which, by its magnitude, overshadows, in a very considerable degree, the learning of real estates.

I. Chattel is a very comprehensive term in our law, and includes every species of property which is not real estate or a freehold. The most leading division of personal property is into chattels real and chattels personal. Chattels real are interests annexed to or concerning the realty, as a lease for years of land; and the duration of the term of the lease is immaterial, provided it be fixed and determinate, and there be a reversion or remainder in fee in some other person. (*b*) It is only personal estate if it be for a thousand years. (*c*) Falling below the character and dignity of a freehold, it is regarded as a chattel interest, and is governed and descendible in the same manner.

(*a*) Reeves's History of the English Law, vol. iii. pp. 15, 369.
(*b*) Co. Litt. 118 b. 2 Blacks. Com. 386.
(*c*) Co. Litt. 46 a. Case of Gay, 5 Mass. Rep. 419. Brewster *v.* Hill, 1 N. H. Rep. 350.

It does not attend the inheritance, for, in that case, it would partake of the quality of an estate in fee.

There are, also, many chattels, which, though they be even of a movable nature, yet being necessarily attached to the freehold, and contributing to its value and enjoyment, go along with it in the same path of descent or alienation. This is the case with the deeds and other papers which constitute the muniments of title to the inheritance; (a) and also with shelves and family pictures in a house, and the posts and rails of inclosures. (b) So, also, it is understood that pigeons in a pigeon-house, deer in a park, and fish in an artificial pond, go with * the inheritance as *heir looms* to the heir. (c) But *heir looms* are a class of property distinct from *fixtures;* and in modern times, for the encouragement of trade and manufactures, and as between landlord and tenant, many things are now treated as personal property which seem, in a very considerable degree, to be attached to the freehold. The law of fixtures is in derogation of the original rule of the common law, which subjected everything affixed to the freehold to the law governing the freehold; and it has grown up into a system of judicial legislation, so as almost to render the right of removal of fixtures a general rule, instead of being an exception. The general rule, which appears to be the result of the cases, is, that things which the tenant has affixed to the freehold for the purpose of trade or manufactures, may be removed, when the removal is not contrary to any prevailing usage, or does not cause any material injury to the estate, and which can be removed without losing their essential character or value as personal chattels. (d) [1] The character of the prop- *343

(a) Lord Coke said that charters, or muniments of title, might be entailed. Co. Litt. 20 a. In the Scotch law, a jewel or a picture may be entailed. 2 Bell's Com. 2. Heritable bonds and ground rents follow the freehold. 2 Ibid. 3. The tenant for life is *prima facie* entitled to retain the custody of the title-deeds, and the remainder-man is not entitled to call them out, except for some specific purpose. Shaw *v.* Shaw, 12 Price's Exch. Rep. 163.

(b) Herlakenden's case, 4 Co. 62. Cooke's case, Moore's Rep. 177, pl. 315. Liford's case, 11 Co. 50, b.

(c) Co. Litt. 8 a.

(d) Trappes *v.* Harter, 3 Tyrwhitt's Rep. 603. Cook *v.* Ch. T. Comp. 1 Denio, 92.

[1] Hill *v.* Wentworth, 2 Wms. (28 Vt.) 428.

erty, whether personal or real, in respect to fixtures, is governed very much by the intention of the owner, and the purposes to which the erection was to be applied. Thus, things set up by a lessee, in relation to his trade, as fats, coppers, tables, and partitions, belonging to a soap-boiler, (*a*) may be removed during the term. The tenant may take away chimney-pieces, and even wainscot, if put up by himself; (*b*) or a cider-mill and press erected by him on the land, (*c*) or a pump erected by him, if removable without material injury to the freehold. (*d*) So, a building resting upon blocks, and not let into the soil, has been held a mere chattel. (*e*)[1] A post wind-mill, erected by the tenant, (*f*) and machinery for spinning and carding, though nailed to the floor, (*g*) and copper-stills, and distillery apparatus, *344 and potash kettles, though * fixed or set on arches, (*h*) are held to be personal property.[2] On the other hand, iron

(*a*) Poole's case, 1 Salk. Rep. 368. Kettles and boilers in a tannery, and stills in a distillery, are not fixtures, but personal property. 1 Missouri Rep. 508. 3 Ibid. 207. On the other hand, iron salt-pans in salt-works erected by the tenant, and the pans resting on brickwork are not allowed to be removed, as being parcel of the works to be left in good repair. Mansfield *v.* Blackburne, 6 Bing. N. C. 426.

(*b*) *Ex parte* Quincy, 1 Atk. Rep. 477.

(*c*) Holmes *v.* Tremper, 20 Johns. Rep. 29.

(*d*) Grymes *v.* Boweren, 4 Moore & Payne, 143. 6 Bing. Rep. 437.

(*e*) Naylor *v.* Collinge, 1 Taunt. Rep. 21.

(*f*) The King *v.* Londonthorpe, 6 Term Rep. 377. See, also, The King *v.* Inhabitants of Otley, 1 B. & Adolph. 161. In Maine, this notion of movable fixtures was carried so far as to allow an action of trover for a saw-mill built by A. on the land of B., with his consent, when occupation was refused. Russell *v.* Richards, 1 Fairfield's Rep. 429. Tapley *v.* Smith, 18 Maine Rep. 12, S. P. So, in England, a wooden barn, erected on a foundation of brick and stone, is not a fixture, and may be removed by the tenant, and trover will lie for it.[3] Wansbrough *v.* Maton, 4 Adolph. & Ellis, 884.

(*g*) Cresson *v.* Stout, 17 Johns. Rep. 116. Tobias *v.* Francis, 3 Vermont Rep. 425. Taffe *v.* Warnick, 3 Blackf. Ind. Rep. 111.

(*h*) Reynolds *v.* Shuler, 5 Cowen's Rep. 323. Raymond *v.* White, 7 Ibid. 319. Wetherbee *v.* Foster, 5 Vermont Rep. 136.

[1] It was held in Blethem *v.* Towle, 40 Maine, 310, that a cistern standing on blocks in the cellar, is a fixture. And see Pullen *v.* Bell, 40 Maine, 314.

[2] So also gas fixtures and stools. Lawrence *v.* Kemp, 1 Duer, 363. Wall *v.* Hinds, 4 Gray, (Mass.) 756. Montague *v.* Dent, 10 Rich. Law, (S. C.) 135. A pump put into the well by the tenant. McCracken *v.* Hall, 7 Port. (Ind.) 30. Sinks and water-pipes. Wall *v.* Hurd, 4 Gray, 256. Trees in a nursery as between tenant and landlord or landlord's mortgagee with notice of tenant's claim. King *v.* Wilcomb, 7 Barb. 263.

[3] But a colossal statute resting by its own weight on a permanent pedestal is a fixture.

stoves, fixed to the brickwork of the chimneys of a house, have been adjudged to pass with the house, as part of the freehold, in a case where the house was set off on execution to a creditor. (*a*) [1] But in another case in the same court, between mortgagor and mortgagee, the possessor, on the termination of that relation, was allowed to take down and carry away buildings erected by him on the land, and standing on posts, and not so connected with the soil but that they could be removed without prejudice to it. (*b*) The tenant may also remove articles put up at his own expense for ornament or domestic convenience, unless they be permanent additions to the estate, and so united to the house as materially to impair it, if removed, and when the removal would amount to a waste. The right of removal will depend upon the mode of annexation of the article, and the effect which the removal would have upon the premises. (*c*)

Questions respecting the right to what are ordinarily called

(*a*) Goddard *v.* Chase, 7 Mass. Rep. 432.

(*b*) Taylor *v.* Townsend, 8 Mass. Rep. 411. But fixtures erected by the mortgagor are annexed to the freehold, and cannot be removed until the debt be paid. Butler *v.* Paige, 7 Metcalf, 40.

(*c*) Buckland *v.* Butterfield, 2 Brod. & Bing. 54. In Burge's Com. on Colonial and Foreign Laws, vol. ii. pp. 6–31, the rules respecting fixtures, not only in the English law but in the civil law and the codes of other nations, are collected. See also Treatise on Fixtures, by Amos & Ferard, ch. 2, secs. 3, 4. This valuable treatise has collected the numerous cases on the subject of fixtures, and traced and stated the subtle distinctions arising therein, with clearness and accuracy. Under the head of ornamental fixtures, hangings, tapestry, and pier-glasses, marble or other ornamental chimney-pieces, marble slabs, window-blinds, and wainscots fastened with screws, have been included; and, under the head of articles put up by the tenant for domestic use and convenience, and allowed to be removed during the term, are enumerated

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Snediker *v.* Warring, 2 Kern. 170. So gas-pipes in the street. Gas Co. *v.* Thurber, 2 R. I. 15. A fence built on another's land without leave. Wentz *v.* Fincher, 12 Ired. 297. Sheds *on posts* must be removed within the term, or they will vest in the landlord. Beckwith *v.* Boyce, 9 Mo. R. 560. A tenant was allowed in Missouri to remove an hydraulic press, fixed in the ground, walled up with solid masonry, and nailed to the building, it being necessary to the business for which he occupied the building. Finney *v.* Watkins, 13 Mo. R. 291. See Vanderpool *v.* Van Allen, 10 Barb. R. 157, in which articles attached by leathern belts were held to be chattels and not fixtures. Dubois *v.* Kelly, 10 Barb. R. 496. Wiltshear *v.* Cottrell, 18 Eng. L. & Eq. 143. Hill *v.* Wentworth, 2 Wms. (28 Vt.) 428. If a building be blown down by a tempest, its fragments are not by that act converted into personalty, but pass with the realty to a purchaser at a sheriff's sale. Rogers *v.* Gillinger, 30 Penn. State R. 185.

[1] Tuttle *v.* Robinson, 33 N. H. 104.

fixtures, or articles of a personal nature affixed to *345 *the freehold, (a) principally arise between three classes of persons: 1. Between heir and executor; and there the rule obtains with the most rigor in favor of the inheritance, and against the right to consider as a personal chattel anything which has been affixed to the freehold. (b)[1] 2. Between the executor of the tenant for life, and the remainder-man or reversioner; and here the right to fixtures is considered more favorably for the executors. 3. Between landlord and tenant; and here the claim to have articles considered as personal property is received with the greatest latitude and indulgence.[2] 4. There is an exception of a broader extent in respect to fixtures erected

grates, stoves,[3] iron backs to chimneys, fixed tables, furnaces, coppers, coffee-mills, malt-mills, jacks, cupboards, iron ovens, &c. Ibid. In the case of Gaffield v. Hapgood, 17 Pick. Rep. 192, a fire-frame fixed in the fireplace was held to be a fixture removable by the tenant during the term. The law of fixtures, in its application to the relation of landlord and tenant, partakes of the liberal and commercial spirit of the times.

(a) It was said by the Barons, in Sheen v. Rickie, Best's Exch. Rep. East. Term, 1839, that fixtures do not necessarily mean things affixed to the freehold. It only means something fixed to another, and which the tenant has the power of removing. 5 M. & W. 175, S. C. But I apprehend that the ordinary meaning is the appropriate and legal meaning, and which is, *things fixed in a greater or less degree to the realty.* It is clearly settled, said Baron Parke, in Minshall v. Lloyd, 2 Meeson & W. 459, that everything substantially and permanently affixed to the soil, is in law a fixture. The principal thing must not be destroyed by the accessary, nor a serious injury inflicted to some important building, unless the building itself be only an accessary to the fixture, as an engine-house, to cover it. The principle seems to be, that the fixture must be adapted to the enjoyment of the realty, and more or less annexed to it.

(b) The New York Revised Statutes, vol. ii. p. 83, sec. 6, 7, 8, declare that things annexed to the freehold, or to any building for the purpose of trade or manufacture, and not fixed into the wall of the house, so as to be essential to its support, go to the executor as assets; and that all other things annexed to the freehold descend to the heir or devisee. The chancellor, in House v. House, 10 Paige, 163, supposed the legislature here intended to put the executor or administrator upon the same footing with a tenant as to the right to fixtures.

[1] Buckley v. Buckley, 11 Barb. R. 43. Tuttle v. Robinson, 33 N. H. 104. Martin v. Roe, 40 Eng. L. & Eq. 68.

[2] A building called a "shanty" held to be a part of the freehold. Fisher v. Saffer, 1 E. D. Smith, (N. Y.) 611.

[3] Stoves not standing in their places at the time of a levy, but put away for the summer in a garret, are not fixtures. *Aliter*, if standing in their places where used. Blethem v. Towle, 40 Maine, 310.

for the purposes of trade, and the origin of it may be traced back to the dawnings of modern art and science. (a) Lord Ellenborough, in *Elwes* v. *Maw*, (b) went through all the cases from the time of the Year Books, and the court concluded that there was a distinction between annexations to the freehold for the purposes of trade or manufacture, and those made for the purposes of agriculture; and the right of the tenant to remove was strong in the one case and not in the other. It was held, that an agricultural tenant who had erected, for the convenient occupation of his farm, several buildings, was not entitled to remove them. Had the erections been made for the benefit of trade or manufactures, there would seem to have been no doubt of the right of removal. The strict rule as to fixtures, that applies between heir and executor, *applies equally as *346 between vendor and vendee, and mortgagor and mortgagee;[1] and growing crops, manure lying upon the land, and fixtures erected by the vendor for the purpose of trade and manufactures, as potash kettles for manufacturing ashes, pass to the vendee of the land. (c)[2] Fixtures go along with the

(a) 20 Hen. VII. 13, a. and b. pl. 24. The exception, in that case, was allowed in favor of a baker and a dyer affixing furnaces or vats, or vessels *pur occupier son occupations*. But the exception in favor of such trades was almost too liberal for the age; and we find, in the following year, 21 Hen. VII. 27, it was narrowed to things fixed to the ground, and not to the walls of the principal building.

(b) 3 East's Rep. 38. The notes attached to this case, in Smith's Leading Cases in Law Library, N. S. vol. xxviii. are valuable.

(c) Spencer, Ch. J., in Holmes *v.* Tremper, 20 Johns. Rep. 30. Hare *v.* Horton, 2 Neville & Manning, 428. Miller *v.* Plumb, 6 Cowen's Rep. 665. Kirwan *v.* Latour, 1 Harr. & Johns. 289. Kittredge *v.* Woods, 3 N. H. Rep. 503. Despatch Line of Packets *v.* Bellamy Man. Co. 12 N. H Rep. 205. Oves *v.* Ogelsby, 7 Watts, 106. Union Bank *v.* Emerson, 15 Mass. Rep. 159. Though *fructus industriales* pass from the intestate to his personal representatives, yet, under a devise or conveyance of land, they pass to the devisee or vendee. The main mill-wheel and gearing of a factory, and *necessary to its operation*, are held to be fixtures and real estate, in favor of the right of dower as against the heir. Powell *v.* Monson and Brimfield Manufacturing

[1] The same rule is held to apply on a division between tenants in common. Parsons *v.* Copeland, 38 Me. 537.

[2] Bratton *v.* Clawson, 2 Strobh. R. 478. In this case it was held, that a cotton-gin fixed in its place passed to the purchaser. If put so as to be removed easily, and without damage, machinery does not pass. Farrer *v.* Chauffetêtes, 5 Denio's R. 527. But see Wilde *v.* Waters, 32 E. L. & Eq. 422.

premises to a lessee, if no reservation be made at the time of the contract; (*a*) and the tenant must remove fixtures put up by him before he quits the possession on the expiration of his lease. (*b*) If not removed during the term, they become the property of the landlord. (*c*) [1]

It has been strongly questioned by high authority, (*d*) whether erections for agricultural purposes ought not, in this country, to receive the same protection in favor of the tenant as those fixtures made for the purposes of trade, manufactures, or do-

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Company, 3 Mason's Rep. 459. Such machinery will also pass to the vendee as against the vendor. Farrar *v.* Stackpole, 6 Greenleaf's Rep. 154. So, manufacturing machinery and fixtures will pass to a mortgagee, as part and parcel of the inheritance, in like manner as they pass to a vendee.[2] Lord Hardwicke, in Ryall *v.* Rolle, 1 Atk. Rep. 175. Union Bank *v.* Emerson, 15 Mass. Rep. 159. Amos & Ferard on Fixtures, 189, 191. Voorhis *v.* Freeman, 2 Watts & Serg. 116. Despatch Line of Packets *v.* Bellamy Manu. Co. 12 N H. Rep. 205. They are parcel of the inheritance. Farrant *v.* Thompson, 5 B. & Ald 826. But in Swift *v.* Thompson, 9 Conn. Rep 63, machinery in a cotton factory attached to the building, so far as to keep the machinery steady, and which could be removed without injury to the building or the machinery, was held to be personal property, as respects creditors and purchasers. The case of Gale *v.* Ward, 14 Mass. Rep. 352, went also to the same point. Fixtures made by a mortgagor after the mortgage, become part of the realty as between him and the mortgagee, and cannot be removed. It might be otherwise in the case of landlord and tenant. The mortgagor makes such improvements as owner, for the permanent benefit of the estate. Winslow *v.* Merchants' Ins. Co. 4 Metcalf's R. 306.[3]

(*a*) Colegrave *v.* Dias Santos, 2 Barnew. & Cress. 76.

(*b*) Gibbs, Ch. J., in Lee *v.* Risdon, 7 Taunt. Rep. 188. *Ex parte* Quincy, 1 Atk. Rep. 477. 2 Barnew. & Cress. *supra.* Poole's case, 1 Salk. Rep. 368. Penton *v.* Robart, 2 East's Rep. 88. White *v.* Arndt, 1 Wharton, 91. 2 Meeson & W. 460, S. P.

(*c*) Lyde *v.* Russel, 1 B. & Adolphus, 394. The French law coincides with the English in respect to fixtures made for embellishment The tenant may remove them, provided they can be removed without being destroyed, and without deteriorating the premises. Lois des Batimens, par Le Page, tom. ii. pp. 190, 205.

(*d*) Van Ness *v.* Pacard, 2 Peters's U. S. Rep. 137.

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[1] But if the tenant hold over as tenant, after the end of his term, he may remove them. Dubois *v.* Kelly, 10 Barb. 496. Or if there be an oral agreement, by which the tenant was to have the right of removal at a subsequent day. McCracken *v.* Hall, 7 Ind. 30.

[2] As machinery used in a building and attached to it. Sparks *v.* State Bank, 7 Blackf. Rep. 469. Murdock *v.* Harris, 20 Barb. 407. McKim *v.* Mason, 3 Md. Ch. 186. Parsons *v.* Copeland, 38 Me. 537. But, see Vanderpoel *v.* Van Allen, 10 Barb. 157; Godard *v.* Gould, 14 Barb. 662; Cope *v.* Romeyne, 4 McL. 384; Teaff *v.* Hewitt, 1 Ohio St. 511; Waterfall *v.* Penistone, 37 E. L. & Eq. 156.

[3] Gardner *v.* Finley, 19 Barb. 317.

mestic convenience. They may be necessary for the beneficial enjoyment of the estate, and the protection of its produce; and public policy, and the interests of the owner of the soil, are equally promoted by encouragement given to the tenant to cultivate and improve the estate. In *Whiting* v. *Brastow*, (*a*) the agricultural tenant received *a liberal application of the exception in favor of the removal of fixtures.[1] He was allowed to remove from the freehold all such improvements as were made by him, the removal of which would not injure the premises, or put them in a worse plight than they were in when he took possession. The case of *Holmes* v. *Tremper* (*b*) may also be referred to as containing a just and enlarged view of the subject; and the tenant was allowed to remove a cider-mill and press erected for his own use.[2] But the same policy of encouraging and protecting agricultural improvements will not permit the outgoing tenant to remove the manure which has accumulated upon a farm during the course of his term. (*c*)[3]

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(*a*) 4 Pick. Rep. 310.

(*b*) 20 Johns. Rep. 29.

(*c*) Lassell *v.* Reed, 6 Greenleaf's Rep. 222. Middlebrook *v.* Corwin, 15 Wendell, 169. Daniels *v.* Pond, 21 Pick. 367. It would seem to be the law in England for the outgoing tenant to sell or take away the manure. Roberts *v.* Barker, 1 Crompt. & Meeson, 809. Gibbons on Dilapidations, 76; but a special usage sometimes obliges the offgoing tenant to leave the manure upon the land. In North Carolina, the outgoing tenant, when there is no custom or covenant to the contrary, has a right to the manure made by him on the farm, provided he takes it away before he removes. Smithwick *v.* Ellison, 2 Iredell's Rep. 326.

In the case of Walker *v.* Sherman, 20 Wendell, 636, Mr. Justice Cowen gave an elaborate examination of the English and American authorities on the subject of fixtures, and the decision in the case was, that the machinery in a woollen factory, being movable, and not in any manner affixed or fastened to the building or land, and yet material to the performance of the factory in certain departments of its work, was personal property, as between tenants in common and owners of the fee. The question was decided on the same principle as if it had arisen between grantor and grantee.

[1] Rails made into fence are fixtures, and pass to a vendee. Mott *v.* Palmer, 1 Comst. Rep. 564. Rails not in a fence are no part of the realty. Robertson *v.* Phillips, 3 Iowa, 220.

[2] See Wiltshear *v.* Cottrell, 18 E. L. & Eq. 142; Ombony *v.* Jones, 21 Barb. 520.

[3] But manure made in a livery stable was held to belong to the lessee, as the reason of the rule in the case of farms did not apply. Plumer *v.* Plumer, 10 Fost. 558.

The civil law was much more natural and much less complicated in the discrimination of things than the common law. It divided them into the obvious and universal distinction of things movable and immovable, or things tangible and intangible. The movable goods of the civil law were, strictly speaking, the chattels personal of the common law. Whatever was fixed to the freehold *perpetui usus causa*, was justly deemed a part of the *res immobiles* of the civil law. (*a*)

II. Property in chattels personal is either absolute or qualified.

Absolute property denotes a full and complete title and dominion over it; but qualified property in chattels is an exception to the general right, and means a temporary or special interest, liable to be totally devested on the happening of some particular event.

A qualified property in chattels may subsist by reason of the nature of the thing or chattel possessed. The elements of air, light, and water, are the subjects of qualified property by occupancy; and Justinian, in his Institutes, (*b*) says, they are common by the law of nature. He who first places *348 * himself in the advantageous enjoyment of a competent portion of either of them, cannot lawfully be deprived of that enjoyment; and whoever attempts to do it, creates a nuisance for which he is responsible. (*c*) Animals *feræ naturæ*, so long as they are reclaimed by the art and power of man, are also the subject of a qualified property; but when they are abandoned, or escape, and return to their natural liberty and ferocity, without the *animus revertendi*, the property in them ceases.

The learned judge considered that the ancient distinction between actual annexation and total disconnection was the most certain and practical, and he collected from the cases, as far as their subtlety and inconsistency would admit of any general conclusion, that nothing of a nature personal in itself would pass as a *fixture*, unless it be in some way habitually or permanently attached or *fixed* to the freehold. There are likewise constructive fixtures which, in ordinary understanding, make part and parcel of the land or building, such as rails on a fence, stones in a wall-fence, and Venetian blinds, and locks and keys to a house, &c.

(*a*) Taylor's Elem. of the Civil Law, 475.

(*b*) Inst. 2, 1, 1.

(*c*) Aldred's case, 9 Co. 58 b.

While this qualified property continues, it is as much under protection of law as any other property, and every invasion of it is redressed in the same manner. (*a*)[1] The difficulty in ascertaining with precision the application of the law, arises from the want of some certain determinate standard or rule, by which to determine when an animal is *feræ vel domitæ naturæ.* If an animal belongs to the class of tame animals, as, for instance, to the class of horses, sheep, or cattle, he is then clearly a subject of absolute property; but if he belongs to the class of animals which are wild by nature, and owe all their temporary docility to the discipline of man, such as deer, fish, and several kind of fowl, (*b*) then the animal is the subject of qualified property, and which continues so long only as the tameness and dominion remain. It is a theory of some naturalists that all animals were originally wild, and that such as are domestic owe all their docility and all their degeneracy to the hand of man. This seems to have been the opinion of Count Buffon; and he says that the dog, the sheep, and the camel, have degenerated from the strength, spirit, and beauty of their natural state, and that one principal cause of their degeneracy was the pernicious influence of human power. (*c*) Grotius, on the other hand, has suggested that savage animals owe all their untamed ferocity, not to their own natures, but to the violence *of *349 man. (*d*) But the common law has wisely avoided all perplexing questions and refinements of this kind, and has

(*a*) 7 Co. 16-18. Finch's Law, 176.

(*b*) Doves are held to be animals *feræ naturæ.* Commonwealth *v.* Chase, 9 Pick. Rep. 15. If kept in a dove-cote, with liberty of egress, they may be subjects of larceny. Regina *v.* Cheafor, 8 Eng. L. & Eq. 598.

(*c*) Buffon's Natural History, vol. ii Smellie's ed.

(*d*) Grotius, Hist. de Belg. lib. 5, cited in Puff. Droit de la Nat. l, 4, ch. 6, sec. 5.

[1] Though not strictly within the scope of the text, it may be well to mention, that the owner of a domestic animal is not, in general, liable for an injury committed by such animal, unless it be shown that he had notice of its vicious propensity. Van Leuven *v.* Lyke, 1 Comst. R. 515. S. C. 4 Denio's R. 127. If he has such knowledge, it is held that no negligence in the keeping of the animal need be proved. May *v.* Burdett, 9 Ad. & El. N. S. 101. Card *v.* Case, 5 Man. Gran. & Scott's R. 622. Buckley *v.* Leonard, 4 Denio's R. 500. The owner of bees is not *primâ facie* liable for injuries committed by them. Earl *v.* Van Alstine, 8 Barb. R. 630. Brinckerhoff *v.* Starkins, 11 Barb. R. 248. The owner of a dangerous animal keeps him at his own risk, without reference to care or negligence. McCaskill *v.* Elliott, 5 Strobh. R. 191.

adopted the test laid down by Puffendorf, (a) by referring the question, whether the animal be wild or tame, to our knowledge of his habits, derived from fact and experience. It was held, by the Supreme Court of New York, in *Pierson* v. *Post*, (b) that pursuit alone gave no property in animals *feræ naturæ.* Almost all the jurists on general jurisprudence agree that the animal must have been brought within the power of the pursuer before the property in the animal vests. Actual taking may not in all cases be requisite; but all agree that mere pursuit, without bringing the animal within the power of the party, is not sufficient. The possession must be so far established, by the aid of nets, snares, or other means, that the animal cannot escape. It was accordingly held, in the case just mentioned, that an action would not lie against a person for killing and taking a fox which had been pursued by another, and was then actually in the view of the person who had originally found, started, and chased it. The mere pursuit, and being within view of the animal, did not create a property, because no possession had been acquired; and the same doctrine was afterwards declared in the case of *Buster* v. *Newkirk.* (c)

The civil law contained the same principle as that which the Supreme Court adopted. It was a question in the Roman law, whether a wild beast belonged to him who had wounded it so that it might easily be taken. The civilians differed on the question; but Justinian adopted the opinion that the property in the wounded wild beast did not attach until the beast was actually taken. (d) So if a swarm of bees had flown from the hive of A., they were reputed his so long as the swarm *350 remained in sight, and might easily be * pursued; otherwise they became the property of the first occupant. (e)

(a) Liv. 4, ch. 6, sec. 5.

(b) 3 Caines's Rep. 175.

(c) 20 Johns. Rep. 75. The legislature of New York have enlarged the right of acquisition of game by pursuit, in the case of deer, in the counties of Suffolk and Queens, by declaring that any person who starts and pursues such game, shall be deemed in possession of the same, *so long as he continues in fresh pursuit* thereof. Laws of N. Y. April 1, 1844, ch. 109. N. Y. R. S. 3d edit. vol. i. 883.

(d) Inst. 2, 1, 13. Dig. 41, 1, 5, 2.

(e) Inst. 2, 1, 14.

Merely finding a tree on the land of another, containing a swarm of bees, and marking it, does not vest the property of the bees in the finder. (a) Bees which swarm upon a tree do not become private property until actually hived. (b)

A qualified property in chattels may also subsist, when goods are bailed, or pledged, or distrained. In those cases, the right of property and the possession are separated; and the owner has only a property of a temporary or qualified nature, which is to continue until the trust be performed or the goods redeemed; and he is entitled to protect this property while it continues, by action, in like manner as if he was absolute owner. (c)

III. Personal property may be held by two or more persons in joint tenancy or in common; and in the former case, the same principle of survivorship applies which exists in the case of a joint tenancy in lands. (d) But by reason of this very effect of survivorship, joint tenancy in chattels is very much restricted. It does not apply to stock used in any joint undertaking, either in trade or agriculture; for the forbidding doctrine of survivorship would tend to damp the spirit and enterprise requisite to conduct the business with success. When one joint partner in trade or in agriculture dies, his interest or share in the concern does not survive, but goes to his personal representatives. (e) Subject to these exceptions, a gift or grant of a chattel interest to two or more persons creates a joint tenancy; and a joint tenant, it is said, may lawfully dispose of the whole property. (f) In legacies of *chattels the courts at one *351

(a) Gillett v. Mason, 7 Johns. Rep. 16.

(b) Inst. 2, 1, 14. Wallis v. Mease, 3 Binney's Rep. 546. Bees which take up their abode in a tree, belong to the owner of the soil, if unreclaimed, but if reclaimed and identified, they belong to their former possessor. Goff v. Kilts, 15 Wendell, 550.

(c) *Vide infra*, pp. 568, 585.

(d) Co. Litt. 182 a.

(e) Co. Litt. 182 a. Noy's Rep. 55. Jefferevs v. Small, 1 Vern. Rep. 217. Elliot v. Brown, cited in Raithby's note to 1 Vern. Rep. 217.

(f) Best, J., in Barton v. Williams, 5 Barnew. & Ald. 395. If this *dictum* be not confined to joint tenancy in merchandise, where it undoubtedly applies, it must, at least, be restricted to chattel interests. A sale in market overt of a chattel by one joint tenant, changes the property at once as against the other joint tenant. A joint tenant of an estate can only convey his part; and if he should levy a fine of the whole estate, or convey it by bargain and sale, it would only reach his interest, and amount

time leaned against any construction tending to support a joint tenancy in them, and testators were presumed to have

to a severance of the joint tenancy. Co. Litt. 186 a. Com. Dig. tit. Estates, K. 6. Ford *v.* Lord Grey, 6 Mod. Rep. 44. 1 Salk. Rep. 286. 2 Ohio Rep. 112. See, also, *infra*, vol. iv. pp. 359, 360, note. If one tenant in common of a chattel sells the share of his co-tenant, as well as his own, he is answerable in trover. Wilson *v.* Reed, 3 Johns. Rep. 175. Hyde *v.* Stone, 7 Wendell, 354. White *v.* Osborn, 21 Ibid. 72. It is a conversion as to the share of the other. Parke, B., 1 M. & Welsby, 685.[1] But one tenant in common of a chattel cannot bring trover against his co-tenant for dispossessing him, for each has an equal right to the possession; though for the loss or destruction, or sale of the whole chatted by one of the co-tenants, an action of trover will lie against him by the other. Litt. sec. 323. Co. Litt. 200 a. Wilson *v.* Reed, *ub. sup.* Fennings *v.* Grenville, 1 Taunton, 241. Barton *v.* Williams, 5 Barnew. & Ald. 395. Farr *v.* Smith, 9 Wendell, 338. Lucas *v.* Wasson, 3 Dev. Rep. 398. Cole *v.* Terry, 2 Dev. & Battle, 252. Herrin *v.* Eaton, 13 Maine, 192. Mersereau *v.* Norton, 15 Johns. Rep. 179.[2] In Waddell *v.* Cook, 2 Hill's Rep. 47, it was held that trover (but not trespass) would lie by one co-tenant of goods against another who sells the whole interest in the chattels. One tenant in common of personal property can sell his own share only. Bradley *v.* Boynton, 22 Maine R. 287. If he sells the whole interest in the common property, the vendee of the original co-tenant cannot be sued *while in possession.* The person in possession under such a sale is a co-tenant with the rightful owner. The remedy is in trover against the co-tenant, whoever he may be, who sells the whole subject as for a conversion of the share of the other owner. Dain *v.* Cowing, Ib. 347. A joint owner of a chattel is bound to bestow

[1] So if one joint owner misuses the joint property, or delivers it wrongfully to a stranger for improper purposes, and such stranger denies the right of the other joint owner, *trover* lies. Agnew *v.* Johnson, 17 Penn. St. 373.

[2] Lowe *v.* Miller, 3 Gratt. 205. Tyler *v.* Taylor, 8 Barb. 585. Smyth *v.* Tankersley, 20 Ala. 212. And in Illinois, by statute, one tenant in common may maintain trover against another, who assumes exclusive control over the property. Benjamin *v.* Stremple, 13 Ill. 466. In Vermont, it is held to be settled that a sale by one of two tenants in common is not a conversion. Barton *v.* Burton, 1 Wms. 93. So in North Carolina, trover does not lie by one tenant in common against the other, unless there be a destruction of the property; and a sale of a slave *within the state* is not such a destruction. Pitt *v.* Petway, 12 Ired. L. 69. Trespass cannot be maintained by one tenant in common of goods against a vendee of the goods to whom an officer had delivered them as the sole property of the other; nor, *it seems*, can trover be maintained. Fiero *v.* Betts, 2 Barb. S. C. R. 633. But see White *v.* Morton, 22 Vermt. R. 15. Blevins *v.* Baker, 11 Ired. R. 291. Crocker *v.* Carson, 33 Me. 436. An injunction will not lie by one tenant in common of a patent against a license granted by the other. Clum *v.* Brewer, 2 Cur. C. C. 506. Where personal property, severable in its nature, in common bulk and of the same quality, is owned by several as tenants in common, each tenant may sever and appropriate his share, if it can be determined by measurement or weight, without the consent of the others, and sell or destroy it, without being liable to his co-tenants in an action for conversion. Fobes *v.* Shattuck, 22 Barb. (N. Y.) 568. The secret removal of entire chattels by one tenant in common, without the consent or knowledge of the other, and for the purpose of selling them and applying the proceeds to his own use, does not amount to a conversion. Jones *v.* Brown, 38 Eng Law & Eq. 304.

intended to confer legacies in the most advantageous manner.(a) But in *Campbell* v. *Campbell*, (b) the master of the rolls reviewed the cases, and concluded, that where a legacy was given to two or more persons, they would take a joint tenancy, unless the will contained words to show that the testator intended a severance of the interest, and to take away the right of survivorship. This same rule of construction has been declared and followed in the subsequent cases. (c)[1]

IV. Another very leading distinction in respect to goods and chattels, is the distribution of them into things in possession and things in action. The latter are personal rights not reduced to possession, but recoverable by suit at law. Money due on bond, note, or other contract, damages due for breach of covenant, for the detention of chattels or for torts, are included under this general head or title of things in action. It embraces the most diffusive, and, in this commercial age, the most useful learning in the law.[2] By far the greatest part of the questions arising in the intercourse of social life, or which are litigated in the courts of justice, are to be referred to this head of personal rights in action.

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upon its preservation that care which a prudent man ordinarily bestows upon his property. Guillot *v.* Dossat, 4 Martin's La. Rep. 2.

(a) Perkins *v.* Baynton, 1 Bro. Rep. 118.

(b) 4 Bro. Rep. 15.

(c) Morley *v.* Bird, 3 Ves. 629. Crooke *v.* De Vandes, 9 Ibid. 197. Jackson *v.* Jackson, Ibid. 591.

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1 Money in the funds, in the name of two persons, belongs to them as joint tenants, whatever trusts may exist. Crossfield *v.* Such, 22 Eng. L. & Eq. 555.

2 The terms "chose in action," and "thing in action," embrace demands arising out of a *tort*, as well as causes of action originating in a breach of contract. Gillet *v.* Fairchild, 4 Denio's R. 80. In Hall *v.* Robinson, 2 Comst. R. 293, it was held, that though a right of action for a tort is not assignable, yet after the conversion of a chattel, the owner may sell it, so as to give the purchaser a right to claim it from the wrongdoer.

The assignee of a chose in action stands exactly as the assignor as to equities arising on it. As a general rule, the creator of the security is not bound, on receiving notice of the assignment, to volunteer information. But if the notice disclose, that the assignee has been deceived, the creator of the security is bound to inform the assignee of the real circumstances, or he may be debarred from the advantage of the equities. Mangles *v.* Dixon, 18 Eng. L. & Eq. 82.

*352 * V. Chattels may be limited over by way of remainder, after a life-interest in them is created, though not after a gift of the absolute property. The law was very early settled, that chattels real might be so limited by will. (*a*) A chattel personal may also be given by will, and it is said that the limitation may also be equally by deed, (*b*) to A. for life, with the remainder over to B., and the limitation over, after the life-interest in the chattel has expired, is good. At common law there could be no limitation over of a chattel, but a gift for life carried the absolute interest. Then a distinction was taken between the use and the property, and it was held that the use might be given to one for life, and the property afterwards to another, though the devise over of the chattel itself would be void. (*c*) It was finally settled that there was nothing in that distinction, and that a gift for life of a chattel was a gift of the use only, and the remainder over was good as an executory devise. (*d*) This limitation over in remainder is good as to every

(*a*) Manning's case, 8 Co. 95. Lampet's case, 10 Co. 46. Child *v.* Baylie, Cro. J. 459.

(*b*) 2 Blacks. Com. 398. Langworthy *v* Chadwick, 13 Conn. Rep. 42. The cases are generally upon wills; but in Child *v.* Baylie, Cro. J. 459, the court speaks of such a remainder as being created equally by grant or devise. In Powell *v.* Brown, S. C. Law Journal, No. 3, 442, it was held, that a limitation over of a personal chattel by deed, was good, though it was not by way of executory trust or a conveyance to uses. See, also, Powell *v.* Brown, 1 Bailey's S. C. Rep. 100. But if the limitation in remainder, after a life-estate in personalty, be not by executory devise, it can only be by conveyance in trust. Betty *v.* Moore, 1 Dana's Ken. Rep. 237. So, in Morrow *v.* Williams, 3 Dev. N. C. Rep. 263, it was said to be a settled rule in North Carolina, that a remainder in chattels, after a life-estate, could not be created by deed. In Rathbone *v.* Dyckman, 3 Paige's Rep. 1, it was held, that a limitation over of personal estate to A. in case of the death of B. without lawful issue, was valid; for the N. Y. Rev. Stats. vol. i. 724, sec. 22; p. 773, sec. 2, have declared, that the words *dying without issue*, mean issue living at the death of the first taker. See *infra*, vol. iv. p. 283. In the English chancery, in bequests of chattel interests, the words *living at the time of the testator's death*, are often supplied by intendment, to avoid uncertainty. Thus, a bequest to *the children of* A., or a legacy to A. for life, and then to *the children of* B., the law, in the case of real estates, restricts the bounty to the children *living at the death* of A. or B., as the case may be. Equity will not presume that a party who is not *in esse* is intended, unless such intention be manifest. Bartleman *v.* Murchison, 2 Russ. & Mylne, 136.

(*c*) 37 Hen. VI., abridged in Bro. tit. Devise, pl. 13. Hastings *v.* Douglass, Cro. C. 343.

(*d*) Hyde *v.* Parrat, 1 P. Wms. 1. It has been frequently held, Mr. J. Buller ob-

species of chattels of a durable nature; and there is no difference in that respect between money and any other chattel interest. The general doctrine is established by numerous English equity decisions, (a) and it has been very extensively recognized and adopted as the existing rule of law in this country; but not until the questions had been very ably *and *353 thoroughly discussed, particularly in the Supreme Court of Errors of the state of Connecticut. (b)

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served, in Doe *v.* Perryn, 3 Term, 484, that the words *dying without issue,* mean without issue *at the time of the death of the party,* in cases of personal property, though it be not so in the limitation of freehold estates.

(a) Smith *v.* Clever, 2 Vern. Rep. 59. Hyde *v.* Parrat, 1 P. Wms. 1. Tissen *v.* Tissen, Ibid. 500. Pleydell *v.* Pleydell, Ibid. 748. Porter *v.* Tournay, 3 Ves. 311. Randall *v.* Russell, 3 Merrivale's Rep. 190.

(b) Moffatt *v.* Strong, 10 Johns. Rep. 12. Westcott *v.* Cady, 5 Johns. Ch. Rep. 334. Griggs *v.* Dodge, 2 Day's Rep. 28. Taber *v.* Packwood, Ibid. 52. Scott *v.* Price, 2 Serg. & Rawle, 59. Deihl *v.* King, 6 Ibid. 29. Royal *v.* Eppes, 2 Munf. Rep. 479. Mortimer *v.* Moffatt, 4 Hen. & Munf. 503. Logan *v* Ladson, 1 Desaus. Rep. 271. Geiger *v.* Brown, 4 M'Cord, Rep. 427. Brummet *v.* Barber, 2 Hill's S. C. Rep. 543 By the N. Y. Revised Statutes, vol. i. p. 773, sec. 1–5, the absolute ownership of personal property cannot be suspended by any limitation or condition for a longer period than two lives in being at the date of the instrument creating it, or if by will, in being at the death of the testator. The accumulation of the interest or profits of personal property may be made as aforesaid, to commence from the date of the instrument, or from the death of the person executing the same, for the benefit of one or more minors then in being, and to terminate at the expiration of their minority; and if directed to commence at a period subsequent to the date of the instrument or death of the person executing it, the period must be during the minority of the persons to be benefited, and terminate at the expiration of their minority. All direction for accumulation contrary hereto are void; and for a longer term than such minority, are void as to the excess of time. But if a minor, for whose benefit a valid accumulation of interests or profits is directed, be destitute, the chancellor may apply a suitable sum from the accumulated moneys for his relief, as to support or education. See *infra,* vol. iv. p. 286, the regulation of the accumulation of the income of real estates; and see Vail *v.* Vail, 4 Paige's Rep. 317, where it was held, that if the trust of accumulation of income of personal estate be void under the statute, such income goes as unbequeathed property. Whenever the proceeds of personal property are not validly disposed of by the testator, they are to be distributed, as of course, to the widow and next of kin. The N. Y. Revised Statutes have not defined the objects for which express trusts of *personal* estate may be created, as has been the case in relation to trusts of real estate. (*Infra,* vol. iv. 310.) They may therefore be created for any purposes which are not illegal; and except as to the mere vesting of the legal title to the property in the trustee, instead of the *cestui que trust,* the conveyance or bequest of personal property is governed by the same rules applicable to a grant or devise of a similar interest in real property. The Revised Statutes, vol. i. 773, tit. 4, restrict, as above stated, the power of suspending the right of alienation of personal property, and the right of accumula-

There is an exception to the rule in the case of a bequest of specific things, as, for instance, corn, hay, and fruits, of which the use consists in the consumption. The gift of such articles for life is, in most cases, of necessity, a gift of the absolute property; for the use and the property cannot exist separately. (a) If not specifically given, but generally as goods and

tion within similar limits. Gott v. Cook, 7 Paige, 534-5. In all other respects *limitations* of future or contingent personal estates are the same as if the subject was real estate. Hone v. Van Schaick, 7 Paige, 222. Kane v. Gott, 24 Wendell, 641. The N. Y. R. Statutes, concerning uses and trusts, are confined to real property. They do not interfere with the mere appropriation of the fund as to personal property, and only as to limitations of future or contingent interest therein; for if the limitation be on a contingency, it must be confined within certain boundaries of time, otherwise you run into an objectionable perpetuity. The rules of real property are not impressed upon personal property, except as to future contingent limitations. See the remarks of Mr. Justice Cowen on this subject in Kane v. Gott, *ut sup.* pp. 662, 663, 666. If personal estate be vested in trustees upon various trusts, some being valid and others void, the court will sustain the valid ones if they can be separated from those which are illegal. Van Vechten v. Van Veghten, 8 Paige's Rep. 105.

The testator may direct the payment of legacies out of the income of the estate by *anticipation*. He may bequeathe the same as a future estate undiminished in amount, subject to the rules against perpetuities. He may carve such intermediate interests, estates and portions out of the income, in the mean time, as he pleases, if it can be done without any actual accumulation of the rents and profits for that purpose. But an *accumulation of rents and profits for the purpose of raising a legacy or portion at a future day*, is not permitted in New York, except such legacy or portion be for the sole benefit of a minor in existence when the accumulation commences. N. Y. R. S. vol. i. p. 726, sec. 37, 38. Ibid. 773, sec. 3, 4.

(a) Randall v. Russell, 3 Merivale's Rep. 194. Evans v. Iglehart, 6 Gill & Johns. 171. Henderson v. Vaulx, 10 Yerger, 30. If the specific personal property bequeathed for life, with remainder over, be capable of increase, as cattle, &c., the tenant for life, taking the increase to himself, is bound to keep up the number of the original stock. 1 Domat, b. 1, tit. 11, sec. 5. But if the animals do not produce young ones, the tenant for life, called the usufructuary in the civil law, is not bound to supply the place of those that die without his fault Ibid. sec. 6. In the southern states slaves may be bequeathed for life and remainder over, and the tenant for life is bound in equity to account for them. Horry v. Glover, 2 Hill's S. C. Ch. Rep. 520. Though property be of a perishable nature, it may, when the case will admit of it, be bequeathed to A. for life, with remainder over; but as such property becomes less valuable, from year to year, it may, under the direction of chancery, be converted into government stock, for the protection of the remainder-man. 4 Russell's Rep. 200.[1]

[1] A purchaser from tenant for life of a slave may be compelled in equity to secure the rights of those in remainder. Gill v. Tittle, 14 Ala. 528. Frazer v. Bevill, 11 Gratt. 9.

chattels with remainder over, the tenant for life is bound to convert them into money, and save the principal for the remainder-man. (a) It is a general principle, that where any interest short of absolute ownership is given in the general residue of personal estate, terms for years and other perishable funds of property which may be consumed in the use, are to be converted or invested, so as to produce a permanent capital, and the income thereof only is to go to the residuary legatee. (b) [1] There cannot be any estate tail in a chattel interest, unless in very special cases, for that would lead to a perpetuity, and no remainder over can be permitted on such a limitation. (c) It is a settled rule that the same words which under the English law would create *an estate tail as to freeholds, give the absolute interest as to chattels. (d) *354

The interest of the party in remainder in chattels is precarious, because another has an interest in possession; and chattels, by their very nature, are exposed to abuse, loss, and destruction. (e) It was understood to be the old rule in chancery, (f) that the person entitled in remainder could call for security from the tenant for life, that the property should be forthcoming at his decease, for equity regards the tenant for life as a trustee for

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(a) Patterson v. Devlin, 1 M'Mullan, S. C. R. 459. The rights of the tenant for life and of the remainder-man, in perishable articles, and in other things which deteriorate or wear out by use and time, are discussed at large in that case, and many illustrations given and distinctions stated.

(b) Howe v. Earl of Dartmouth, 7 Vesey, 137. Fearns v. Young, 9 Ibid. 549.

(c) Dyer's Rep. 7, pl. 8. 2 Blacks. Com. 398.

(d) Seale v. Seale, 1 P. Wms. 290. Chandless v. Price, 3 Vesey, 99. Brouncker v. Bagot, 1 Merivale's Rep. 271. Tothill v. Pitt, 1 Maddock's Ch. Rep. 488. Garth v. Baldwin, 2 Vesey, 646. Jackson v. Bull, 10 Johns. Rep. 19. Paterson v. Ellis, 11 Wendell's Rep. 259. Moody v. Walker, 3 Arkansas Rep. 147.

(e) The interest in remainder in a chattel was held, in Allen v. Scurry, 1 Yerger's Tenn. Rep. 36, not to be the subject of sale on *fi. fa.*, for no delivery could be made by the sheriff. The remainder of a term in a live chattel was a contingent interest.

(f) 2 Freeman's Rep. 206, case 280. Bracken v. Bentley, 1 Rep. in Chancery, 59.

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[1] The rule gives way before an expressed intention of testator, that the property shall be enjoyed *in specie*. Morgan v. Morgan, 7 Eng. L. & Eq. 216. Smith v. Barham, 2 Dev. Eq. 420. Jones v. Simmons, 7 Ired. Eq. 178. And where the property is given by the executor to the tenant for life, and by him consumed, either the executor of the testator or of the tenant for life may be held responsible. Ib.

the remainder-man; but that practice has been overruled. (*a*)[1] Lord Thurlow said that the party entitled in remainder could call for the exhibition of an inventory of the property, and which must be signed by the legatee for life, and deposited in court, and that is all he is ordinarily entitled to. (*b*) But it is admitted that security may still be required in a case of real danger, that the property may be wasted, secreted, or removed. (*c*) And where there is a general bequest of a residue for life, with remainder over, the practice now is, to have the property sold and converted into money by the executor, and the proceeds safely invested, and the interest thereof paid to the legatee for life. (*d*)

(*a*) Foley *v.* Burnell, 1 Bro. Rep. 279. Sutton *v.* Craddock, 1 Iredell's N. C. Eq. Rep. 134.

(*b*) The rule in New York, as declared in De Peyster *v.* Clendining, 8 Paige's Rep. 295, is in the case of a specific bequest for the legatee to give to the personal representative of the testator an inventory of the articles bequeathed, stating his possession of them, and that when his interest expires they are to be delivered up.

(*c*) Fearne on Executory Devises, vol. ii. p. 53, 4th edit. by Powell. Mortimer *v.* Moffat, 4 Hen. & Munf. 503. Gardner *v.* Harden, 2 M'Cord's Ch. Rep 32. Smith *v.* Daniel, Ibid. 143. Merril *v.* Johnson, 1 Yerger's Tenn. Rep. 71. 1 Hill's S. C. Ch. Rep. 44, 74, 137, 157. Henderson *v.* Vaulx, 10 Yerger, 30. Hudson *v.* Wadsworth, 8 Conn. Rep. 348. Langworthy *v.* Chadwick, 13 Ibid. 42. Homer *v* Shelton, 2 Metcalf's Rep. 194. In Georgia, the person entitled in remainder or reversion of personal property may have a writ of *ne exeat* in such cases. Prince's Dig. 1837, p. 469.

(*d*) Howe *v.* Earl of Dartmouth, 7 Vesey, 137. But in the case of a bequest of *specific* chattels to A. for life, with remainder over, the legatee for life is entitled to the possession and enjoyment of *the chattel*, and not to have it sold by the executors, and the proceeds invested for his use, unless the will directs it. He is entitled to the increase and income of it from the testator's death. If, however, the property bequeathed would be of no use unless converted into cash, in that case a safe investment ought to be made by the executor, for the benefit of the parties in interest respectively. Evans *v.* Iglehart, 6 Gill & Johnson, 171. De Peyster *v.* Clendining, 8 Paige's Rep. 295. But in the case of a female slave bequeathed to A. for life, and then to B., her issue born during the life-estate goes to the ultimate legatee. Covington *v.* McEntire, 2 Ired. Eq. 316. In Pennsylvania, by Act of 24th February, 1834, security is to be given in all cases, under the direction of the Orphan's Court, where personal property is bequeathed for life only.

[1] See, however, Miller *v.* Williamson, 5 Md. 219; Roberts *v.* Stoner, 18 Mo. 481; Nance *v.* Coxe, 16 Ala. 125. Where the tenant for life had been missing fourteen years, the court could only give the *interest* to those in remainder, requiring an undertaking from them to account to the tenant for life if he should appear. *In re* Mileham's Trust, 21 Eng. L. & Eq. 550.

LECTURE XXXVI.

OF TITLE TO PERSONAL PROPERTY BY ORIGINAL ACQUISITION.

TITLE to personal property may accrue in three different ways: —

I. By original acquisition.
II. By transfer, by act of the law.
III. By transfer, by act of the parties.

The right of original acquisition may be comprehended under the heads of occupancy, accession, and intellectual labor.

I. *Of original acquisition by occupancy.*

The means of acquiring personal property by occupancy are very limited. Though priority of occupancy was the foundation of the right of property, in the primitive ages, and though some of the ancient institutions contemplated the right of occupancy as standing on broad ground, (a) *yet, in *356 the progress of society, this original right was made to yield to the stronger claims of order and tranquillity. Title by occupancy is become almost extinct, under civilized governments, and it is permitted to exist only in those few special cases in which it may be consistent with the public welfare.

(1.) Goods taken by capture in war were, by the common law, adjudged to belong to the captor. (b) But now, by the acknowledged law of nations, and the admiralty jurisprudence

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(a) *Quod ante nullius est, id naturali ratione occupanti conceditur.* Inst. 2, 1, 12. Mr. Selden has shown that among the ancient Hebrews, fruits, fish, animals, and everything found in desert or vacant places, belonged to the first occupant. De Jur. Nat. et Gent. juxta disciplinam Ebræorum, cited by Puff. b. 4, ch. 6, sec. 5.

(b) Finch's Law, 28, 178. Bro. tit. Property, pl. 18, 38. Wright, J., in Morrough v. Comyns, 1 Wils. Rep. 211.

of the United States, as has been already shown, (*a*) goods taken from enemies, in time of war, vest primarily in the sovereign; and they belong to the individual captors only to the extent and under such regulations as positive law may prescribe.

(2.) Another instance of acquisition by occupancy, which still exists under certain limitations, is that of goods casually lost by the owner, and unreclaimed, or designedly abandoned by him; and in both these cases they belong to the fortunate finder. (*b*) But it is requisite that the former owner should have completely relinquished the chattel, before a perfect title will accrue to the finder; though he has, in the mean time, a special property sufficient to maintain trover against every person but the true owner. (*c*)[1] He is not even entitled to reward from the owner for finding a lost article, if none had been promised. He has no lien on the article found for his trouble and expense, and he is only entitled to indemnity against his necessary and reasonable expenses incurred on account of the chattel. (*d*) The Roman law equally denied to the finder of lost

(*a*) See vol. i. p. 100.

(*b*) 1 Blacks. Com. 296. 2 Ibid. 402. In Massachusetts, the finder of lost money or goods must give notice as prescribed, and if no owner appears within one year, one half goes to the finder, and the other half to the town. Act, 1788, ch. 55. Revised Statutes, 1836, p. 394. In Illinois, (Revised Laws of Illinois, 1833,) the finder of lost goods, money, or choses in action, takes them if not above fifteen dollars in value, and no claimant within one year after due public notice. If above that value, they are to be sold in six months for public use. See Stat. of Illinois, 1858, p. 753.[2]

(*c*) Amory *v.* Delamirie, Str. Rep. 505. Brandon *v.* Huntsville Bank, 1 Stewart's Ala. Rep. 320.

(*d*) Armory *v.* Flynn, 10 Johns. Rep. 102. Binstead *v.* Buck, 2 Wm. Blackstone, 1117. Nicholson *v.* Chapman, 2 H. Blacks. 254. Etter *v.* Edwards, 4 Watts's Penn. Rep. 63. It is considered in the two last cases to be still an unsettled point, whether the finder of lost property can recover a compensation for the labor and expense voluntarily bestowed upon lost property found. In Reeder *v.* Anderson, 4 Dana's Ken.

[1] See a learned and interesting discussion of this subject in Briddes *v.* Hawkesworth, 7 Eng. L. & Eq. 424. The decision was in accordance with the doctrine of the text. The place where the lost article is found does not constitute an exception to the rule that the finder is entitled against all persons except the owner. See Matthews *v.* Harssell, 1 E. D. Smith, (N. Y.) 393.

[2] In Wisconsin there is a provision similar to the law of Massachusetts, relating to property found. R. S. of Wisc. 1849, ch. 86.

property a reward for finding it; and, according to the stern doctrine of Ulpian, (a) it was even considered * to be theft to convert to one's own use, *animo lucrandi*, property found, when the finder had no reason to believe it had been abandoned. (b) *357

This right of acquisition by finding is confined to goods found *upon* the surface of the earth, and it does not now extend to goods found *derelict* at sea, though abandoned without hope of recovery. (c) Nor does this right of acquisition extend

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Rep. 193, it was held that the finder was entitled, under an implied assumpsit, for his indemnity at least, against his expenditure of time and money in the successful recovery of lost property. Mr. Justice Story, (Bailment, p. 391, 2d edit.) gives a strong opinion in favor of compensation (or what he, in admiralty law language, terms *salvage*) to the "mere finder of lost property on land," beyond a full indemnity for their reasonable and necessary expenses. I beg leave to say, that it appears to me that such findings have no analogy in principle to the cases of hazardous and meritorious sea or coast salvage under the admiralty law, and that the rule of the common law, as illustrated by Chief Justice Eyre, in Nicholson *v.* Chapman, as to these mere land findings, is the better policy. Ibid. § 121, n.

(a) Dig. 47, 2, 44, sec. 4-10. The English law requires that the *animus furandi* must have existed when the property was first received or taken, to constitute larceny. Rex *v.* Mucklow, 1 Ryan & Moody, C. C. 160. Butler's case, 3 Inst. 107. Lord Coke, Ibid. 2 East's P. C. 663. The People *v.* Anderson, 14 Johns. Rep. 294. It is not larceny, if there be no evidence to show that the finder *at the time* knew who the owner was, though he afterwards concealed the fact of finding the property. The People *v.* Cogdell, 1 Hill's N. Y. Rep. 94. But, on the other hand, the doctrine of Ulpian is not without approbation in some of the modern decisions; and it has been held, that if the person who finds property lost knows the owner, and, notwithstanding, conceals and converts the property to his own use, it is larceny. The State *v.* Weston, 9 Conn. Rep. 527. Lawrence, J., and Gibbs, J., cited in 2 Russell on Crimes, 102, (3d Lond. edit. 13, 14); and these cases are directly sanctioned in the case of People *v.* M'Garren, 17 Wendell's Rep. 460.

(b) But the finder of a *chose in action*, as a check or lottery ticket, is not entitled to payment of the money due upon it, if the party paying has notice that the holder came to the possession of it by finding. Payment under such circumstances, to the holder, would be no bar to an action by the owner. McLaughlin *v.* Waite, 5 Wendell's Rep. 404. Picking up a purse of money in the highway and appropriating it, is not larceny, if it had not any mark by which the owner might be known. Regina *v.* Mole, 1 Carr. & Kirw. 417. But it seems, from the modern cases, that if a person finds lost property, knows the owner, or there are circumstances to ascertain the owner, a conversion of it *animo furandi* is larceny. Merry *v.* Green, 7 Meeson & W. 623. Regina *v.* Peters, 1 Carr. & Kirw. 245. If a chattel be dropped in a field or highway, or left in a stage-coach, the owner does not lose the property; and if another finds it, he is only justified in appropriating it to his own use where the owner cannot be found, or where it may be fairly said he had abandoned it.

(c) The ancient rule, giving to the finder a moiety of the proceeds of goods found.

to goods found *hidden* in the earth, and which go under the denomination of *treasure-trove.* Such goods, in England, belong to the king; and in New York, they formerly belonged to the public treasury; for the statute of 4 Edw. I. was reënacted by the *Act concerning coroners*, (a) which directed the coroner to inquire, by jury, of treasure said to be found, and who were the finders, and to bind the finders in recognizance to appear in court. I presume that this direction had never been put in practice, and that the finder of property has never been legally questioned as to his right, except on behalf of the real owner; and the whole provision has been omitted in the New York Revised Statutes of 1829. The common law originally, according to *Lord Coke, (b) left treasure-trove to the person who deposited it; or, upon his omission to claim it, to the finder. The idea of deriving any revenue from such a source has become wholly delusive and idle. Such treasures, according to Grotius, (c) naturally belong to the finder; but the laws and jurisprudence of the middle ages ordained otherwise. The Hebrews gave it to the owner of the ground wherein it was found; and it is now the custom in Germany, France, Spain, Denmark, and England, to give lost treas-

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derelict at sea, (if any such rule ever existed,) has become obsolete; and derelicts are held to be perquisites or *droits* of the admiralty, subject to be reclaimed by the owner, but without any other claim on the part of the finder than to his reasonable salvage remuneration. This is now the general rule of civilized countries. The Aquila. 1 Rob Adm. Rep. 37. The King *v.* Property derelict, 1 Hagg. Adm. Rep. 383. Peabody *v* Proceeds of twenty-eight Bags of Cotton. American Jurist, No. 3, (vol. ii) 119, decided in the District Court of Massachusetts, 1829. A vessel at sea is not deemed derelict, unless she was absolutely abandoned as hopeless, and the *animus revertendi* did not exist. The Emulous, 1 Sumner, 207. Mesner and others *v.* Suffolk Bank, District Court of U S. Mass. November, 1838. In Wyman *v.* Hurlburt, 12 Ohio R 81, a vessel was found by special verdict to have been *abandoned* by the owners, and *derelict* at the bottom of the lake in Lake Erie, after being for ten months sunk in sixty feet water; and it was held, on those facts, that the original owner was not entitled to his action of trover against the finder who recovered the vessel. The right of property in goods abandoned from necessity at sea as derelict is not lost to the owners, and the finder is bound to consult the interest of the owners as well as his own as a salvor. Case of The Amethyst, District Court of Maine, Daveis, R. 20.

(a) L. N. Y. sess. 24, ch. 43.

(b) 3 Inst. 132.

(c) De Jure B. & P. b. 2, ch. 8. sec. 7.

ure to the prince or his grantee; and such a rule, says Grotius, may now pass for the law of nations. (*a*) The rule of the Emperor Hadrian, as adopted by Justinian, (*b*) was more equitable, for it gave the property of treasure-trove to the finder, if it was found in his own lands; but if it was fortuitously found in the ground of another, the half of the treasure went to the proprietor of the soil, and the other half to the finder; and the French and Louisianian codes have adopted the same rule. (*c*)

Goods *waived*, or scattered by a thief in his flight, belong, likewise, at common law, to the king; for there was supposed to be a default in the party robbed, in not making fresh pursuit of the thief, and reclaiming the stolen goods before the public officer seized them. (*d*) But this prerogative of the crown was placed by the common law under so many checks, (*e*) and it is so unjust in itself, that it may perhaps be considered as never adopted here as against the *real owner, and *359 never put in practice as against the finder; though, as against him, I apprehend the title of the state would be deemed paramount. We must also exclude from the title by occupancy *estrays*, being cattle whose owner is unknown; for they are disposed of, in New York, (*f*) and, I presume, generally in this country, when unreclaimed, by the officers of the town where the estray is taken up, for the use of the poor, or other public purposes. (*g*) [1] All *wrecks* are likewise excluded from this right

(*a*) According to the Grand Coustumier of the Duchy of Normandy, ch. 18, *treasure-trove* belonged to the duke. It belonged, says the text, *a la Dignité au Duc.*

(*b*) Inst. 2, 1, 39.

(*c*) Code Civil, No. 716. Civil Code of Louisiana, Art. 3386. But the French code limits this right of the finder to that particular case. The general rule is, that all property vacant and without a master belongs to the state. Code, Nos. 539, 713, 714, 717: and Toullier, in the Droit Civil Français, tom. iv. pp 37–42, complains much of the contradictions, confusion, and uncertainty of the French regulations on this subject of goods without an owner.

(*d*) Foxley's case, 5 Co. 109. Cro. Eliz. 694.

(*e*) Finch's Law, 212.

(*f*) N. Y. Revised Statutes, vol. i. pp. 351, 352.

(*g*) In Indiana, by statute of 1830, the person who finds and takes property adrift, or animals estrayed, is entitled to retain the property, on paying twenty per cent. of

[1] Smith *v.* Ewers, 21 Ala. 38. Simpson *v.* Talbot, 25 Ala. 469. State *v.* Apel, 14 Texas, 428. Hyde *v.* Pryor, 13 Ill. 64.

of acquisition by occupancy; for if they be unreclaimed for a year, they are liable to be sold, and the net proceeds, after deductions for salvage, paid into the public treasury. (a)

By the colony laws of Massachusetts and Connecticut, *wrecks* were preserved for the owner; and, if found at sea, they are supposed to belong now to the United States, as succeeding, in this respect, to the prerogative of the English crown. (b) But if discovered on the coast, or in the waters within the jurisdiction of a state, they are, by statutes in the several states, to be kept for the owner, if redeemed within a year; and if not, they are to be sold, and the net proceeds, deducting costs and salvage, appro-

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the appraised value for the support of seminaries. But he is subject, nevertheless, to have the property, or its value, reclaimed at any time by the owner, on payment of reasonable costs and charges.[1] But, by statute of 1838, estray animals, not exceeding $10 in value, after a year's notice and unreclaimed, vest in the taker. The same as to water-craft, after sixty days' notice, and none but freeholders and householders are allowed to take up. Revised Statutes of Indiana, 1838, p. 266. In Ohio, the estray goes to the finder, if no owner appears, and the estray be appraised at five dollars or under; but if it exceeds that sum, the net proceeds go to the treasurer of the town. Statute of Ohio, 1831. The statute applies equally to boats, rafts, water-craft, &c., found adrift. In Michigan, under the Territorial Act of April 16th, 1833, boats found adrift were to be sold, unless claimed within three months; and the claimant, on proving property, is to pay what three disinterested freeholders shall deem reasonable. In Illinois, the boat or vessel goes to the taker if not claimed in six months, if the value does not exceed $20; and if it does, and the owner does not appear in ninety days after due public notice the boat is sold at auction, and the net proceeds are appropriated to public use. Revised Laws of Illinois, 1833, and of 1858, p. 753.

(a) N. Y. Revised Statutes, vol. i. pp. 690-691. A *wreck* is understood to be goods cast or left upon land by the sea. Constable's case, 5 Co. 106. In England, wrecks of the sea are generally manorial rights, founded on grant or prescription; while goods found afloat on the high seas belong to the crown, as "droits of admiralty."

(b) Dane's Abr. of American Law, ch. 76, art 7, sec. 12, 21, 23, 38. Connecticut Code of 1702. Colony Laws of Massachusetts, 1641, 1647, published in the Code of 1675. It is the general law of continental Europe, that wrecks belong to the nation, when the owner does not appear. Heinec. Elem. Jur. Ord. Inst. sec. 352, 353. Toullier, Droit Civil Français, tom. iv. Nos. 42-46 In England, by the ancient common law, all property stranded, or of the description of wreck, belonged to the king absolutely, after a year and a day; and during that time it was vested in him for protection, until the owner could be found, and it was placed in the custody of the admiralty. Lord Stowell, 1 Hagg. Adm. Rep. 18, 20.

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[1] Under such a statute, the finder has a *lien* for costs and charges. Ford *v.* Ford, 3 Wis. 399.

priated to public uses. (*a*) The statute law of Massachusetts, since the Revolution, pursued the policy of the colony law, and disposed of estrays, lost money and goods, if unreclaimed for a year, by giving one half of the proceeds to the finder, and the other half to the poor of the town. (*b*) Shipwrecked goods, if unreclaimed for a year, are to be sold, and the proceeds paid into the public treasury. (*c*) The statutes have been extended in practice to * all goods and moneys lost, hidden, *360 waived, or designedly abandoned, when no owner appears. (*d*) This is, upon the whole, as wise and equitable a regulation as any that has ever been made upon the subject at any period of time. By an Act in New Hampshire, in 1791, chattels found, waifs, treasure-trove, and estrays, are given wholly to the town, after deducting the expenses of the finder; (*e*) and the learned and laborious author of the General Abridgment of the American Law, not unreasonably concludes, (*f*) that in those states where there are no statute regulations on the subject, estrays, treasure-trove, and waifs belong to the finder, in the absence of the owner. (*g*)

II. *Of the original acquisition by accession.*

Property in goods and chattels may be acquired by accession; and under that head is also included the acquisition of property proceeding from the admixture or confusion of goods.

The right of accession is defined, in the French and Louisianian codes, (*h*) to be the right to all which one's own property produces, whether that property be movable or immovable, and the right to that which is united to it by accession, either naturally

(*a*) N. Y. Revised Statutes, vol. i. p. 690. Revised Statutes of Connecticut, 1821, p. 482. Massachusetts Statutes, 1814, ch. 170. Revised Statutes of Mass. 1836. Elmer's N. J. Digest, 615.

(*b*) Acts of 1788, 1827. Revised Statutes of 1836, part 1, tit. 14, ch. 56.

(*c*) Act of 1714. Revised Statutes of Massachusetts of 1836, Ibid. ch. 57.

(*d*) Dane's Abr. *ubi supra*, sec. 15, 16.

(*e*) Ibid. sec. 22.

(*f*) Ibid. sec. 21.

(*g*) In East New Jersey, in the infancy of the colony, waifs, estrays, treasure-trove, and wrecks were forfeited to the lords proprietors of the province. Leaming and Spicer's Collections, 590.

(*h*) Code Civil, Nos. 546, 547. Civil Code of Louisiana, art. 490, 491.

or artificially. The fruits of the earth, produced naturally or by human industry, the increase of animals, and the new species of articles made by one person out of the materials of another, are all embraced by this definition. (*a*) I purpose only to allude to those general rules which were formed, digested, and refined by the sagacity and discussions of the Roman lawyers, and transferred from the civil law into the municipal institu- *361 tions of the principal *nations of Europe. By means of Bracton (*b*) they were introduced into the common law of England, and, doubtless, they now equally pervade the jurisprudence of these United States. The subject has received the most ample consideration of the French civilians; and all the distinctions of which it was susceptible are easily perceived and clearly understood, by means of the pertinency and fulness of their illustrations. (*c*)

If a person hires, for a limited period, a flock of sheep or cattle, of the owner, the increase of the flock during the term belongs to the usufructuary, who is regarded as the temporary proprietor. This general principle of law was admitted in *Wood* v. *Ash*, (*d*) and recognized in *Putnam* v. *Wyley*. (*e*) The Roman law made a distinction in respect to the offspring of slaves, (*f*) and so does the civil code of Louisiana. (*g*) Though the children were born during the temporary use or hiring of the female slave, they belonged not to the hirer, but to the permanent owner of the slave. Another rule is, that if the materials of one person are united to the materials belonging to another, by the labor of the latter, who furnishes the principal materials, the property in the joint produce is in the latter by right of accession. This rule of the Roman and English law was acknowledged in *Merritt* v. *Johnson*, (*h*) and it has been applied by Molloy (*i*) to the case of building a vessel. According to

(*a*) Codes, Ibid.

(*b*) De acqui. rerum dom. b. 2, ch. 2, 3.

(*c*) Pothier, Traité du Droit au Propriété, Nos. 150, 193. Toullier, Droit Civil Français, tom. iii. Nos. 106–150.

(*d*) Owen's Rep. 139.

(*e*) 8 Johns. Rep. 432.

(*f*) Inst. 2, 1, 37.

(*g*) Art. 539.

(*h*) 7 Johns. Rep. 473.

(*i*) De Jure Maritimo, b. 2, ch. 1, sec. 7.

the doctrine of the Pandects, (a) if one repairs his vessel with another's materials, the property of the vessel remains in him; but if he builds the vessel from the very keel with the materials of *another, the vessel belongs to the owner *362 of the materials. The property is supposed to follow the keel, *proprietas totius navis, carinæ causam sequitur.* This title exercised to a great degree the talents and criticism of the civilians. If A. builds a house with his own materials upon the land of B., the land, said Pothier, is the principal subject, and the other is but accessary; for the land can subsist without the building, but the building cannot subsist without the land on which it stands; and, therefore, the owner of the land acquired, by right of accession, the property in the building. It is the same thing if A. builds a house on his own land with the materials of another; for the property in the land vests the property in the building by right of accession, and the owner of the land would only be obliged (if bound to answer at all) to answer to the owner of the materials for the value of them. (b) The same distinctions apply to trees or vines planted, or seed sowed by A. in the land of B. When they take root and grow, they belong to the owner of the soil, and the other can only claim, upon equitable principles, a recompense in damages for the loss of his materials. But the Roman law held, that if A. painted a fine picture on the cloth or canvas of B., in that case the rule would be reversed; for though the painting could not subsist without the canvas, and the canvas could subsist without the painting, yet, *propter excellentiam artis*, the canvas was deemed the accessary, and went as the property of the painter by right of accession, for it would be ridiculous, say the Institutes of Justinian, (c) that a picture of Apelles, or Parrhasius, should be deemed a mere accessary to a worthless tablet. The Roman

(a) Dig. 6, 1, 61.

(b) By the French Civil Code, the general principle is, that the property of the soil carries with it the property of all that which is directly above and under it, (art. 552.) This covers all erections and works made on or within the soil; and if made by a third person with his own materials, the owner has a right to keep them by the right of accession, on reimbursing to the owner, the value of the materials and price of workmanship, without any regard to the value which the soil may have acquired thereby. Miller v. Michoud, 11 Rob. La. 225.

(c) De rer. div. 2, 1, sec. 34.

law was quite inconsistent on this subject; for if a fine poem or history was written by A. on the paper or parchment of B., the paper or parchment was deemed the principal, and drew to the owner of it, by right of accession, the ownership of the poem or history, however excellent the composition, and how- *363 ever *splendid the embellishments of the work. The French law, according to Pothier, and Toullier, does not follow this absurd decision of the Roman law; for it holds, that the paper is a thing of no consideration in comparison with the composition, and that the author has a higher, and consequently, the principal interest in the written manuscript, and the whole shall belong to him on paying B. for the value of his paper. (*a*)

The English law will not allow one man to gain a title to the property of another upon the principle of accession, if he took the other's property wilfully as a trespasser. It was a principle settled as early as the time of the Year Books, that whatever alteration of form any property had undergone, the owner might seize it in its new shape, and be entitled to the ownership of it in its state of improvement, if he could prove the identity of the original materials; as if leather be made into shoes, or cloth into a coat, or a tree be squared into timber. (*b*) [1] So, the civil law, in order to avoid giving encouragement to trespassers, would not allow a party to acquire a title by accession, founded on his own act, unless he had taken the materials in ignorance of the true owner, and the materials were incapable of being restored to their original form. (*c*) The Supreme Court of New York, in *Betts & Church* v. *Lee*, (*d*) admitted these principles, and held that where A. had entered upon the land of B. and cut down trees, and sawed and split them into shingles, and carried

(*a*) Vide Pothier, Droit de Propriété, n. 169–192, and Toullier, tom. iii. pp. 73–79, for the distinctions on this subject.

(*b*) 5 Hen. VII. 15. 12 Hen. VIII. 10. Fitz. Abr. Bar. 144. Bro. tit. Property, 23.

(*c*) The Civil Code of Louisiana, arts. 494, 495, has explicitly recognized the same principle.

(*d*) 5 Johns. Rep. 348. See, also, Worth *v.* Northam, 4 Iredell, N. C. R. 102.

[1] But where a manufacturer has increased the value of an article in good faith, in pursuance of a contract with the owner, he is entitled to be allowed for the increase in an action against him for damages for conversion of the property. Hyde *v.* Cookson, 21 Barb. 92.

them away, the conversion of the timber into shingles did not change the right of property. But if grain be taken and made into malt, or money taken and made into a cup, or timber taken and made into a house, it is held, in the old English law, that the property is so altered as to change the title. (*a*) In the civil law there was much discussion and controversy on the question, how far a change of the form *and character *364 of the materials would change the title to the property, and transfer it from the original owner of the materials to the person who had effected the change. If A. should make wine out of the grapes, or meal out of the corn of B., or make cloth out of the wool of B., or a bench, or a chest, or a ship, out of the timber of B., the most satisfactory decision, according to the Institutes of Justinian, is, (*b*) that if the species can be reduced to its former rude materials, the owner of the materials is to be deemed the owner of the new species; but if the species cannot be so reduced, as neither wine nor flour can be reduced back to grapes or corn, then the manufacturer is deemed to be the owner, and he is only to make satisfaction to the former proprietor for the materials which he had so converted. (*c*) [1]

With respect to the case of a *confusion* of goods, where those of two persons are so intermixed that they can no longer be distinguished, each of them has an equal interest in the subject as tenants in common, if the intermixture was by consent. But if it was wilfully made without mutual consent, then the civil law

(*a*) Bro. tit. Property, pl. 23.

(*b*) Inst. 2, 1. 25.

(*c*) The commentators have been much divided in opinion concerning the solidity of these distinctions taken by Justinian. Vinnius and Pothier have approved of the rule established in the Institutes; while Valin and Basnage lay down the doctrine, that the thing must be restored, if there be clear evidence of its identity, even though the form be changed, as corn into flour, or skins into leather. Mr. Bell has referred to the several writers by whom this subject is discussed; and though he condemns the rule of Justinian as too subtle, he gives us no distinct principle as a substitute. 1 Bell's Com. 276, n. See the Civil Code of Louisiana, art. 512 to 524, which has incorporated the principal or most material distinctions in the French law.

1 See *post*, p. 794, (690,) note (1.) The right of property by accession may occur when materials, belonging to several persons, are united by labor into one article. The ownership of the article is in the party to whom the principal part of the materials belonged. Pulcifer *v.* Page, 32 Maine, 404.

gave the whole to him who made the intermixture, and compelled him to make satisfaction in damages to the other party for what he had lost. (*a*) The common law gave the entire property, without any account, to him whose property was originally invaded, and its distinct character destroyed. (*b*) [1]
*365 If A. will wilfully intermix his corn * or hay with that of B., or casts his gold into another's crucible, so that it becomes impossible to distinguish what belonged to A. from what belonged to B., the whole belongs to B. (*c*) But this rule is carried no farther than necessity requires; and if the goods can be easily distinguished and separated, as articles of furniture, for instance, then no change of property takes place. (*d*) So, if the corn or flour mixed together were of equal value, then the injured party takes his given quantity, and not the whole.[2] This is Lord Eldon's construction of the cases in the old law. (*e*) But if the articles were of different value or quality, and the original value not to be distinguished, the party injured takes the whole. It is for the party guilty of the fraud to distinguish his own property satisfactorily, or lose it. No court of justice is bound to make the discrimination for him. (*f*) [3]

III. *Of original acquisition by intellectual labor.*

Another instance of property acquired by one's own act and power is that of literary property, consisting of maps, charts, writings, and books; and of mechanical inventions, consisting

(*a*) Inst. 2, 1, 27, 28.
(*b*) Popham's Rep. 38, pl. 2.
(*c*) Popham's Rep. *ub. sup.* Warde *v.* Æyre, 2 Bulst. 323.
(*d*) Colwill *v.* Reeves, 2 Campbell's N. P. Rep. 575. Holbrook *v.* Hyde, 1 Vermont Rep. 286.
(*e*) 15 Ves. 442.
(*f*) Hart *v.* Ten Eyck, 2 Johns. Ch Rep. 108. Sir William Scott, in the case of The Odin, 1 Rob. Adm. Rep. 248. Brackenridge *v.* Holland, 2 Black. Ind. Rep. 377.

1 Willard *v.* Rice, 11 Met. R. 493. See, also, Pratt *v.* Bryant, 20 Vermont R. 333. It is said, in this last case, that if the intermingling is a consequence of *negligence only*, the goods are not lost.

2 But where a bailee has converted goods of his bailor to his own use, the latter cannot claim *similar* goods belonging to the bailee, unless he can show his own to be among them. Wood *v.* Fales, 24 Penn. 246.

3 See Hesseltine *v.* Stockwell, 30 Maine R. 237; Bryant *v.* Ware, Id. 295; Dillingham *v.* Smith, Id. 370; Inglebright *v.* Hammond, 19 Ohio, 337; Dunning *v.* Stearns, 9 Barb. 630.

of useful machines or discoveries, produced by the joint result of intellectual and manual labor. As long as these are kept within the possession of the author, he has the same right to the exclusive enjoyment of them as of any other species of personal property; for they have proprietary marks, and are a distinguishable property. But when they are circulated abroad, and published with the author's consent, they become common property, and subject to the free use of the community. It has been found necessary, however, for the promotion of the useful arts, and the encouragement of learning, that ingenious men should * be stimulated to the most active exertion *366 of the powers of genius, in the production of works useful to the country and instructive to mankind, by the hope of profit, as well as by the love of fame or a sense of duty. It is just that they should enjoy the pecuniary profits resulting from mental as well as bodily labor. We have, accordingly, in imitation of the English and foreign jurisprudence, secured by law to authors and inventors, for a limited time, the right to the exclusive use and profit of their productions and discoveries. The jurisdiction of this subject is vested in the government of the United States, by that part of the constitution which declares (a) that Congress shall have power "to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." This power was very properly confided to Congress, for the states could not separately make effectual provision for the case.

(1.) *As to patent rights for inventions.*

A patent, according to the definition of Mr. Phillips, (b) is a grant by the state of the exclusive privilege of making, using, and vending, and authorizing others to make, use, and vend, an invention.[1]

(a) Art. 1, sec. 8.

(b) The Law of Patents for Inventions, p. 2. In 1847 was published, at London, Hindmarch's "Treatise on the Law relating to Patent Privileges for the sole Use of Inventions."

[1] In Kendall v. Winsor, 21 How. U. S. Rep. 328, the court said, that "the limited and

The first Act of Congress on this subject was passed April 10th, 1790; and it authorized the secretary of state, the secretary of war, and the attorney-general, or any two of them, to grant patents for such new inventions and discoveries as they should deem sufficiently useful and important. That Act extended equally to aliens, and the board exercised the power of refusing patents for want of novelty or utility. This Act was repealed, and a new Act passed on the 21st February, 1793. It confined patents to the citizens of the United States, and they were to be granted by the secretary of state, subject to the revision of the attorney-general. The Act gave no power to the secretary of state to refuse a patent for want of novelty or usefulness, and the granting of the patent became a mere ministerial duty. The privilege of suing out a patent was, by the Act of 17th April, 1800, extended to aliens, of two years' residence in the United States. The Act of July 13th, 1832, only required the alien to be a resident at the time of the application, and to have declared his intention, according to law, to become a citizen.

But as every person was entitled to take out a patent, on complying with the prescribed terms, without any material inquiry, at least at the patent-office, respecting the usefulness and importance of the invention or improvement, a great many worthless and fraudulent patents were issued, and the value of the privilege was degraded, and in a great degree destroyed. (*a*) It became necessary to give a new organization to the patent-office, and to elevate its character, and confer upon it more efficient power. This was done by the Act of Congress of July 4th, 1836, ch. 357, which repealed all former laws on this subject, and reënacted the patent system with essential improvements.

(*a*) It was stated, in an able report made by a committee of the Senate of the United States, on the 28th April, 1836, (and who introduced a new bill on the subject,) that the whole number of patents issued at the patent-office, under the laws of the United States, up to March 31st, 1836, amounted to 9,731, being more than double the number issued either in England or France during that period.

temporary monopoly granted to inventors was never designed for their exclusive profit or advantage; the benefit to the public or community at large was another and doubtless the primary object in granting and securing that monopoly."

A patent-office is now attached to the department of state, and a commissioner of patents appointed. Applications for patents are to be made in writing to the commissioner, by any person having discovered or invented any new and useful art, machine, manufacture, (*a*) or composition of matter, or any new and useful improvement on any art, machine, manufacture, or composition of matter, not known or used by others before his discovery or invention thereof, and not at the time of his application for a patent in public use or on sale, with his consent or allowance, as the inventor or discoverer. (*b*) The applicant must deliver a written description of his invention or discovery, and of the manner and process of making, constructing, using, and compounding the same, in full, clear, and exact terms, avoiding unnecessary prolixity, so as to enable any person skilled in the art or science to which it appertains, or is most nearly connected, to make, construct, compound, and use the same; and he must, in the case of a machine, fully explain the principle and the application of it, by which it may be distinguished from other inventions; and he must particularly specify the part, improvement, or combination, which he claims as his own invention

(*a*) The English statute of James I. was confined to the word *manufacture*, and that, said Lord Ch. J. Abbott, in the case of the King *v.* Wheeler, (2 B. & Ald 349,) has been generally understood to denote, either a thing made which is useful for its own sake, and vendible as such, as a medicine, a stove, a telescope; or to mean an engine or instrument, or some part thereof to be employed either in the making of some previously known article, or in some other useful purpose, as a stocking-frame, or a steam-engine for raising waters from mines. The French law extends to every invention or discovery, and in any kind of industry; and yet the practical construction of the English, French, and American law, in regard to the kinds of inventions that are patentable, is substantially the same.

(*b*) By the English law, if the invention had been already made public in England by a description contained in a work, whether written or printed, which had been publicly circulated, the patentee is not the first and true inventor, whether he borrowed his invention from such publication or not. The question will be, whether, upon the whole evidence, there has been such a publication as to make the description a part of the public stock of information. If a single copy of a work had been kept in a depository in a state of obscurity, the inference would be different. Stead *v.* Williams, 7 Mann. & Granger, 818. S. C. 8 Scott, N. C. 681. Househill Co. *v.* Neilson, 1 Wels. 718. The public use of an invention, so as to prevent it from being new, means a use *in public*, so as to come to the knowledge of others than the inventor. Carpenter *v.* Smith, 9 Meeson & Welsby, 300, and in making a machine for a patent, if a workman hints improvements which are adopted, it will not destroy the patent in the hands of the employer. Allen *v.* Rawson, 1 Comm. Bench R. 551.

*367 or discovery. (*a*) He must accompany *the same with drawings and written references, where the nature of the case admits of drawings or specimens of ingredients, and of the composition of matter sufficient in quantity for the purpose of experiment, where the invention or discovery is of a composition of matter. He must likewise furnish a model of his invention, in cases which admit of representation by model. The applicant, also, must make oath or affirmation that he believes he is the original and first inventor or discoverer of the art, machine, composition, or improvement for which he solicits a patent, and that he does not know or believe that the same was ever before known or used, and he must further state of what country he is a citizen.

On filing the application, description, and specification, the commissioner of patents is to examine the alleged new invention or discovery, and if it appears to him that the applicant was not the original and first inventor or discoverer thereof; or that any part of what he claims as such, had before been invented or discovered, or patented, or described in any printed publication in this or any foreign country; or that the description is defective and insufficient, he is to notify the same to the applicant, so as to enable him to remove the objections, if he be able. But if the same does not so appear to the commissioner, and it had not been previously in public use, or on sale with the applicant's consent, and he shall deem the same to be sufficiently useful and important, he is then to issue a patent in

(*a*) The *principle* of a machine, in reference to the patent law, means the *modus operandi*, or that which applies, modifies, or combines mechanical powers to produce a certain result, and so far a principle, if new in its application to a useful purpose, may be patentable.[1] Story, J., in Barrett *v.* Hall, 1 Mason, 470. Woodcock *v.* Parker, 1 Gallison, 438. Whittemore *v.* Cutter, Ib. 478. Earle *v.* Sawyer, 4 Mason, 1. Lowell *v.* Lewis, 1 Mason, 187. Buller, J., and Eyre, Ch. J., in Boulton *v.* Bull, 2 H. Blacks. 486, 495. Smith *v.* Pearce, 2 McLean's Rep. 176. A new *composition* of known materials, or a new *combination* of existing machinery producing a new and useful result, may be patentable. Bovill *v.* Moore, Dav. Pat. Cases, 361. Story, J., in Moody *v.* Fiske, 2 Mason, 112. Lord Eldon, in Hill *v.* Thompson, 3 Merivale, 629, 630. Thompson, J., in Reynolds *v.* Sheldon, C. C. U. S. for Connecticut, September, 1838.

[1] But see Smith *v.* Ely, 5 McL. 9, per M'Lean, J.; O'Reilly *v.* Morse, 15 How. U. S. 62.

the name of the United States to the applicant, his heirs, executors, administrators, or assigns, for the exclusive right of making, using, and vending the same for a term not exceeding fourteen years. The patent may, in special cases, and in the discretion of the board of commissioners, be renewed and extended to the further term of seven years. If the application be rejected, and the applicant persists in his claim, he is to make his oath or affirmation anew; and if the specification and claim be not so modified as to remove the objection, the applicant may appeal to a board of three examiners, to be appointed by the secretary of state, and the commissioner of patents is to be governed by their decision.[1]

If the applicant be a citizen, or an alien of one year's residence, he is to pay to the treasury of the United States $30; and if a British subject, $500; and all other applicants, $300. The original and true inventor is not to be deprived of the right to a patent for his invention, by reason of his having previously taken out letters-patent therefor in a foreign country, and the same having been published at any time within six months next preceding the filing of his specification and drawing. (a) The executors and administrators of persons dying before a patent is taken out, may apply and take it out in trust for the heirs or devisees, on due compliance with the terms of the statute. Patents are assignable, and may be granted in whole or

(a) By Act of Congress of March 3d, 1839, ch. 88, sec. 6, this restriction was removed, and it was declared that no person is to be debarred from receiving a patent for any invention or discovery, by reason that the same was patented in a foreign country more than six months before, if the same has not been introduced into public and common use in the United States prior to the application. By the Act of Congress of August 29th, 1842, ch. 263, any citizen, or alien of one year's residence in the United States, and who has taken the oath of his intention to become a citizen, and having invented or produced any new and original design for a manufacture, &c., may apply for a patent, and, if granted, the duration of the patent is to be for seven years, and the fee in such cases shall be reduced one half of the sum heretofore required. A penalty of not less than $100 given for each infringement of the patent right.

[1] An appeal now lies also to the chief justice, or any of the associate justices of the United States District Court for the District of Columbia. Stat. 1839, ch. 88. 1852, ch. 107.

in part by writing, to be recorded in the patent-office.[1] If invalid by reason of defective specifications, or by claiming too much, the patent may be surrendered, and a new patent taken out for the unexpired period, provided the error did not arise from any fraudulent intention.[2] If the patentee be an alien, he forfeits his exclusive right, if he fails for eighteen months from the date of the patent, to continue on sale to the public, on reasonable terms, the invention or discovery covered by the patent. The patentee does not lose his patent if it satisfactorily appears to the court, that at the time of his application he believed himself to be the first inventor or discoverer of the thing patented, though the invention or discovery, or any part thereof, had been before known or used in a foreign country; provided it does not appear that the same, or any substantial part thereof, had before been patented or described in any printed publication. (a)[3]

These are the principal existing statute provisions on the subject, and though the Act of Congress of 1836, has made considerable alterations in the preëxisting laws, respecting the organization of the patent-office, and the limitations on the granting of patents, yet the essential and established doctrines concerning patents, heretofore declared in the decisions of the courts, remain unaffected. The Act of 1793 declared, that simply changing the form or the proportions of any machine or composition of matter in any degree was not a discovery. And

(a) Act of Congress, July 4, 1836, ch. 357.

[1] The recording of the assignment is not a constituent part of the transfer of the title, and is required only to give notice. Peck v. Bacon, 18 Conn. R. 377. Case v. Redfield, 4 McL. 526. McKernan v. Hite, 6 Ind. 428. An assignment recorded in the patent-office, conveying all inchoate rights, vests the property in the assignee, though a patent is afterwards issued to assignor. Gayler v. Wilder, 10 How. U. S. 477. Clum v. Brewer, 2 Curtis, C. C. 506. Rathbone v. Orr, 5 McL. 131. Gay v. Cornell, 1 Blatch. 506. Where one of two assignees of a patent dies, an action for infringement, in his lifetime, descends to the survivor, who may recover whole damages. Smith v. London R. Co. 20 E. L. & Eq. 94.

[2] But where a part of a machine is not covered by the original patent, it cannot be included in a reissue on a surrender after the machine has come into use, because so much of the machine as was not patented was abandoned to the public. Batten v. Taggert, 2 Wallace, Jr. 101.

[3] O'Reilly v. Morse, 15 How. U. S. 62.

also, that the person who had discovered an improvement in the principle of any machine, or in the process of any composition of matter, might obtain a patent for such improvement, but that he could not thereby make, use, or vend the original discovery, nor could the first inventor use the improvement. These declaratory provisions are omitted in the law of 1836, and I presume the construction was considered to be necessarily the same without the provision. (*a*)

In an age distinguished for an active and ardent spirit of improvement in the arts of agriculture and manufactures, and in the machinery of every kind applied *to their use, the doctrine of patent rights has attracted *368

(*a*) The Act of Congress of July 4, 1836, authorized the *extension* of a patent for seven years, on the application of the executor or administrator of the deceased patentee; and such extension, according to the decision in the case of Wilson *v.* Rousseau, 4 How. U. S. 646, inures to the benefit of the administrator, &c., as such, and is good, though the original patentee had in his lifetime disposed of all his interest in the patent, inasmuch as such sales do not carry anything beyond the term of the original patent. But it is held that the assignees, *who were in use of the patent at the time of the renewal*, have still a right to use it during the new term, though not to sell it.[1] This subject is full of difficulty, and the confidence in the decision is much impaired by the conflicting discussions and decisions on the bench, some of the judges contending that unless the assignment gave to the assignee the right in the extended or renewed patent, his interest would expire with the limitation of the original patent. It is held, in Woodworth *v.* Sherman, 3 Story's Rep. 171, that the assignee or grantee under the original patent does not acquire any right under the *extended* patent, unless such a right be expressly conveyed to him by the patentee.[2] But the extension of a patent may be granted to an administrator. Washburn *v.* Gould, Ib. 122. An assignee of a patent right takes only such rights as the inventor had, and if the inventor be an alien, and not within the specified qualifications required of an alien, his assignee takes no title.[3] Tatham *v.* Loving, C. C. Massachusetts District, May Term, 1845.

[1] The assignee has a right to make *bonâ fide* and reasonable repairs upon his machine, according to the usual and established course of business, or to supply a particular or effective part; but he has no right to *reconstruct* it, or to build a substantially new machine on the old frame. Wilson *v.* Simpson, 9 How. U. S. 109. See, also, Woodworth *v.* Curtis, 2 Wood. & M. Rep. 524. A special Act, extending a patent, is considered as engrafted on the general law. A party, purchasing a right under the general law, is entitled to use it during the extension authorized by the special Act. Bloomer *v.* McQuewan, 14 How. U. S. 538.

[2] Brooks *v.* Bicknell, 4 McL. 64. Phelps *v.* Comstock, Id. 353. Case *v.* Redfield, Id. 526.

[3] But a contract may be made to convey future inventions or improvements. Nesmith *v.* Calvert, 1 Wood. & M. Rep. 34.

much discussion, and become a subject of deep interest, both here and in Europe. (*a*)

The circuit courts of the United States, have original jurisdiction over the question of damages for the infringement of patent rights, and exclusive authority to declare a patent void. (*b*) [1] It has been adjudged in the federal courts that

(*a*) Patents are no doubt procured in many cases for frivolous and useless alterations in articles, implements, and machines in common use, under the name of improvements; and the abuses arising from the facility in suing out patents and provoking litigation, were painted in glowing colors by the district judge at New York, in Thompson *v.* Haight, (U. S. Law Journal, vol. i. p. 563,) and yet the collection of models and machines in the patent-office relating to every possible subject, constitutes a singularly curious museum of the arts, and one strongly illustrative of the inventive and enterprising genius of our countrymen. The Act of Congress of July 4th, 1836, ch. 357, sec. 20, gave authority and facility to the classification and arrangement in rooms and galleries, for a beneficial and favorable display of the unpatented models and specimens of compositions, and of fabrics and other manufactures and works of art, and machines and implements relating to agriculture deposited in the office.

On the morning of the 15th of December, 1836, the building at the city of Washington, containing the general post-office, the city post-office, and the patent-office, was destroyed by fire, and all the machines and other materials and matter in the patent-office were consumed. The loss of the patent-office and all its contents was a national calamity; and to repair it as far as possible, the Act of 3d March, 1837, ch. 45, provided for the recording anew of patents and assignments of patents recorded prior to the 15th December, 1836, and for issuing new patents for those destroyed. Duplicates of the most interesting models destroyed were to be procured by the officers of the patent-office, at an expense not exceeding $100,000.

(*b*) Act of Congress of July 4th, 1836. See the former Acts of Congress of 21st February, 1793, ch. 11, secs. 6, 10; 17th April, 1800, ch. 25, sec. 3; 15th February, 1819, ch. 19; Parsons *v.* Barnard, 7 Johns. Rep. 144; *Supra*, vol. i. p. 303. But in Burrall *v.* Jewett, 2 Paige's Rep. 134, the Court of Chancery in New York sustained jurisdiction in the case of a patent, by investigating the merits of a patent claim and by ordering a contract in relation to the sale of a patent right to be rescinded, as being founded in mistake. It was considered in the last case, that the jurisdiction of the circuit courts of the United States, in respect to patents, under the Act of Congress, 15th February, 1819, was not exclusive, except to the extent mentioned in the text. But since the Act of Congress of July, 1836, it has been held

[1] A bill in equity, to enforce a specific performance of a contract to convey a patent, it seems is not "a case arising under the laws of the United States." Nesmith *v.* Calvert, 1 Wood. & M. Rep. 34.

The right of patent will be enforced against foreigners coming to England with machinery constructed in their own country, if the machinery be within the English patent. Caldwell *v.* Van Vlissengen, 9 Eng. L. & Eq. 51. But the United States Patent Law has received a different construction. Brown *v.* Duchesne, 2 Curt. C. C. 371, S. C. 19 How. U. S. 183; and since the case of Caldwell *v.* Van Vlissengen, the English law on this subject has been changed by Stat. 15 & 16 Vict. ch. 83, sec. 26, 4 Chitty's Statutes, 217.

the first inventor who has reduced his invention first to practice, and put it to some real and beneficial use, however limited in extent, is entitled to a priority of the patent right; and a subsequent inventor cannot sustain his claim, although he be an original inventor, and has obtained the first patent. The law, in such case, cannot give the whole patent right to each inventor, even if each be equally entitled to the merit of being an original and independent inventor; and it therefore adopts the maxim, *qui prior est in tempore, potior est in jure.* If the patentee be not the first or original inventor, in reference to all the world, he is not entitled to a patent, even though he had no knowledge of the previous use or previous description of the * invention, in any printed publication, for the law *369 presumes he may have known it. (*a*) If the first inventor has suffered his invention to go into public use, or to be publicly sold for use, before taking out a patent, the better opinion and the weight of authority is, that he cannot afterwards resume the invention, and hold the patent. This voluntary act or acquiescence in the public sale or use, is an abandonment of his right, for it creates a disability to comply with the terms and conditions of the patent law. It would be unreasonable and injurious for a person to be permitted to lie by, and suffer his invention or improvement to go into use, and expensive undertakings to be assumed, and machinery constructed for the application of

in the New York Court of Chancery that the courts of the United States have exclusive cognizance of suits in equity, relative to interfering patents, in cases where the court may declare a patent void in whole or in part.[1] Gibson *v.* Woodworth, 8 Paige, 132. But where the validity of patent rights comes in collaterally, they are necessarily the subject of inquiry in the state courts. Rich *v.* Atwater, 16 Conn. R. 409.[2] By the Revised Patent Act of 1836, the former statute provisions are essentially superseded.

(*a*) Woodcock *v.* Barker, 1 Gall. Rep. 438. Bedford *v.* Hunt, 1 Mason's Rep. 302. Evans *v.* Eaton, 3 Wheaton, 454. 1 Peters's Cir. Rep. 322, S. C. Reutgen *v.* Kanowrs, 1 Wash. Cir. Rep. 168. Dawson *v.* Follen, 2 Ibid. 311. Shaw *v.* Cooper, 7 Peters's U. S. Rep. 292. Whitney *v.* Emmett, Baldwin's C. C. U. S. Rep. 303.

[1] So, also, in Dudley *v.* Mayhew, 3 Comst. R. 9. The consent of the parties cannot give the court jurisdiction.

[2] But the contrary was held in Elmer *v.* Pennel, 40 Maine, 430. And see Thomas *v.* Quintard, 5 Duer, (N. Y.) 80.

that invention, and then sue out a patent and arrest all such proceedings. The just inference from such delay is, that he has made an abandonment or surrender of his discovery to the public;[1] and a similar construction has been put upon the English statute of monopolies of 21 James I. ch. 3. (a) The use or knowledge of the invention, prior to the application for a patent, will not affect the right of the inventor, provided that knowledge was surreptitiously obtained and communicated to the public, and there is no acquiescence in the public use by the inventor, and he immediately asserts his right. (b)[2] But after the patent has been obtained, any disuse of it by the patentee,

(a) Whittemore v. Cutter, 1 Gall. Rep. 478. Thompson v. Haight U. S. Law Journal, vol. i. p. 563. Morris v. Huntington, 1 Paine's Rep. 368. Mellus v. Silsbee, 4 Mason's Rep. 108. Pennock and Sellers v. Dialogue, 2 Peters's Sup. Ct. Rep. 1. Gray v. James, 1 Peters's Cir. Rep 394. Wyeth v. Stone, 1 Story's Rep. 273. Rundell v. Murray, 3 Jacob's Rep. 311, 316. Saunders v. Smith, 3 Mylne & Craig, 711, 735. Wood v. Zimmer, 1 Holt's N. P. Rep. 58. If the first inventor keeps his invention a secret, or does not put it in practice until another person makes the same invention and obtains a patent for it, the patent is valid and will prevail. Dollond's case, cited by Buller, J., in 2 H. Blacks. 487. It is the first inventor who has put the invention in practice, *and he only*, that is entitled to a patent. Story, J., in Bedford v. Hunt, 1 Mason, 304. The doctrine in Dollond's case is not law in the United States. The first, as well as the original inventor, who first perfects and adapts his patent to use, is entitled to a patent, though he had kept his invention in secret. Reed v. Cutter, 1 Story's Rep. 590 And again it is said, that whoever finally perfects a machine, and renders it capable of useful operation, is entitled to a patent, although others may have had the idea, and made experiments towards putting it in practice.[3] Washburn v. Gould, 3 Story's Rep. 122. The English statute of monopolies, and the French law, according to M. Renouard, confine the patent to inventions not in use *at the time of the patent*. The Act of Congress of 1836 is more large and liberal, and it only requires the invention to be *new at the time of the invention*, and not *in use at the time of the application* for the patent. The French doctrine on this point is unreasonable, for, according to that doctrine, even if there be a confidential disclosure of the invention, prior to a patent, or if the public have acquired the knowledge of it by other means, they are not bound afterwards to buy the secret, though a subsequent patent be obtained, for it is no longer a novelty. Renouard's Traité des Brevets d'Invention, p 170, edit Paris, 1825.

(b) Shaw v. Cooper, 7 Peters's U. S. Rep. 292.

[1] *In re* Adamson's Patent, 35 Eng. L. & Eq. 327. But a special permission to an individual to use the invention is not an abandonment. McKay v. Burr, 6 Barr's R. 147. The owner of a secret medicine can restrain his operatives from setting it up against their employer. Morison v. Moat, 9 Eng. L. & Eq. 182.

[2] Hovey v. Stevens, 1 Wood. & M. Rep. 291.

[3] See Parker v. Ferguson, 1 Blatch. 407; Parkhurst v. Kinsman, Id. 488; Goodyear v. Day, 2 Wall. Jr. 283.

unless he be an alien, within the fourteen years, is not, of itself, an abandonment of his right. (*a*) It has been a point of some discussion and difficulty to determine to what extent an invention must be useful, to render it the subject of a patent. This will, as a matter of fact, depend upon the circumstances of each case. It must be to a certain degree beneficial to the community, and not injurious, or frivolous, or insignificant. (*b*) [1]

The Act of Congress has described in substance the requisite * parts of a valid specification of the discovery, * 370 and yet the defects of the specification is one great source of a vexatious and perplexing litigation in our own, as well as in the English courts. The Act of Congress requires drawings, with written references, to be annexed to the specification, when the nature of the case admits of them; and when so annexed, they become part of the specification, and give certainty to the description, and may help and make good a specification which would otherwise be defective. (*c*) In the present improved state of the arts, it is often a question of intrinsic difficulty, especially in cases of the invention of minute additions to complicated machinery, to decide whether one machine operates upon the same principle as another, and whether that which is stated to be an improvement be really new and useful. (*d*) The material point of inquiry generally is, not whether the same elements of motion, and in some particulars the same manner of operation, and the same component parts are used, but whether the given effect be produced substantially by the same mode of operation, and the same combination of powers,

(*a*) Gray and Osgood *v.* James, 1 Peters's C. C. Rep. 403.

(*b*) Lowell *v.* Lewis, 1 Mason's Rep. 182. Bedford *v.* Hunt, Ib. 302. Langdon *v.* De Groot, 1 Paine's Rep. 203. Evans *v.* Eaton, 1 Peters's Cir. Rep. 322.

(*c*) Earle *v.* Sawyer, 4 Mason's Rep. 1.

(*d*) The cases of Hill *v.* Thompson, 8 Taunt. Rep. 375, and Evans *v.* Eaton, 7 Wheaton, 356, may be selected as examples of the intricacy and subtlety of such investigations. Mr. Phillips terms the patent-law branch of our jurisprudence the metaphysics of the law. The heavy tax imposed in England on taking out a patent, and the difficulty of protecting and enforcing patent rights, and the distressing litigations which so frequently attend them, have contributed very much to lessen their value, and to repress the stimulus which patent privileges were intended to give to the cause of science.

[1] See Dunbar *v.* Marden, 13 N. Hamp. R. 311.

in both machines. Mere colorable differences, or slight improvements, cannot shake the right of the original inventor. (*a*) If a machine produces several different effects by a particular construction of machinery, and those effects are produced the same way in another machine, and a new effect is added, the inventor of the latter cannot entitle himself to a patent for the whole machine. He is entitled to a patent for no more than his improvement. And if the inventor of an improvement obtain a patent for the whole *machine, or mix up the new and the old discoveries together, or incorporate in his specification inventions neither novel nor his own; the patent being broader and more extensive than the invention, and claiming thereby things which are the property or the invention of others, is absolutely and totally void. (*b*) The inven-

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(*a*) It is laid down as a general rule, that where two machines are *substantially* the same, and operate in the same manner, to produce the same result, they must be in principle the same, though there be a formal variation. Washington, J., in Gray *v.* James, 1 Peters's C. C. Rep. 398, and see the late English cases of The King *v.* Fussel, The King *v.* Lister, The King *v.* Daniell, and Brunton *v.* Hawkes, cited in Phillips on the Law of Patents, 128–133.

(*b*) Brunton *v.* Hawkes, 4 B. & Ald. 540. Stanley *v.* Hewitt, Circuit Court U S. for the Southern District of New York, November, 1835. Lowell *v.* Lewis, 1 Mason, 188. Moody *v.* Fiske, 2 Ib. 112. The King *v.* Else, Dav. Pat. Cas. 144. 11 East, 109, n. S. C. Wyeth *v.* Stone, 1 Story's Rep. 273. The American decisions held the patent in many cases in which it would be void under the English law, because in the American patents the specification can be resorted to for a construction of the title, and relieves the difficulty arising from the defective description in the patent. The specification is part of the patent. Story, J., in 1 Mason, 477. Phillips on the Law of Patents, pp. 223–231. Nor is the French law as strict and severe on this point as the English, for if the specifications be too broad or defective, it does not vitiate the whole patent. It is only void *pro tanto.* Nor if the process claimed by the patentee fails in one point, does it fail *in toto.* M. Perpigna, in his treatise on the French patent law, boasts in these respects of the superiority of the French law. See his treatise at large, pp. 67–73, in vol. iv. of the Law Library, edited by Sergeant & Lowber, at Philadelphia, 1834. It is a clear and copious work, and well written in the English language, by the author, who is a "barrister in the royal court of Paris." He says he was induced to undertake the work in English at the solicitation of his English and American clients. Though a patent be too broad in its general terms, it may be limited by a disclaimer to anything before known or used, and by showing the thing intended to be patented. Whitney *v.* Emmett, Baldwin's C. C. U. S. Rep. 303.[1] The English Act of 5 and 6 Wm. IV. ch. 83, allows the patentee to enter a

[1] But the patentee must enter his disclaimer without unreasonable delay, and he shall not recover costs against a defendant unless he has entered a disclaimer before suit brought. Silsby *v.* Foote, 20 How. U. S. 378.

tion must be substantially new in its structure and mode of operation, and the specification must point out the new improvement of the patentee, so as to show in what the improvement consists. (*a*) [1] If the patentee has made a *combination* which is new and useful, though the parts of the machine, when separate, and not in combination, were in common use before, he is entitled to his patent.[2] The law has no regard to the process of mind by which the invention was accomplished, whether the discovery be by accident, or by sudden or by long and laborious thought. (*b*)

The English decisions under their patent law are essentially the same. The Statute of Monopolies of 21 James I. ch. 3, contains the provision under which patents for the term of fourteen years for new and useful inventions are granted.[3] It does not

disclaimer of any part of the title or specification, so as to save the loss of his patent. But the American Act of 1836 makes a more effectual provision, by allowing a surrender of the defective patent, and taking out a new one for the unexpired part of the term So the Act of 3d March, 1837, ch. 34, secs. 7 and 9, declares that if the specification be too broad, and the patentee claims beyond his original invention, he may disclaim, by writing, duly attested and recorded, the excess in the specification, and such disclaimer shall be considered as part of the specification to the extent of his interest in the patent. And if the excessive specification did not arise from wilful default or fraud, the claim shall be good to the extent of the invention, if it be of a material and substantial part of the thing.

(*a*) Woodcock *v.* Parker, 1 Gall. Rep. 438. Whittemore *v.* Cutter, Ibid. 478. Odiorne *v.* Winkley, 2 Ibid. 51. Lowell *v.* Lewis, 1 Mason's Rep. 182 Evans *v.* Eaton, 7 Wheaton, 356. Dixon *v.* Moyer, 4 Wash. Cir. Rep. 68.

(*b*) Earle *v.* Sawyer, 4 Mason's Rep. 1. Walker *v.* Congreve, cited in Phillips on the Law of Patents, p. 127, from the Rep. of Arts, 2d series, vol. xxix. p. 311.

[1] Hovey *v.* Stevens, 1 Wood. & M. Rep. 290. Buck *v.* Hermance, 1 Blatchf. R. 398. Le Roy *v.* Tatham, 14 How. U. S. R. 156. This case came before the Supreme Court a second time, and the second decision is reported in 22 How. U. S. Rep. 132, in entire accordance with the decision in 14 Howard. Silsby *v.* Foote, 14 How. U. S. R. 218. Hotchkiss *v.* Greenwood, 11 How. U. S, 248. Rheem *v.* Holliday, 16 Penn. 347. Newton *v.* Vaucher, 11 E. L. & Eq. 589. McCormick *v.* Talcott, 20 How. U. S. 402. Tolson's Patent, 39 E. L. & Eq. 538.

[2] But a patent claiming a combination is not infringed by using one of the parts of the combination. McCormick *v.* Manny, 6 McL. 539. Byam *v.* Eddy, 24 Vt. 666. See, however, Newton *v.* G. J. R. Co. 6 E. L. & Eq. 557; El. Tel. Co. *v.* Brett, 4 E. L. & Eq. 347. In Unwin *v.* Health, 32 E. L. & Eq. 45, it was held by the House of Lords, reversing the decision below, that the use of the elements of a chemical substance, instead of the substance itself, in a patented process, was not evidence of infringement.

[3] This statute remained the only one on the subject of patents until the year 1835, when the statute 5 & 6 Wm. IV. c. 83, was passed, making provision for the extension, renewal, and confirmation of letters-patent on petition to the privy council. The process of obtaining a patent remained however excessively tedious, expensive, and uncertain, while

confine the privilege to British subjects. It applies to "the true and first inventor of any manner of new manufactures within the realm, which others at the time of granting the patent did not use;" it has been decided that an importer is within the clause; and it has been deemed sufficient to entitle the party to a patent, that his invention was *new in England*, and that it was immaterial whether the patentee acquired the discovery by study or travel, or only introduced what was invented abroad. The policy of the law was equally answered in either *372 case.(a) It is allowed in England, as it is with us, to take out a patent for an addition or improvement in any former invention or machine.(b) But the invention must be new and useful, and the specification intelligible, and it must accurately describe the invention; and if it covers more, than is

(a) Edgeberry v. Stephens, 2 Salk. Rep. 447. Darcy v. Allin, Noy, 182, 183. Lewis v. Marling, 1 Lloyd & Welsby's Rep. 28. 4 Carr. & Payne, 52. 10 Barnew. & Cress. 22, S. C. If we were to judge from the language of the statute of James, and from the construction given to it by Lord Coke himself, 3 Inst. 184, (and he was chairman of the committee in the House of Commons which reported the bill,) the patentee himself must have been the *true and first inventor*; and there would seem to be no foundation for the opinion of Lord Holt, in Edgeberry v. Stephens. But the modern received doctrine is in conformity with the decision of Lord Holt. Sturz v. De la Rue, 5 Russell's Rep. 322. And this is the sense of the English law, as understood by Mr. Justice Story, in Earle v. Sawyer, 4 Mason's Rep. 8; though it was admitted that the law in the United States was different, and required the patentee to be *absolutely the first inventor* of the machine, in its simple or in its combined character. But the Act of Congress of 1836, (as see *supra*,) does not make the patent void in all cases, though the thing patented, or some part thereof, had been before known or used in some foreign country. The severity of the former statute is somewhat mitigated by the last Act, which only requires the belief of the patentee that he was the first inventor or discoverer, and that no substantial part of the invention had before been patented or described in any printed publication.

(b) Morris v. Branson, cited in 2 H. Blacks. Rep. 489. Boulton v. Bull, Ibid. 463. Hornblower v. Boulton, 8 Term Rep. 95.

the means of protecting the rights of patentees in the courts were quite inadequate. The subject of patent-law reform was taken up by Parliament in 1851, and an Act was passed substituting a board of commissioners for the complicated system of offices through which applications had previously been obliged to pass; giving the patentee protection from the time of the *application*, so that the benefit of the patent can no longer be lost by the secret escaping during the delay in issuing it, reducing the expenses and providing for the payment of the government fee in instalments at intervals of some years. A system of indexes was also introduced, the want of which had made it almost impossible for the inventor to ascertain whether any previous patent existed for the same thing. See Patent-Law Amendment Act, 1852, 15 & 16 Vict. ch. 83; Coryton on Patents, Law Lib. vol. 90.

actually new and useful, it destroys the patent, even to the extent to which it might otherwise have been supported.[1] A patent was declared void because it extended to a whole watch, when the invention was of a particular movement only. (a) The holder of a defective patent may surrender it to the department of state, and obtain a new one, which, being a continuation of the first, shall have relation to the emanation of the first, and the rights of the patentee shall be ascertained by the law under which the original application was made. (b)[2] In no case can a patentee, by taking out a new patent for the same invention, or by any other means, prolong his exclusive right beyond the limitation annexed to the first patent. (c)

A patent-right is personal property, and is assignable; and the patented article may be seized and sold on execution. (d)[3]

In addition to the ordinary remedies by action, for violation of a patent-right,[4] the party in possession will be protected in

(a) Hill v. Thompson, 8 Taunt. Rep. 375. 3 Merivale's Rep. 629. Jessop's case, cited in 2 H. Blacks. Rep. 489. Brunton v. Hawkes, 4 B. & Ald. 540. Minter v. Mower, 1 Neville & Perry, 595.

(b) Grant v. Raymond, 6 Peters's U. S. R. 220. Shaw v. Cooper, 7 Id. 292.

(c) Odiorne v. The Amesbury Nail Factory, 2 Mason, 28.

(d) Hesse v. Stevenson, 3 B. & Puller, 565. Sawin v. Guild, 1 Gallison, 495.

[1] If there be no fraud, and the title be not inconsistent with the specification, it is not a fatal objection that the title is so general as to be capable of comprising a different invention. Cook v. Pearce, 8 Ad. & El. (N. S.) R. 1044.

As to what degree of uncertainty or generality will render a patent void, see Hogg v. Emerson, 6 How. U. S. 437. Stevens v. Keating, 2 Wels. Hurl. & Gord. R. 772. Hastings v. Brown, 16 E. L. & Eq. 272. Holmes v. Railway Co. Ib. 409. Tetley v. Easton, 22 Ib. 321. Bush v. Fox, 26 Ib. 464. Holliday v. Rheem, 18 Penn. 465. A patent should be construed favorably to the patentee. Goodyear v. R. R. 2 Wall. Jr. 356. Winans v. Denmead, 15 How. U. S. 330. Kittle v. Merriam, 2 Curtis, C. C. 475. Allen v. Hunter, 6 McL. 303. As to what constitutes *prior use*, see Heath v. Smith, 25 E. L. & Eq. 165.

[2] The decision of the commissioner of patents, in respect to accepting the surrender of old patents and the granting of new ones, is not examinable by the U. S. courts.

The patentee will not be permitted to make a surrender to the prejudice of the rights of his assignees. Woodworth v. Stone, 3 Story's R. 749. McBurney v. Goodyear, 11 Cush. (Mass.) 569.

[3] But the *patent-right* cannot be so seized and sold. Stevens v. Gladding, 17 How. U. S. 447.

[4] The sale of the product of a patented machine is not an infringement of the patent. Boyd v. M'Alpin, 3 McLean, R. 427. If the vendor is in any way connected with the use of the machine, it would be otherwise. The sale of the thing patented is not, *per se*, an infringement; but, accompanied by other circumstances, it may be evidence of an in-

the enjoyment of his right by injunction, provided he has had exclusive possession of some duration. (a)[1] If the right be doubtful, and the patent be recent, the courts of equity will not interfere by injunction until the patentee has first established the validity of his patent in a court at law. (b)[2] The courts

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(a) Washburn v. Gould, 3 Story's Rep. 122.

(b) Sullivan v. Redfield, 1 Paine's Rep. 441. Hill v. Thompson, 3 Merivale's R. 622. Livingston v. Van Ingen, 9 Johns. R. 507, 585. Washburn v. Gould, 3 Story's R. 122. The measure of damages is, in each case, a matter of fact for the discretion of the jury under the circumstances; and the better opinion is, that it is not the legal operation of the verdict, in a case of piracy for making and using a patented machine, (whatever measure of damages may be given,) to transfer to the defendant the future right to the use of the machine. A verdict and judgment against a trespasser, for using the machine for one period, is no bar to a like action for the use in another and subsequent period. Whittemore v. Cutter, 1 Gall. Rep. 478. Earle v. Sawyer, 4 Mason's Rep. 12-14. The law of patents in France is founded on decrees of the Constituent Assembly of December 31st, 1790, and January 7th and May 25th, 1791; and it assures to inventors of discoveries in the arts, for a certain period, the exclusive right to make and sell their discoveries; and it makes no distinction between Frenchmen and foreigners, or between residents and non-residents. The French law admits of three distinct kinds of patents, viz: Patents for inventions, patents for improvements, and patents for importations of foreign inventions unknown in France. Perpigna on the French Law of Patents, pp. 23, 36, 47, 84. A decree of Napoleon, of the 13th of August, 1810, placed patents for importations on the same footing with patents for inventions; but that law is not now in force, and therefore patents for imported inventions cannot extend beyond the term fixed for the expiration of the privilege in the foreign country. Ibid. pp. 84, 85. The patent may be taken out for five, ten, or fifteen years, at the option of the patentee, under the charge of a tax proportioned to the time; and whoever first imports a foreign discovery or improvement is entitled to the privilege of an inventor. The patentee must exhibit a true and accurate specification of the principles, plans, and models of his discovery or importation. If he obtains a patent for the same object in a foreign country, he forfeits his French patent. The French jurisprudence on this point is very fully considered by A. C. Renouard, in his Traité des Brevets d'Invention, de Perfectionnement et d'Importation, Paris, 1825. The conditions necessary to the validity of a French patent,

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fringement. Byam v. Bullard, 1 Curtis, 100. The exclusive use granted to a patentee does not extend to a foreign vessel entering an American port; and the use of a patented improvement in the construction, fitting out, or equipment of such vessel, while temporarily there for the purposes of commerce, is not an infringement of the rights of an American patentee, provided the improvement was placed upon her in a foreign port, and is authorized by the laws of the country to which she belongs. Brown v. Duchesne, 19 How. U. S. 183.

[1] Woodworth v. Stone, 3 Story's Rep. 749.

[2] Injunctions were allowed without actions at law, in Newall v. Wilson, 19 E. L. & Eq. 156; Goodyear v. Day, 2 Wall. Jr. 283.

having cognizance of the subject may award to the amount of treble the actual damages found by the jury, for making, using,

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says M. Perpigna, are, 1. The invention must be lawful. 2. It must be new. 3. The inventor, improver, or importer must disclose at once, in the specification, his whole secret. 4. Whatever improvements he makes, he must declare them, and obtain additional patents for them. 5. After having taken a patent in France, the patentee must not take a patent for the same thing in a foreign country. 6. He must put his invention into practice within two years. See the *French law and practice of patents for inventions, improvements, and importations*, by M. Perpigna, p. 62. The same questions concerning the priority of invention and the requisite proofs, have disturbed the French tribunals, which have so long been agitated in ours. (Répertoire de Jurisprudence, tit. Brevet d'Invention. Questions de Droit.) The law as to patents for new inventions and discoveries, in the dominions of the Emperor of Austria, rests upon an imperial decree of December 6th, 1820. By that decree, foreigners, residents, and non-residents may obtain patents on the same terms as the native subjects. The objects of the patents are *new* discoveries; but those are considered as new which, although known in other countries, are not, at the time of the application, in practical use in the Austrian dominions, nor specifically described in any printed work. The patents may be taken out for fifteen years; and the application for them must describe, accurately and minutely, the invention, discovery, or improvement, and be accompanied with models, if the nature of the case requires them. The patentee must put his invention into practice within one year from the date of the patent, or he forfeits it. See the substance of the Austrian decree, inserted in the Appendix to Mr. Phillips's Treatise on Patents. In the same appendix is also given the patent law of the Netherlands, made in 1817. It is very analogous, in its chief provisions, to the Act of Congress of 1836. It allows patents, not exceeding fifteen years, to the persons who have made any invention or essential improvement (not already used in the kingdom by another person, or described in any work printed or published) in any branch of arts or manufactures, and also to those who shall first introduce or practise in the kingdom any invention or improvement made in foreign countries. Patents for foreign inventions or improvements, and under foreign patent, may be granted for the unexpired term; but the thing must be manufactured in the kingdom. A subsequent patent in a foreign country vacates the patent; and the thing patented must be put in practice within two years. The Spanish patent law is founded on a decree of the king and cortes, of October 14th, 1820. It grants a monopoly of any art or manufacture to the inventor, for ten years; to him who improves it, for six years, and to him who imports it, for five years. The law is well drawn and guarded, and is annexed to the treatise of M. Renouard.

The valuable work of Mr. Phillips, of Boston, on *The Law of Patents for Inventions*, is an elaborate production, and contains a critical examination of all the English and American cases applicable to the subject; and they are well digested. He has likewise incorporated in his treatise much interesting information on the French law of patents, drawn from the excellent treatise of M. Renouard; so that the work gives us an enlarged and accurate survey of the English and French, as well as American law of patents.

It may be here observed, that although a merchant or trader has no patent-right relative to the disposition of his goods and manufactured articles, yet the law will

or selling the thing secured to another by patent; and all cases arising under the patent laws are made originally cognizable,

throw a protection over the particular marks or signs he may habitually affix to his goods, to distinguish them from similar articles belonging to others; and if another person fraudulently uses those marks and signs, with intent to injure him in his trade, he will be entitled to a special action on the case at law for damages, and to a much more prompt and effectual remedy in equity, by injunction to restrain such a fraudulent invasion of his private right. By statute of New York, of May 14, 1845, and of New Jersey, 1847, to counterfeit or forge any private stamp or label, with fraudulent intent, is made penal. Popham's Rep. 144, where Doderidge, J., stated a case of a successful action in 22 Eliz., against a clothier, by another clothier, who used his marks to ill-made cloth. Sykes *v.* Sykes, 3 B. & Cressw. 541. Blofeld *v.* Payne, 4 B. & Adolph 410. Knott *v.* Morgan, 2 Keen's Rep. 213. Motley *v.* Downman, 3 M. & Cr. 1. Taylor *v.* Carpenter, 11 Paige's Rep. 292. S. C. 2 Wood. & M Rep. 1. Coates *v.* Holbrook, before Ass. V. Ch. Sandford, 3 N. Y. Legal Observer, 404. 2 Sandford's Ch. R. 586. Taylor *v.* Carpenter, Ibid. 603.[1]

[1] The following principles seem to be established by the recent decisions on this subject:

1. *As to the right to trade-marks.*

Every manufacturer, and every merchant for whom goods are manufactured, has the right to distinguish the goods he manufactures or sells by a peculiar mark or device, which no other person may assume. See cases cited above, and Amoskeag Manufacturing Co. *v.* Spear, 2 Sandf. Law Rep. 599, 605; Clark *v.* Clark, 25 Barb. (N. Y.) 76.

Aliens may assert this right in our courts equally with citizens. Coates *v.* Holbrook, 2 Sandf. Ch. Rep. 586. Taylor *v.* Carpenter, Id. 603. S. C. 3 Story, R. 458. S. C. 2 Wood. & Min. R. 1. 11 Paige, 292.

The right to trade-marks may be sold, so as to give the vendee an absolute property in the same. Samuel *v.* Berger, 24 Barb. (N. Y.) 163.

2. *What is a violation of this right?*

Though the owner of the trade-mark is to be protected in the use of marks designating the origin or ownership of his articles, he has no right to the exclusive use of marks which have no relation to the origin or ownership, but only indicate their name or quality. Amoskeag Man. Co. *v.* Spear, 2 Sandf. Law Rep. 606. Burgess *v.* Burgess, 17 E. L. & Eq. 257. Stokes *v.* Landgraff, 17 Barb. 608.

A colorable imitation will be restrained; and an imitation is colorable which requires a careful inspection to distinguish its marks from those imitated. Partridge *v.* Menck, 2 Sandf. Ch. R. 622. S. C. 3 Denio, 610. S. C. 2 Barb. Ch. Rep. 101. Clark *v.* Clark, 25 Barb. (N. Y.) 76. Brooklyn White Lead Co. *v.* Masury, 25 Barb. (N. Y.) 416. Farina *v.* Silverlock, 39 E. L. & Eq. 514.

If the violation be doubtful, the plaintiff must establish his right by an action at law before equity will grant an injunction. Cases, *supra.* And Spottiswoode *v.* Clarke, 2 Sandf. Ch. R. 628. 10 Lond. Jur. R. 1043. Merrimack Manufacturing Co. *v.* Garner, 3 E D. Smith (N. Y.) 387. Acquiescence in the violation will prevent an injunction. Rodgers *v.* Nowill, 17 E. L. & Eq. 83, 145.

3. *Liability of those infringing the right.*

An injunction is granted if the violation be clear. Where a seller transferred the trademark of the plaintiff from a superior to an inferior article of the plaintiff's manufacture, which usually bore a different mark, an injunction was granted on the ground of fraud against the plaintiff and the public. Gillott *v.* Kettle, 3 Duer, 624. See Farina *v.* Silver-

as well in equity as at law, in the Circuit Court of the United States, and in the district courts having the jurisdiction of circuit courts, with the right to a writ of error or appeal, as in other cases, to the Supreme Court of the United States. (a)

*(2.) *As to copyrights of authors.* (b) *373

The authors of books, maps, charts, and musical compositions, and the inventors and designers of prints, cuts, and engravings, being citizens of the United States, or residents therein, (c) are entitled to the exclusive right of printing, re-

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(a) Act of Congress, July 4, 1836, ch. 357, secs. 14, 17.

(b) Since the last edition of this work, George Ticknor Curtis, Esq., already favorably known to the profession by his work on Merchant Seamen, has published an essay "*on the law of copyright in books, dramatical and musical compositions, letters and other manuscript engravings and sculpture, as enacted and administered in England and America.*" It is an admirable work, and worthy of the attentive perusal of the professional reader.

(c) A bill was introduced into the Senate of the United States, in February, 1837, by Mr. Clay, extending the privilege of the Act to the non-resident subjects of Great Britain and France in respect to future publications. It was stated that as American authors could be protected abroad in their productions, under the copyright laws of those two kingdoms, such an extension of the privilege was called for on a principle of reciprocity as well as of justice. The bill, we regret to say, did not pass into a law. Mr. Lieber, in a letter to Mr. Preston on international copyright, (1840,) has urged the justice of such a law with his usual ability and force. In Bentley v. Foster, 10 Simon, 329, the vice-chancellor of England held, that an alien, resident abroad,

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lock, 39 E. L. & Eq. 514. An action at law lies for damages, which are measured by the loss of sales to the owner, and injury done to the reputation of his business or merchandise. Taylor v. Carpenter, 2 Wood. & Min. 1, 20, 21. It would seem that to entitle the plaintiff to damages for past sales, the defendant must have intended to deceive, or have known he was using plaintiff's marks. Rodgers v. Nowill, 5 Man., Gran., & S. Rep. 109. Taylor v. Carpenter, 11 Paige, Rep. 292.

It is no excuse that one using the trade-marks of another informs his dealers of the imitation, for succeeding sellers may not make similar disclosures. Coates v. Holbrook, 2 Sandf. Ch. Rep. 586.

By a statute of New York, passed April 1, 1850, ch. 123, the *forging* of trade-marks, with intent to deceive or defraud the purchaser or manufacturer, is made a misdemeanor; and the vending of goods, with forged stamps, *scienter*, without disclosing the fact to the purchaser, is likewise made penal.

See an elaborate article on this subject in the Western Law Journal, vol. vi. p. 337, taken from Hunt's Merchants' Magazine.

A public conveyance has a similar good will attached to it, and may be distinguished by a device or sign which will be protected. Stone v. Carlow, N. York Superior Ct. Law Reporter, Nov. 1850, p. 360. Knott v. Morgan, 2 Keen's R. 213.

printing, publishing, and vending them, for the term of twenty-eight years from the time of recording the title thereof; and if the author, inventor, or designer, or any of them, where *374 the work was originally composed and made *by more than one person, be living, and a citizen of the United States, or resident therein, at the end of the term, or, being dead, shall have left a widow, or child, or children, either or all of them living, she or they are entitled to the same exclusive right for the further term of fourteen years, on complying with the terms prescribed by the Act of Congress. Those terms are, that the author or proprietor, before publication, deposit a printed copy of the title of the book, map, chart, musical composition, print, cut, or engraving, in the clerk's office in the district in which he resides, and which copy is to be recorded; and that he cause to be inserted on the title-page, or the page next following, of each and every edition of the book, and cause to be impressed on the face of the map, chart, musical composition, print, cut, or engraving, or upon the title or frontispiece of a volume of the same, the following words: "Entered, according to the Act of Congress, in the year ——, by A. B., in the clerk's office of the District Court of ——," (as the case may be.) He is then, within three months after publishing the book or other work as aforesaid, to cause to be delivered a copy of the same to the clerk of the said district court, who is once in every year to transmit a certified list of all such records of copyright, and the several books or other works deposited as aforesaid, to the secretary of state, to be preserved in his office. The violation of the copyright thus duly secured is guarded against by adequate penalties and forfeitures.

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who composes a work abroad and publishes it first in England, was entitled to the protection of copyright. By the statute of 7 and 8 Vict. ch. 69, the queen in council may grant a copyright in any book, print, or works of art, which at the time of such order shall be first published in any foreign country, to the authors, &c., and their representatives and assigns, for a term not exceeding that of the author's copyright therein in England.

The earliest instance of a protected copyright for printing books was granted by the senate of Venice in 1469; and as early as 1486, a censorship of the press, or restraint on the sale of printed books, was introduced in Germany. Hallam's Introduction to the Literature of Europe, vol. i. 344, 348.

On the renewal of the copyright, the title of the work must be again recorded, and a copy of the work delivered to the clerk of the district, and the entry of the record noticed as aforesaid at the beginning of the work; and all these regulations must be complied with within six months before the expiration of the first term. And in addition to these regulations, the author or proprietor must, within two months from the date of the renewal cause a copy of the record thereof to be published in one or more of the public newspapers printed in the United States for the space of four weeks. (*a*)

* It was for some time the prevailing and better opinion *375 in England, that authors had an exclusive copyright at common law, as permanent as the property of an estate; and that the statute of 8 Anne, ch. 10, protecting by penalties that right for fourteen years, was only an additional sanction, and made in affirmance of the common law. This point came at last to be questioned; and it became the subject of a very serious litigation in the court of K. B. It was debated at the bar and upon the bench, with great exertion of the talent, and a very extensive erudition and skill in jurisprudence. It was decided that every author had a common-law right in perpetuity, independent of statute, to the exclusive printing and publishing his original compositions. (*b*) The court were not unanimous; and a subsequent decision of the House of Lords, in *Donaldson* v. *Becket*, in February, 1774, settled this very litigated question against the opinion of the K. B., by establishing that the common-law right of action (if any existed) could not be exercised, beyond the time limited by the statute of Anne. (*c*)

The Act of Congress is declared not to extend to prohibit the importation, or vending, printing, or publishing, within the United States, any map, chart, or book, musical composition,

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(*a*) Act of Congress, February 3d, 1831, ch. 16. The rights of authors in the printing, publishing, profits, and sale of their works, published prior to the date of this statute, depended upon the Acts of Congress of 1790 and 1802; and for the protection of copyright under those statutes, see *post*, p. 376, note *a*, the case of Wheaton *v.* Peters. See Dwight *v.* Appleton, N. Y. Legal Observer, vol. i. 195, on the valid security of a copyright.

(*b*) Millar *v.* Taylor, 4 Burr. Rep. 2303.

(*c*) Donaldsons *v.* Becket, cited in 4 Burr. Rep. 2408. 7 Bro. P. C. 88, S. C. Beckford *v.* Hood, 7 Term Rep. 620.

print, or engraving, written, composed, or made by any person not a citizen of the United States, nor resident within the jurisdiction thereof.[1]

The statute of Anne had a provision against the scarcity of editions and exorbitancy of price. The Act of Congress has no such provision; and it leaves authors to regulate, in their discretion, the number and price of their books, calculating (and probably very correctly) that the interest an author has in a rapid and extensive sale of his work, will be sufficient to keep the price reasonable, and the market well supplied. (a) The Act of Congress, though taken generally from the provisions in the statutes of 3 Anne, ch. 19, varies from *it in several respects. The statute of Anne did not discriminate, as the Act of Congress does, between natives and foreigners, or require any previous residence of the latter, but granted the privilege of copyright to every author of any book. (b) The statute of Anne renewed the copyright at the expiration of the fourteen years, if the author was then living, for another term of fourteen years, without any reëntry and republication, as is required with us. In one respect, authors with us are exempted from an exceedingly onerous burden imposed upon them by the statute of Anne. (c) That statute required not only the title of the book to be entered at Station-

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(a) When the copyright, or the exclusive privilege of printing and selling books for a limited period was introduced in Spain, under Isabella, it was granted, says Mr. Prescott, (Hist. of Ferdinand and Isabella, vol. ii. p. 207,) in consideration of the grantee selling at a reasonable rate; and foreign books of every description were allowed to be imported into the kingdom free of all duty whatever.

(b) See D'Almaine v. Boosey, 1 Younge & Collyer, 288.

(c) The exemption of American authors, mentioned in the text, no longer exists. By an Act of Congress passed August 10th, 1846, ch. 178, sec. 10, it is provided that the author or proprietor of any book, &c., for which a copyright shall be secured, &c., shall within three months from the publication of said books, &c., deliver, or cause to be delivered, one copy of the same to the librarian of the Smithsonian Insti-

[1] It has been decided that a purchaser at a sheriff's sale of a copperplate, on which a map was engraved, does not acquire the right to take impressions therefrom and sell them. Stevens v. Cady, 14 How. 528. Same v. Gladding, 17 How. 447. Wood engravings, printed, or illustrations of a book, are protected. Bogue v. Houlston, 10 E. L. & Eq. 215.

ers' Hall, but nine copies to be deposited there for the use of the libraries of the two universities and other libraries; and the statute of 54 Geo. III. enlarged the number to eleven copies, by requiring two copies for libraries in the city of Dublin. (*a*) In the case of splendid and expensive publications, supporting only a few copies, this requisition is a very heavy tax upon the author. The statute of 8 Geo. II. ch. 13, securing the privilege of copyright for twenty-eight years to the inventors of prints and engravings, did not require the deposit of any copies for public uses; whereas the Act of Congress requires the like entry, publication, and deposit in the case of historical and other prints, as in the case of books. The statute of 54 Geo. III. ch. 156, greatly improved upon the statute of Anne, and gave to the author at once the full term of twenty-eight years; and if he be living at the end of that period, then for the residue of his life. The statute of 5 and 6 Vict. ch. 45, provided still more amply in favor of authors, by declaring that every book published in the lifetime of its author shall endure for his natural life, and seven years longer; and if the seven years shall expire before the end of forty-two years from the first publication, the copyright shall endure for such period of forty-two years. (*b*)

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tution, and one copy to the librarian of Congress Library, for the use of said libraries."[1]

(*a*) A statute of Wm. IV. repealed this part of the former Act, and reduced the number of deposited copies to five The law of copyright was again amended by the Act of 5 and 6 Vict. ch. 45; and by a clause in the Acts of 8 and 9 Vict. ch. 93, the absolute prohibition of foreign reprints of copyright books is extended to the British colonial possessions.

(*b*) Under the English statute of 54 Geo. III., the omission to enter the work at Stationers' Hall deprived the author of the penalties given to him for breach of the copyright, and subjected him to certain small forfeitures; and his exclusive copyright still existed, and he might sue for damages on the violation of it. Beckford *v.* Hood, 7 Term Rep. 620. Stat. 5 and 6 Vict. ch. 45, S. 1.[2] The Act of Congress is not susceptible of that construction, though the omission to *deposit a copy of the book* in the clerk's office under the Act of Congress of 1831, does not deprive the author of his vested copyright, nor of his remedies under the statute. That provision is merely directory. It has been decided in a case of copyright, under the Act of Congress of

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[1] In Jollie *v.* Jaques, (S. Dist. of N. York,) it was held that the delivery of copies to the two librarians was not a prerequisite to the title to a copyright. 1 Blatchf. R. 618.

[2] Lover *v.* Davidson, 38 Eng. L. & Eq. 180. Chappell *v.* Davidson, 36 Eng. L. & Eq. 321.

*377 *The cognizance of cases arising under the Act of Congress securing to authors the copyright of their pro-

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1790, that after depositing the title of the book in the clerk's office, the exclusive right was vested, and that the publication of the title, and the deposit of a copy of the book in the secretary's office, were acts merely directory, and constituted no part of the essential requisites for securing the copyright. Nichols *v.* Ruggles, 3 Day's Conn. Rep. 145. But under the Act of 1802, the publication was held to be essential. Ewer *v.* Coxe, 4 Wash. C. C. Rep. 487. And in Wheaton *v.* Peters, 8 Peters's U. S. Rep. 591, the question of copyright was discussed by counsel with great learning and ability, and a majority of the Supreme Court held that an author had no common-law copyright in his published works; that if such a common-law right ever existed in England, yet there was no common law of the United States on the subject, and there was no evidence or presumption that any such common-law right had ever been introduced or adopted in Pennsylvania, where the controversy in that case arose; and that, as in England, since the statute of 8 Anne, an author's exclusive right of literary property in his published works was confined to the period limited by the statute, so in that case the author's right depended upon the Acts of Congress of 1790 and 1802. It was further held that the requirements in the Act of 1790, as explained and amended by the Act of 1802, to deposit a copy of the title in the clerk's office, and to insert a copy of that record in the title-page of the work, or in the succeeding page, and to publish the same for four weeks in a newspaper, and to deposit a copy of the work, within six months, in the office of the secretary of state, were all acts essential to the title, and necessary to be performed, to enable the author to claim the protection and benefit of those statutes. The court likewise declared that no reporter had or could have any copyright in the written opinions delivered by the judges of that court. The minority of the court held that authors had a common-law right in their works, which existed independent of the Acts of Congress, and under the common law of the several states; and that the statute right and remedy vested upon recording the title-page of the book, and inserting a copy of the Act in the page next to the title-page: and that the subsequent notice and deposit were merely directory, according to the decision in Nichols *v.* Ruggles.

M. Renouard, the author of a treatise on patents, as mentioned in a preceding note, has published a dissertation on the rights of authors, in which he contends that authors have not, upon just principles, any perpetual copyright, and are only entitled to the protection and remuneration which statute law affords. The substance of that dissertation is given in the American Jurist, No. 43, for October, 1839; and if the reason and policy upon which the opinion of M. Renouard is founded be not sufficient, we are nevertheless satisfied that the protection of copyright in perpetuity, independent of statute provision, as was once contended for in the great case of Miller *v.* Taylor, is visionary and impracticable.

The French law of copyright is founded on the republican decree of July 19th, 1793, which gave to authors of writings of all kinds, composers of music, painters, and engravers, a right for life in their works, and to their heirs for ten years after their deaths, with strong provisions against the invasion of such literary property. One copy was to be deposited in the national library. The imperial decree of the 5th February, 1810, made some modifications of that law, and gave the right to the author for life, and to his wife, if she survived, for life, and to their children for twenty

ductions, belongs to the courts of the United States; but there *are no decisions in print on the subject, and *378

years; and the right was secured by adequate civil penalties. A number of interesting questions have been discussed and decided in the French tribunals under the above law, and they are reported in the Répertoire de Jurisprudence, par Merlin, tit. Contrefaçon, sec. 1-15; and in his Questions de Droit, tit. Propriété Littéraire, secs. 1, 2. In the case of Masson & Besson *v.* Moutardier & Leclere, in the latter work, sec. 1, a new edition of the Dictionary of the French Academy, with colorable additions only, was adjudged to be a fraudulent violation of the copyright; and Merlin has preserved his elaborate and eloquent argument in support of literary property. In the case of Lahante & Bonnemaison *v.* Sieber, the question was concerning the rights of foreign authors; and it was decided and settled on appeal, in March, 1810, that the French assignee of a literary or musical work, not published abroad, acquired in France, after conforming to the usual terms of the French law, *before any publication abroad*, the exclusive copyright under the law of 1793. See Questions de Droit, tit. Propriété Littéraire, sec. 2. It is understood to be lawful to publish in France, without the permission of the author, a work already published in a foreign country. Répertoire, *ub. sup.* sec. 10. The French law is much more liberal in the protection of intellectual productions to authors and their heirs, than either the English or our American law; and it is a curious fact in the history of mankind, that the French national convention, in July, 1793, should have busied themselves with the project of a law of that kind, when the whole republic was at that time in the most violent convulsions, and the combined armies were invading France and besieging Valenciennes; when Paris was one scene of sedition, terror, proscription, imprisonment, and judicial massacre, under the forms of the revolutionary tribunal; when the convention had just been mutilated by its own denunciation and imprisonment of the deputies of the Gironde party, and the whole nation was preparing to rise in a mass to expel the invaders. If the production of such a law, at such a crisis, be not resolvable into mere vanity and affectation, then indeed we may well say, with Mr. Hume, so inconsistent is human nature with itself, and so easy do gentle, pacific, and generous sentiments ally both with the most heroic courage and the fiercest barbarity!

There is a disposition in France to enlarge still further the term of an author's property in his works; and the commissioners appointed by the king to frame a new law on the subject, reported, in the summer of 1826, the draft of a law, in which they proposed to give to authors and artists of works of all kinds, property in their works for life, and to their legal representatives for fifty years from their deaths; and copyright in a work to be protected from piracy by representation, as well as piracy by publication. But it is understood that the French copyright still rests upon the provisions of 1810, and that the proposed modifications of 1826 did not pass into a law. In Prussia, by an ordinance of the king, in June, 1837, copyright endures for the life of the author, and to his heirs for thirty years after his death. The rapid and piratical reprint in Belgium of French books, as soon as they are out, and the consequent diffusion of them all over France, ruins the value of copyright in France. There is the same evil as respects French Switzerland. Copyright has a fair claim to international protection. In Germany, copyright is perpetual; but it cannot be of much value, for there is no one uniform Germanic legislation on the subject, to protect copyright among so many independent states, using a common language. It is said, however, that there is a reciprocal security of copyright by treaty between Prussia

we must recur for instruction to principles settled by the English decisions under the statute of Anne, and which are, no doubt, essentially applicable to the rights of authors under the Act of Congress.

It was decided, in *Coleman* v. *Wathen*, (a) that the acting of a dramatic composition on the stage, was not a publication within the statute. The plaintiff had purchased from O'Keefe the copyright of an entertainment called the Agreeable Surprise, and the defendant represented this piece upon the stage. The mere act of repeating such a performance from memory was held to be no publication. On the other hand, to take down from the mouths of the actors the words of a dramatic composition, which the author had occasionally suffered to be

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and Austria; and by the act of union of the Germanic confederacy of 1815, the diet was directed to make uniform decrees for the protection of copyright. By the Prussian ordinance of June, 1837, the copyright law of that kingdom applies generally to works published in foreign states, provided the copyright law of such state applies to and protects works published in the Prussian dominions. So, also, the English statute of 1 and 2 Victoria, ch. 59, secures to authors, in certain cases, the international copyright, by allowing the queen in council to grant to authors of books, which shall thereafter be published in any foreign country to be specified in the order, the privilege of copyright in the British dominions, for a term not exceeding that granted to British authors, upon entry and deposit of the work with the warehouse keeper of the company of stationers in London; the grant to be upon the condition that British authors have the like protection in the foreign country. The case of Germany shows how important it was in this country, that the law of copyright should rest on the broad basis of federal jurisdiction. By the law in Russia, as established in 1828, copyright in books and translations is secured to an author for life, and to his heirs, after his death, for twenty-five years, and no such right can be sold for debt. In May, 1840, a treaty was entered into by the Sardinian and Austrian Lombardy governments, providing for the security of literary property within their respective dominions; and the king of the Two Sicilies, the Grand Duke of Tuscany, and the Dukes of Lucca and Modena, have acceded to the treaty. This is justly deemed a very auspicious event in the history of copyright. The copyright, or right of property in works of science, literature, and art, including pictures, statues, drawings, copperplates, and lithographs, appearing within their respective Italian states, is secured to the author and his assigns for his life, and for thirty years after his death. If published after his death, it is protected for forty years from the time of publication. Every article of an encyclopedia or periodical work, exceeding three printed sheets, is to be held a separate work, and all allowable extracts are to be confined to three printed pages of the original. In Holland and Belgium, the author is protected in his copyright during his life, and to his legal representatives during twenty years after his death.

(a) 5 Term Rep. 245.

acted, but never printed or published, and to publish it from the notes so taken down, was deemed a breach of right; and the publication of the copy so taken down (being the farce entitled Love à la Mode) was restrained by injunction. (*a*) Since the case above mentioned, injunctions have been granted in chancery even *against the acting of a dramatic work, without the consent of the proprietor; (*b*) and the narrow and unreasonable construction given to the claims of an author by the K. B., seems to have been very properly enlarged by the court of chancery. But as the lord chancellor, as late as 1822, took the opinion of the court of K. B. whether an action would lie for publicly acting, and representing for profit, a tragedy altered for the stage, without the consent of the owner of the copyright,—and as that opinion was against the action, it is probable that the rule in chancery will conform to that at law. (*c*) [1] In England, there may be relief granted against the piratical publication for profit, of lectures delivered orally, and taken down in short hand by the pupils. (*d*) [2] But relief for such an injury does not seem to come within any of the provisions of the Act of Congress on the subject of copyrights; and if it can be afforded at all, it must be upon the principles of the common law, under the state jurisdictions. (*e*)

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(*a*) Macklin *v.* Richardson, Amb. Rep. 694.

(*b*) Morris *v.* Harris and Morris *v.* Kelly, cited in Eden on Injunc. 198.

(*c*) Murray *v.* Elliston, 5 Barnew. & Ald. 657.

(*d*) Abernethey *v.* Hutchison, reported in Maugham on Literary Property, 147-154. The statute of 5 and 6 Wm. IV. ch. 65, has since secured to *oral* lecturers the sole liberty of printing and publishing their own compositions.

(*e*) In Clayton *v.* Stone, decided in the Circuit Court of the United States, at New

[1] By the statute 3 and 4 W. IV. ch. 15, § 2, in England, and statute 1856, ch. 169, in the United States, dramatic authors are protected in the exclusive right to the representation of their works upon the stage.

[2] Bartlett *v.* Crittenden, 4 Mc'L. 300, 5 Mc'L. 32. Nor is it a publication for a teacher to allow his pupils to copy his MSS., Ibid. It is an infringement of copyright under St. 5 and 6 Vict. ch. 45, to lithograph copies of a song for private use and not for sale. Novello *v.* Sudlow, 11 Eng. L. & Eq. 492. One who adapts words of his own to an old song, adding thereto a prelude and accompaniment, acquires a copyright in the combination and may properly describe himself as proprietor of the entire combination. Lover *v.* Davidson, 38 Eng. L. & Eq. 180.

If an author first publishes abroad, and does not use due diligence to publish in England, and another fairly publishes his work in England, it is held that he cannot sue for a breach of copyright. Whether the act of printing and publishing abroad makes the work *publici juris*, is not decided. It becomes so if the author does not promptly print and publish in England; and the statute of Anne had a reference to publications in England, and it was them only that it intended to protect. (*a*)

An injunction to restrain the publication of unpublished *manuscripts has been frequently granted in England; (*b*) and on the ground that the author had a prop-

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York, December, 1828, it was held, that a *price current*, published in a semi-weekly newspaper, was not a *book*, within the Act of Congress, because not a work of science or learning, but of mere industry.

(*a*) Clementi *v.* Walker, 2 Barnew. & Cress. 861. In the case of Chappell *v.* Purday, 1845, 14 Meeson & W. 319, the Lord Ch. Baron, upon a review of the English authorities, declared the result to be, that if a foreign author, not having published abroad, first publishes in England, he may have the benefit of English statutes of 21 James I. and 54 Geo. III. ; but that no case had decided that if the author first published abroad, he can afterwards have the benefit of them by publishing in England. The decision in the case was, that a foreign author residing abroad, or the assignee of a foreign author, who composes and publishes his work abroad, had not at common law, nor under the English statutes above mentioned, any copyright in England. The British statutes, said Ch. B. Pollock, meant only to protect British subjects, and to foster and encourage British industry and talent.[1]

(*b*) Eden on Injunctions, 275.

[1] In Boosey *v.* Purday, 13 Jurist Rep. part 1, p. 918, it was decided that a foreign author residing abroad, or his assign, was not entitled to the benefit of the statutes. 8 Anne, ch. 19, and 54 Geo. III. ch. 156. These Acts have, however, since been repealed.

In the case of Boosey *v.* Davidson, 13 Jurist, part 1, p. 678, it would seem that the decision was directly contrary, as it was also in the previous case of Cocks *v.* Purday, 5 Man. Gran. & Scott, 860. The last case was under the existing statute of 5 & 6 Vict. ch. 45; but the case of Boosey *v.* Purday is the latest. The law on this point is considered as unsettled in England. See an elaborate article on this subject, taken from the London Jurist, in the U. S. Law Magazine for Dec. 1850, vol. ii. p. 524.

Since the preceding note was written, a decision has been made in the Exchequer Chamber, that the assignee of a work, written by an alien in a foreign country, but never before published, is entitled to the protection of the English copyright laws, upon taking out a copyright in England. Boosey *v.* Jefferys, 1851, 4 E. L. & Eq. 479. The case was finally decided in the House of Lords, August 1, 1854.

The decision of the Exchequer Chamber was reversed. It was held that a foreigner could not obtain an English copyright by first publishing, while a resident abroad, a work in England; and that his assignment conferred no right to a resident of England. It was said, that if a foreigner was in England at the time of the first publication, and thus owed a local allegiance to the crown, he could obtain a copyright for his works.

erty in an unpublished work independent of the statute. (*a*)[1] Literary property is the ownership to which an author is entitled in the original manuscript of his literary work; and the identity of the work consists in the sentiment and language. (*b*) It is clearly the author's exclusive right, inasmuch as it is created by his own labor and invention; and the reason and moral sense of mankind acquiesce in the solidity of the title. The Act of Congress says that no person shall be entitled to the benefit of the Act, unless he shall, before publication, record the book in the clerk's office of the District Court, by depositing *a printed copy* of the title with the clerk; but there is another section of the Act which declares, that if any person should print or publish any manuscript, without the consent of the author or proprietor, (he being a citizen or resident of the United States,) he shall be responsible in damages by a special action on the case. The courts of the United States are authorized to grant injunctions to protect the violation of the rights of authors and invent-

(*a*) Duke of Queensberry *v.* Shebbeare, 2 Eden's Rep. 329. Southey *v.* Sherwood, 2 Merivale's Rep. 435. Macklin *v.* Richardson, Ambl. Rep. 694. White *v.* Geroch, 2 Barnew. & Ald. 298.

(*b*) The identity of a literary composition, says Sir Wm. Blackstone, consists entirely in the sentiment and the language. The same conceptions, clothed in the same words, must necessarily be the same composition. 2 Blacks. Com. 406. The copyright applies to the peculiar expression of ideas which the author has used, and a work may be the subject of copyright, although the materials which compose it may be found in the works of other authors antecedently printed, provided the plan, the arrangement, and the combination of those materials be original, and which must necessarily be the result of intellectual exertion and skill. It is of no consequence whether the invasion of the copyright be a simple reprint, or by incorporating the whole, or a large portion thereof, in some larger work. The form in which the piracy is effected is not material. Gray *v.* Russell, C. C U. S. for Massachusetts, October, 1839. 1 Story's Rep. 11. Emerson *v.* Davies, 3 Story's Rep. 768. An equitable right to a copyright is equally within the protection of the law. Shadwell, Vice-chancellor, in Bohn *v.* Bogue, Feb. 1846.

[1] The author of works of literature, art, or science, has such exclusive right of property in such works, while they remain unpublished, that the court will restrain any person not having title, from publishing any list or descriptive catalogue of such works. Prince Albert *v.* Strange, (Eng. Ch.) Law Reporter, July, 1849, vol. xii. p. 133.

A writer in the London Jurist, (Feb. 1849,) intimates doubts, and with apparent justice, of the correctness of this position. It is certainly carrying the right of authors to a great extent to restrain by injunction the communication, not only of the works themselves, but the fact of their existence, and the designation of the mode of their existence.

ors, and to protect manuscripts from piratical publication. (*a*)[1] No length of time will authorize the publication of an author's original manuscript without his consent. In England, the publication of private letters, forming a literary composition, has been restrained, on the ground of a joint property existing in the writer, as well as in the person to whom the letters were addressed. The letters of Pope, Swift, and others, and the letters of Lord Chesterfield, were prevented from a surreptitious and unauthorized publication by the process of injunction. Lord Ch. Hardwicke declared that the receiver of a private letter only acquires a qualified interest in it. The paper on which it is written may belong to him, but the composition does not; and he cannot publish it without the consent *381 of the writer. (*b*) In the case of *Perceval* v. * *Phipps*, (*c*) the vice-chancellor held, that private letters, having the character of literary composition, were within the spirit of the Act protecting literary property; and that by sending a letter, the writer did not give the receiver the right to publish it. But the court would not interfere to restrain the publication of commercial or friendly letters, except under circumstances. (*d*) The publication or production of business letters might often be necessary in one's own defence. If the publication of private letters would be a breach of trust, the publication has been, and may be restrained. (*e*) It is easy to perceive the delicacy and

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(*a*) Act of Congress, February 3d, 1831, sec. 9.

(*b*) Pope *v.* Curl, 2 Atk. Rep. 342. Thompson *v.* Stanhope, Amb. Rep. 737. In 1804, the Court of Sessions in Scotland interdicted, at the instance of the children, the publication of the manuscript letters of the poet Burns. Cadell & Davis *v.* Stewart, cited in 1 Bell's Com. 116, n.

(*c*) 2 Ves. & Bea. 19.

(*d*) In Wetmore *v.* Scovell, 3 Edward's N. Y. Ch. Rep. 515, the vice-chancellor refused to exercise the power to prevent the publication of private letters of business, *when they possessed no attribute of literary composition.*

(*e*) Perceval *v.* Phipps, 2 Ves. & Bea. 27. Earl of Granard *v.* Dunkin, 1 Ball & B. 207. Gee *v.* Pritchard, 2 Swanst. Rep. 418. Mr. Justice Story asserts strongly the propriety of the jurisdiction, by injunction, to restrain the publication of private letters, though not strictly literary compositions, except when called for in the administration of public justice. Com. on Eq. Jurisprudence, vol. ii. §§ 944–950. Denis

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[1] Bartlett *v.* Crittenden, 5 McL. 32.

importance of this branch of equity jurisdiction relative to the publication of manuscripts and private correspondence. The publication of private letters ought to be restrained, when it would be a breach of confidence and trust, as letters of courtship; or when injurious to the character and happiness of others.[1] On the other hand, the courts will not lend their protection to works which are evidently injurious to the public morals or peace, or are an offence against decency, or are libels upon individuals. (a)

A copyright may exist in a translation as much as in an original composition, and whether it be the result of personal application and expense, or a gift. (b)[2] A copyright may ex-

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v. Leclerc, 1 Martin's La. Rep. 297 This doctrine is sound and just, that a court of equity ought to interpose where a letter from its very nature, as in the cases of matters of business, or friendship, or advice, or family or private confidence, imports the *implied* or necessary intention and *duty* of privacy and secrecy, or where the publication would be a violation of *trust* or *confidence*, founded in contract or implied from circumstances; or when made for the purpose of indulging a gross and diseased public curiosity by the circulation of private anecdotes, or family secrets, or personal concerns. Story, *ubi supra*, secs. 947, 948, 949.[3]

(a) Fores v. Johnes, 4 Esp. N. P. Rep. 97. Hime v. Dale, 2 Camph. Rep. 27, n. Southey v. Sherwood, 2 Merivale's Rep. 435. Walcot v. Walker, 7 Ves. 1. Lawrence v. Smith, Jacob's Rep. 471. Murray v. Benbow, and Lawrence v. Smith, decided in 1822, and cited in Maugham on Literary Property, 90, 91.

(b) Wyatt v. Barnard, 3 Ves. & Bea. 77.

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[1] The authority of chancery to restrain the publication of private letters, upon petition of the author or owner, has been held to rest exclusively upon the ground of their value to the complainant, as literary *property*. Where letters were published under circumstances calculated to greatly wound the feelings of the author, and which he would never have consented to publish, an injunction restraining such publication was dissolved, on the ground that "the complainant never could have considered them as of any value whatever, as literary productions." Hoyt v. Mackenzie, 3 Barb. Ch. R. 320.

[2] A translation is no infringement of copyright even when another translation has been published under the author's sanction. Stowe v. Thomas, 2 Wall. Jr. 547.

[3] In the case of Woolsey v. Judd, 4 Duer, (N. Y.) 379, the New York Superior Court made a very thorough examination of the law as to the publication of private letters. In a very admirable opinion rendered by Mr. Justice Duer, the court refused to be bound by the decision in Wetmore v. Scovell, and the decision of Chancellor Walworth in Hoyt v. Mackenzie. They held that these cases, together with the case of Perceval v. Phipps, on which they were founded, were a departure from the law. And they considered the law well established, that the writer of letters, whether they are literary compositions, or familiar letters, or letters of business, possesses the sole and exclusive right of publishing the same, and, without his consent, they cannot be published by the person to whom they are addressed, or any other, unless it be shown that the publication of the letters is necessary

ist in part of a work, without having an exclusive right to the whole. Gray's poems were collected and published, with 382* additional pieces, by Mason; and Lord Bathurst *prohibited by injunction the unauthorized publication of the additions. (a) So Lord Hardwicke restrained a defendant from printing Milton's Paradise Lost, with Dr. Newton's notes. (b) A mere colorable abridgment of a book is an evasion of the statute, and will be restrained; but, as Lord Hardwicke observed, this will not apply to a real and fair abridgment; for an abridgment may, with great propriety, be called a new book. It is often very extremely useful, and displays equally the invention, learning, and judgment of the author. (c) A *bonâ fide* abridgment of Hawkesworth's Voyages has been held no violation of the original copyright. (d) So, an abridgment of Johnson's Rasselas, given as an abstract in the Annual Register, was held not to be a piratical invasion of the copyright, but innocent, and not injurious to the original work. (e)[1]

(a) Mason v. Murray, cited in 1 East's Rep. 369.

(b) Lord Kenyon, in East's Rep. 361. Tonson v. Walker, 1752, 3 Swanst. Rep. 672. Though there was nothing new in Milton's Paradise Lost, with Newton's notes, except the notes, Lord Hardwicke granted an injunction against the whole book; but the rule seems now to be, that chancery cannot grant an injunction against *the whole book*, on account of the piratical quality of a part, unless the part pirated is such, that granting an injunction against that part necessarily destroys the whole. An action at law may be brought for pirating a part. Lord Eldon, in Mawman v. Tegg, 2 Russell's Rep. 398. An editor may have a copyright in his own marginal notes. Wheaton v. Peters, 8 Peters's Rep. 591.

(c) Gyles v. Wilcox, 2 Atk. Rep. 141.

(d) Anon. Lofft's Rep. 775.

(e) Dodsley v. Kinnersley, Amb. Rep. 403. This latitudinary right of abridgment is liable to abuse, and to trench upon the copyright of the author. The question as to a *bonâ fide* abridgment may turn, not so much upon the quantity as the value of the selected materials. All the vital part of another's book, said Lord Cottenham, might be taken, though it might be of a small proportion of the book in quantity. The slightest circumstances in these cases, as Lord Eldon well observed, make the most important distinction. Wilkins v. Aikin, 17 Vesey, 425. Bramwell v. Halcomb, 3 Mylne & Craig, 737. Saunders v. Smith, Ib. 728, 729. Mr. Justice Story makes some very just and pertinent observations on this point in the case of Gray v. Russell,

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to the vindication of the receiver's rights or conduct, against unjust claims or imputations; and that a court of equity will interpose to prevent the publication of letters without the consent of the writer, unless such necessity be shown.

[1] See, on infringement by abridgment, Story's Executors v. Holcombe, 4 Mc'L. 306.

A person cannot, under the pretence of quotation, publish either the whole, or any material part of another's work; but

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C. C. U. S. for Massachusetts, October term, 1839, 1 Story's R. 11. And as evidence of the sensibility as well as good sense and sound morality of authors on this subject, we may refer to Dr. Lieber, who condemns this abuse of copyright under the shape of abridgments, and holds that it is as if a man had a right to cut the ears of my corn, provided he leaves the stalks untouched. Politial Ethics, vol. i. 133. Lord Campbell, in his very interesting and learned "Lives of the Lord Chancellors," vol. v. 56, questions the extent of the rule laid down by Lord Hardwicke, which may extend to an abridgment tending to injure the reputation and lessen the profits of the author. In Curtis's Treatise on Copyright, the author reviews critically the English and American cases on this point, and arrives at the following conclusion: "The result to which English and American jurisprudence ought to come upon this question, is, that an abridgment, in which the text, the plan, the ideas, arguments, narrative, and discussion of an original author are reproduced, in a condensed form, is a violation of his right of property." Curtis on Copyright, p. 280. He cites Renouard's Droits d'Auteurs, tom. i. pp. 249, 269, and tom. ii. pp. 29–34, by which it seems that in *France*, by the law of 1793, and in *Belgium*, by a law of the 25th January, 1817, and by the *Prussian* law of the 11th June, 1837, abridgments, without license, are violations of the author's rights.

There would seem to be little doubt that the case supposed by Mr. Curtis, and indeed much less than the case supposed, would be a violation of copyright; and, at the same time, it may be admitted that no monopoly can or ought to exist in *ideas*. In the appendix to Maugham's Treatise on the Laws of Literary Property, pp. 211–228, various opinions are collected on the nature of literary property, which, if allowed to be correct, may have decisive effect in resolving the present inquiry. A writer in the Monthly Review for 1774, (Maugham, appendix, p. 221,) observes: "Every man's ideas are doubtless his own, and not the less so because another person may have happened to fall into the same train of thinking with himself. But this is not the property which an author claims; it is a property in literary composition, the identity of which consists in the same thoughts, ranged in the same order, and expressed in the same words." Mr. Hargrave's opinion is to the same effect, (Maugham, p. 216): "The subject of the property is a written composition; and that one written composition may be distinguished from another is a truth too evident to be much argued upon. Every man has a mode of combining and expressing his ideas peculiar to himself. The same doctrines, the same opinions, never came from two persons, or even from the same person at different times, clothed wholly in the same language. A strong resemblance of style, of sentiment, of plan, and disposition, will frequently be found; but there is such an infinite variety in the modes of thinking and writing, as well in the extent and connection of ideas, as in the use and arrangement of words, that a literary work, really original, like the human face, will always have some singularities, some lines, some features to characterize it, and to fix and establish its identity."

These opinions seem to accord in the principle, that the proper object of the copyright is the *peculiar expression of the author's ideas*, meaning by this, the structure of his work, the sequence of his remarks, and, above all, his language; and that this peculiarity is always distinguishable, as, by a law of nature, every human production is stamped with the idiosyncrasy of the author's mind.

he may use, what is in all cases very difficult to define, fair quotation. (*a*)[1] A man may adopt part of the work of another. The *quo animo* is the inquiry in these cases. The question is, whether it be a legitimate use of another's publication, in the exercise of a mental operation, deserving the character of an original work. (*b*) If an encyclopædia or review should 383* copy so much of a book as to serve as a * substitute for it, it becomes an actionable violation of literary property, even without the *animus furandi.* If so much be extracted as to communicate the same knowledge as the original work, it is a violation of copyright.[2] It must not be in substance a copy. An encyclopædia must not be allowed, by its transcripts, to sweep up all modern works. It would be a recipe for completely breaking down literary property. (*c*)

If these views are correct, it will follow that any abridgment of the work, in the original author's language, is an infringement of his right; and, indeed, every quotation will be, *pro tanto*, a violation, unless excused on the ground of its inconsiderable extent, or on the presumed assent of the author, which, in works of fair criticism, might be justly implied.

(*a*) Mr. Curtis, after an examination of the authorities on the question, how far the quotation of passages may be allowed, even when there is a fair acknowledgment of the source from which they are taken, observes: "There is no more definite and consistent limit than *the point where an injury may be perceived,* which varies of course in each case, and is not by our law supposed to be capable of a distinct announcement by a positive rule." Curtis on Copyright, p. 252.

(*b*) Wilkins *v.* Aikin, 17 Ves. 422.

(*c*) Roworth *v* Wilkes, 1 Camp. N. P. Rep. 94. In Bohn *v.* Bogue, before the vice-chancellor of England, in February, 1846, (New York Legal Observer for August, 1846, vol. 4, p. 310,) it was held that the word *substitute* was not correctly used by Lord Ellenborough, in the case in Campbell; for a work may be a piracy though the passages copied are stated to be quotations, and are not so extensive as to render the piratical work a substitute for the original work. If the piracy take, though as quotation, a materially valuable part of a work, it is a breach of copyright, and chancery will interfere and direct a trial on that point. If the matter extracted from a publication be merely for the purpose of criticism, or if the matter extracted be too minute as a matter of property or value, it will not be protected under an injunction.

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[1] A charge of piracy of an English book is not rebutted by showing that the part complained of was copied from a foreign book, which appeared to be copied from the English book. Murray *v.* Bogue, 17 E. L. & Eq. 165. Copying the head-notes of reports into a Digest, seems to be a piracy. Sweet *v.* Benning, 30 E. L. & Eq. 461.

[2] See Webb *v.* Powers, 2 Wood. & M. Rep. 497. If the original work has been so closely imitated as to demonstrate a case of mere evasion, or if it has been substantially copied, it is a piracy. Emerson *v.* Davies, 3 Story's R. 768.

The Act of Congress of 1831,[1] (and of which the substance has been given in the preceding pages,) has greatly enlarged the privilege of copyright beyond that which existed under the Acts of Congress of 1790 and 1802. Under those Acts, the exclusive right of printing, publishing and vending, was confined to the term of fourteen years, if the author should be living when the first term expired. The Act of 1831, extends and continues to the proprietors of copyrights then existing, and not expired when the Act passed, the benefit of all its provisions for the enlarged term given by the Act, to be computed from the time of the first entry of the copyright under the former statutes, and with the like privilege of renewal, as is provided in relation to copyrights originally secured under the Act of 1831. All the provisions and remedies intended for the protection and security of copyrights, are declared to extend to the benefit of the proprietors of copyrights already obtained according to law, during the extended term thereof, in the same manner as if the copyright had been entered and secured under the new Act. (a)

Under the English law it was understood that if the author

Bel v. Whitehead, in the English Chancery, 1839. In the case of The Publishers of Sparks's Life of Washington v. The Publishers of Upham's Life of Washington, in U. S. C. C. for Massachusetts, 1841, it appeared that 353 pages out of 886 pages, of which the two volumes of the work of the defendant was composed, were copied *verbatim* from the former work, being letters of Washington. Judge Story granted a perpetual injunction, and held that the letters of Washington were the subject of copyright under the circumstances in which they were placed. He laid down the general proposition, that if so much of a work be taken in form and substance, that the value of the original work is sensibly diminished, or the labors of the original author are substantially, to an injurious extent, appropriated by another, it constitutes, in point of law, piracy *pro tanto.*

(a) Act of Congress, February 3d, 1831, ch. 16, secs. 15, 16. The Act of Congress of February 15th, 1819, ch. 19, gave to the circuit courts original cognizance, as well in equity as at law, of all suits and controversies arising under any law of the United States, granting or confirming to authors or inventors the exclusive right to their writings or discoveries; and with authority on bills in equity to grant injunctions, according to the course and principles of courts of equity, to prevent the violation of the rights of authors or inventors.

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[1] This Act imposes a penalty of fifty cents for each sheet pirated; but it is only upon the sheets *found in the possession* of the piratical publisher, and not upon all those which he has published. Backus v. Gould, 7 How. U. S. 798.

assigned away his right generally, and outlived the period of twenty-eight years, his assignee, by the general assignment, would have the benefit of the resulting term of fourteen years more. Such a contingent right in the author himself will pass by the general assignment of all his interest in the copy- *384 right. (a) *But if the author died before the expiration of the period entitling him to a renewal, his personal representatives, and not the assignee, were entitled to the renewal. (b) The language of the Act of Congress, giving the right of renewal, in the case of the author's death, to his widow and children, would seem to require the same construction, and to have intended a personal benefit to the widow and children. The statute speaks of the widow and children in a restrictive sense as a *descriptio personarum ;* and it says that *they* shall be *entitled* to the renewal of the copyright, on complying with certain terms. (c)

The justice and policy of securing to ingenious and learned men the profit of their discoveries and intellectual labor, were very ably stated by the court of K. B. in the great case of *Miller* v. *Taylor.* The constitution and laws of the United States contain the declared sense of this country in favor of some reasonable provision for the security of their productions. The former law of Congress afforded only a scanty and inadequate protection, and did not rise to a level with the liberal spirit

(a) Carnan v. Bowles, 2 Bro. C. C. 80. By Act of Congress of June 30th, 1834, instruments in writing for the transfer or assignment of copyrights, are to be proved or acknowledged, as deeds for the conveyance of land are, and are to be recorded in the office where the original copyright is deposited and recorded. If not so recorded within sixty days after execution, they are to be deemed fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, without notice.[1]

(b) Petersdorff's Abr. vol. vi. p. 565, n.

(c) In the case of Pierpoint v. Fowle, 2 Wood. & Minot's R. 23, the plaintiff having assigned his copyright to his book, The Reader, renewed the copyright at the expiration of the fourteen years, and the assignee continuing to publish the book as his own, the court (Judge Woodbury) held, that the author, by selling the copyright, sold only the right then existing, and that the subsequent copyright so renewed, belonged to the original author, and the assignee was decreed to account for his subsequent sales.

[1] They are valid between the parties, though not recorded. Webb v. Powers, 2 Wood. & M. Rep. 497.

of the age. But the recent statute has made liberal amends, and redeemed the government of our country from the reproach to which it had been exposed. Lord Camden once declaimed against literary property. "Glory," said he, "is the reward of science, and those who deserve it scorn all meaner views. It was not for gain that Bacon, Newton, Milton, and Locke, instructed and delighted the world." In answer to this it may be said, that the most illustrious writers in every branch of science, within the last half century, have reaped a comfortable support, as well as immortal fame, from the fruits of their pen. The experiment in Great Britain has proved the utility, as well as the justice, of securing a liberal recompense to intellectual labor; and the prospect of gain has not been found, in the case of such men as Robertson, or Gibbon, or Sir Walter Scott, either to extinguish the ardor of genius or abate the love of true glory.

LECTURE XXXVII.

OF TITLE TO PERSONAL PROPERTY BY TRANSFER BY ACT OF LAW.

Goods and chattels may change owners by act of law, in the cases of forfeiture, succession, marriage, judgment, insolvency, and intestacy. Those of succession and marriage have already been considered, and I shall now confine myself to the other means of acquiring title to chattels by act of law.

I. *By forfeiture.*

The title of government to goods by forfeiture, as a punishment for crimes, is confined, in New York, to the case of treason. The right, so far as it exists in this country, depends, probably, upon local statute law; and the tendency of public opinion has been to condemn forfeiture of property, at least in cases of felony, as being an unnecessary and hard punishment of the felon's posterity. Every person convicted of any manner of treason, under the laws of New York, forfeits his goods and chattels, and also his lands and tenements, during his lifetime; but the rights of all third persons, existing at the time of the commission of the treason, are saved. (*a*) Forfeiture of *386 property for crimes in any other case is expressly *abolished. (*b*) And even the attainder of treason does not extend to corrupt the blood of the offender, or to forfeit the dower of his wife. (*c*) The forfeiture in treason as to real estate

(*a*) N. Y. Revised Statutes, vol. i. p. 284, secs. 1, 2; vol. ii. p. 656, sec. 3. It is made the duty of the attorney-general to recover, by ejectment, real estates escheated to the people of the state of New York, or forfeited upon any conviction or outlawry for treason. Ibid. vol. i. pp. 283, 284. There is a similar statute provision in some of the other states.

(*b*) N. Y. Revised Statutes, vol. ii. p. 701, sec. 22.

(*c*) Ibid. vol. i. p. 742, sec. 16. Ibid. vol. i. p. 282. Ibid. vol. ii. p. 701, sec. 22. Ibid. vol. ii. p. 98, sec. 81.

related at common law back to the time of the treason committed; and, therefore, all alienations and incumbrances by the traitor, between the time of the offence and the conviction, were avoided; but the forfeiture of his goods and chattels related only to the time of the conviction, and all sales made in good faith and without fraud, before conviction, were good. (*a*)

Forfeiture of estate and corruption of blood, under the laws of the United States, and including cases of treason, are abolished. (*b*) Forfeiture of property, in cases of treason and felony, was a part of the common law, and must exist at this day in the jurisprudence of those states where it has not been abolished by their constitutions or by statute. (*c*) Several of the state constitutions have provided that no attainder of treason or felony shall work corruption of blood or forfeiture of estate, except during the life of the offender, (*d*) and some of them have taken away the power of forfeiture absolutely, without any such exception. (*e*) There are other state constitutions which impliedly admit the existence or propriety of the power of forfeiture, by taking away the right of forfeiture expressly in cases of suicide, and in the case of deodand, and preserving silence as to other cases; and in one instance (*f*) forfeiture of property is limited to the cases of treason and murder.

The English law has felt the beneficial influence of the progress of public opinion on this subject. The statute of 7 Anne, ch. 22, abolished, after the death of the Pretender, forfeiture for treason beyond the life of the offender; and *though the statute of 17 Geo. II. ch. 29, postponed the *387 operation of that provision, it was only until the death of the Pretender and his sons. And, by a bill introduced into Parliament by Sir Samuel Romilly, in 1814, and afterwards,

(*a*) Hawk. P. C. b. 2, ch. 49, sec. 30. 4 Blacks. Com. 381, 387. In the case of custom-house seizures for forfeiture of goods, the title of the government relates back to the time of the forfeiture. Ocean Ins. Co. *v.* Polleys, 13 Peters's Rep. 157.

(*b*) Laws of U. S. April 20th, 1790, ch. 9, sec. 24.

(*c*) In Massachusetts, as lands under their charter were held as of the manor of East Greenwich, the customs of gavel-kind were so far applied to the tenure as not to subject the lands to forfeiture for treason or felony. Hutch. Hist. vol. i. p. 447.

(*d*) Constitutions of Pennsylvania, Delaware, and Kentucky.

(*e*) Constitutions of Connecticut, Ohio, Tennessee, Indiana, Illinois, and Missouri.

(*f*) Constitution of Maryland.

under the modifications, passed into a law, corruption of blood, in cases of felony, except murder, was abolished. (*a*) The ingenious and spirited defence of the law of forfeiture, which was made by Sir Charles Yorke in the middle of the last century, (*b*) and in which he insisted that it stood on "just, social, and comprehensive principles, and was a necessary safeguard to the state, whether built on maxims of monarchy or freedom," has failed to convince the judgment or satisfy the humanity of the present age.

Government succeeds, as of course, to the personal and real estate of the intestate, when he has no heirs or next of kin to appear and claim it; but this is for the sake of order and good policy; and the succession in such cases is usually regulated by statute. (*c*)

II. *By judgment.*[1]

On a recovery by law in an action of trespass or trover of the value of a specific chattel, of which the possession has been acquired by tort, the title of the goods is altered by the recovery, and is transferred to the defendant; and the damages recovered are the price of the chattel so transferred by operation of law — *solutio pretii emptionis loco habetur.* The books either do not agree, or do not speak with precision on the point, whether the transfer takes place in contemplation of law upon the final judgment merely, or whether the amount of the judgment must first be actually paid or recovered by execution. In *Brown* v. *Wootton,* (*d*) *Fenner, J., said that in case of trespass, after the judgment given, the property

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(*a*) This was the statute of 54 Geo. III. ch. 145, which declared that no attainder for felony, murder excepted, should extend to disinherit the heirs or affect the right and title to the lands beyond the life of the offender. The statute of 3 and 4 Wm. IV. ch. 106, went further, and declared, that after the death of any person attainted, his descendants may inherit.

(*b*) Considerations on the Law of Forfeiture for High Treason.

(*c*) Dane's Abr. vol. iv. p. 538. Statutes of Connecticut, 1821, p. 198.

(*d*) Cro. J. 73.

[1] By the common law, a decree of the Court of Chancery did not transfer the legal title to land; but the court compelled the holder to convey the title pursuant to the decree. Such is still the effect of decrees, unless express statute has made the decree a legal transfer. In the matter of Van Wyck, 1 Barb. Ch. R. 566.

of the goods is changed, so that the former proprietor may not seize them again: and in *Adams* v. *Broughton*, (*a*) the K. B. declared that the property in the goods was entirely altered by the judgment obtained in trover. and the damages recovered were the price thereof. On the other hand, the rule is stated in Jenkins, (*b*) to be, that if one person recovers damages in trespass against another for taking his chattel, "by the recovery *and execution* done thereon," the property of the chattel is vested in the trespasser; and in the Touchstone (*c*) it is said, that if one recovers damages of a trespasser for taking his goods, the law gives him the property of the goods, "because he hath *paid for them.*" The rule in the civil law was, that when the wrongful possessor of movable property, who was not in a condition to restore it, had been condemned in damages, and had paid the same to the original proprietor, he became possessed of the title. The Roman and the French law speak of the change of rights as depending upon the payment of the estimated value. (*d*) So, also, in the modern case of *Drake* v. *Mitchell*, (*e*) Lord Ellenborough observed, that he always understood the principle of *transit in rem judicatam* to relate only to the particular cause of action in which the judgment was recovered, operating as a change of remedy, from its being of a higher nature than before; and that a judgment recovered in any form of action was still but a security for the original cause of action, until it was made productive in satisfaction to the party; and until then it would not operate to change any other collateral concurrent remedy which the party might * have. This is * 389 the more reasonable, if not the most authoritative conclusion on the question. (*f*)

(*a*) Andrew's Rep. 18. S. C. Str. 1078. (*b*) Jenk. Cent., Case 88, p. 189.

(*c*) Shep. Touch. tit. Gift.

(*d*) Dig. 6, 1, 35, 63. Pothier, Traité Droit de Propriété, No. 364. Merlin, Répertoire, vol. xiii. p. 34. Verbo. Pret.

(*e*) 3 East's Rep. 251.

(*f*) It remains a vexed question, by reason of loose or contradictory decisions in the books, whether a recovery by judgment in trespass or trover of the value of a chattel, does, by implication of law, *per se*, amount to a transfer of title to the defendant, or those who held under him, without payment or satisfaction of the judgment. In Smith *v.* Gibson, Cas. temp. Hard. 319, Lord Hardwicke said, that if the plaintiff recover damages for a thing, it is as a sale of a thing to the defendant which vests the

III. *By insolvency.*

It has been found necessary, in governments which authorize

property in him, and it is a bar to another action for the same thing. The plea in that case, to which the remark applied, was, that the damages given were *recorded in full satisfaction* of the damages sustained. In Moor *v.* Watts, 1 Lord Raym. 614, Lord Holt is made to say, that in replevin for cattle with *adhunc detinet*, damages given for the cattle will change the property. In the same case, as reported in 12 Mod. Rep. 428, he says, that in replevin for cattle with an *adhunc detinet*, and judgment for damages against the defendant, *by payment thereof*, the property of the distress vests in him. The American cases leave the law in equal uncertainty. In Curtis *v.* Groat, 6 Johns. Rep. 168, Osterhout *v.* Roberts, 8 Cowen's Rep. 43, Prentiss, J., in Sanderson *v.* Caldwell, 2 Aik. Rep. 203, Jones *v.* M'Neil, 2 Bailey's S C. Rep. 466, and Walker *v.* Farnsworth, Supreme Court of Tennessee, September, 1844, the doctrine is, that a recovery in damages of the value of a specific chattel does not, of itself, work a change of title, and transfer it to the defendant or his vendee, without satisfaction of the value found. This is the better doctrine; property does not pass by the judgment, but only by satisfaction of the judgment; so it is adjudged in Sharp *v.* Gray, 5 B Monroe, 4, that a judgment in detinue without satisfaction does not change the right of property. On the other hand, it is declared in Murrell *v.* Johnson, 1 Hen. & Munf. 452, Floyd *v.* Browne, 1 Rawle's Rep. 121, March *v.* Pier, 4 Idem. 273, Fox *v.* The Northern Liberties, 3 Watts & Serg. 107, Rogers, J, in Merrick Estate, 5 Watts & Serg. 17, Rogers *v.* Moore, 1 Rice's S. C. Rep. 60, and Carlisle *v.* Burley, 3 Greenleaf's Rep. 250, that a recovery of the value of a chattel by judgment divests the plaintiff of his title, and transfers it to the defendant, though the judgment be not satisfied, and bars him from asserting his title in any other action. In the Am. Law Mag. for April. 1844, there is an able discussion of the authorities and of the legal principles applicable to the question of the "transfer of personal property by judgment;" and in King *v.* Hoare, 13 Mees. & W. 494, it was adjudged, after a full discussion, that a judgment against one or two *joint* debtors is a bar against the other. It is otherwise where the debt is *joint and several.* The right given by the judgment without satisfaction merges the inferior remedy by action for the same debt, and the same result follows in tort. The same principle of law was declared in Ward *v.* Johnson, 13 Mass. R. 148, Smith *v.* Black, 9 Serg. & Rawle, R. 142, and Robertson *v.* Smith, 18 Johnson, 476. If one defendant in *a joint* contract and action can plead a sufficient bar as it respects himself, it will avail the other defendant; whereas, in the case of *a joint and several* contract, an unsatisfied judgment against one of the debtors is no bar to a subsequent action against the other. The case in the Supreme Court of the United States, in Sheehy *v.* Mandeville, 6 Cranch, R. 253, may be considered as having been completely overruled by our American authorities, long before the same decisions against it were made in the English Court of Exchequer. See Trafton *v.* United States, 3 Story's R. 646, for confirmation of the case of King *v.* Hoare.[1]

[1] Payment of interest by one of two joint makers of a note, before the statute of limitations has attached, continues the liability of each maker for six years from the payment. Reid *v.* McNaughton, 15 Barb. R. 168. *Contra*, Dunham *v.* Dodge, 10 Barb. R. 566. The acceptance by a creditor of the separate liability of one of several joint debtors is a sufficient consideration for a discharge of the others. Lyth *v.* Ault, 11 Eng. L. & Eq. 580. Caldwell *v.* Sigourney, 19 Conn. R. 37.

personal arrest and imprisonment for debt, to interpose and provide relief for the debtor in cases of inevitable misfortune; and this has been particularly the case in respect to insolvent merchants, who are obliged, by the habits, the pursuits, and the enterprising nature of trade, to give and receive credit, and encounter extraordinary hazards. Bankrupt and insolvent laws are intended to secure the application of the effects of the debtor to the payment of his debts, and then to relieve him from the weight of them. (*a*)

(1.) The constitution of the United States gave to Congress the power to establish uniform laws on the subject of bankruptcies throughout the United States. Bankruptcy in the English law has, by long and settled usage, received an appropriate meaning, and has been considered to be applicable only to unfortunate *traders*, or persons who get their livelihood by buying and selling for gain, and who do certain acts which afford evidence of an intention to avoid payment of their debts. (*b*)

(*a*) Insolvency means the condition of a person unable to pay his debts as they fall due, or in the usual course of trade and business. Deeds of compositions with creditors frequently avoid the necessity of a resort to discharges under bankrupt and insolvent laws. By these contracts, the creditors agree to accept a composition for their debts, on a part of the whole, and discharge the debtor. They have been termed private bankruptcies, without the advantages attending a regular commission; but if they are made fairly, and in good faith, and strictly conducted, they are valid in equity and beneficial to all parties. See the case of *Ex parte* Vere, and note. Ibid. 19 Vesey, 93. A creditor who does not agree with other creditors to a composition is not bound; but if he does consent, an agreement in derogation of the composition is fraudulent in respect to the other creditors, and void. The composition binds him to good faith. Greenwood *v.* Lidbetter, 12 Price's Exch. Rep. 183. Acker *v.* Phœnix, 4 Paige's Rep. 305. Jackman *v.* Mitchell, 13 Vesey, 581. *Ex parte* Sadler & Jackson, 15 Idem. 52. Leicester *v.* Rose, 4 East's Rep. 372. Browne & Stackpole, 9 N. H. Rep. 488. See a collection of all the modern cases on the subject, Petersdorff's Abr. vol. vi. tit. Comp. with Creditors, and in the notes added to the case of Cumber *v.* Wane, 1 Str. 426, in Smith's Selections of Leading Cases, p. 146, in the Law Library, N. S. vol. (xix.) xxvii.[1]

(*b*) 2 Blacks. Com. 285, 471. The Bankrupt Act of 6 Geo. IV. enlarged the description of persons subject to the bankrupt laws, and extended it to persons following

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[1] Every composition deed, it is said, in Breck *v.* Cole, 4 Sandf. S. C. R. 79, is in its spirit an agreement between the creditors as well as with the debtor. Any agreement giving advantage secretly to one creditor, is void as to the other creditors, and void as to the debtor himself, as obtained by moral *duress* and fraud. Hall *v.* Dyson, 10 E. L. & Eq. 424.

*390 *The general principle that pervades the English bankrupt system is equality among creditors who have not previously and duly procured some legal lien upon the estate of the bankrupt; and in order to attain and preserve that equality, the bankrupt's estate, as soon as an act of bankruptcy is committed, becomes a common fund for the payment of his debts, and he loses the character and power of a proprietor over it (a). He can no longer give any preferences among his creditors,[1] and the race of diligence between them to gain advantages is wholly interrupted; and if the bankrupt acts fairly and candidly, he will ultimately be relieved from imprisonment, and even from the obligation of his debts. In this respect there is a marked difference in general between the bankrupt and insolvent laws, for while the bankrupt may be discharged from his debts, the insolvent debtor is usually only discharged from imprisonment. But the line of partition between bankrupt and insolvent laws is not so distinctly marked as to enable any person to say, with

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the vocation of "victuallers, keepers of inns, taverns, hotels, or coffee-houses." A bankrupt means a broken up and ruined trader, according to the original signification of the term; a person whose table or counter of business is broken up, *bancus ruptus*. Story, J., in Everett *v.* Stone, 3 Story's Rep. 453.

(*a*) The English law carries the lien of the assignees of the bankrupt back to the time of the act of bankruptcy committed, so that the sheriff, who on *fi. fa.* seizes and sells the goods of the bankrupt before the commission issued, but after the act of bankruptcy committed, and without notice of the act of bankruptcy, becomes liable in trover to the assignees, inasmuch as the assignment has relation back to the act of bankruptcy, and vests the title to the property in the assignees from that time. Cooper *v.* Chitty, 1 Burr. Rep. 36. Balme *v.* Hutton, 1 Crompt. & Meeson, 262. S. C. 9 Bingham's Rep. 471. This last decision was made in the Exchequer Chamber, after a very able and learned discussion, and the rule was considered as settled, as it had been uniformly recognized and acted upon ever since the decision under Lord Mansfield.

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[1] As to what will constitute a giving of preference, and when an act is considered as done "in contemplation of bankruptcy," see M'Lean *v.* Lafayette Bank, 3 McLean's R. 587; Everett *v.* Stone, 3 Story's R. 446; Winsor *v.* Kendall, Id. 507; Ashby *v.* Steere, 2 Wood & M. Rep. 347; Hale *v.* Allnutt, 36 E. L. & Eq. 383; Utley *v.* Smith, 24 Conn. 290; Brouwer *v.* Harbeck, 5 Selden, (N. Y.) 589; McKenzie *v.* Garrison, 10 Rich. Law, (S. C.) 234.

An agreement by a creditor, who has received an unlawful preference, to surrender the property received, and to share pro rata with other creditors, made before commencement of insolvent proceedings, but not consummated until afterwards, does not purge the illegality. Blodgett *v.* Hildreth, 11 Cush. (Mass.) 311.

positive precision, what belongs exclusively to the one, and not to the other class of laws. It is difficult to discriminate with accuracy between bankrupt and insolvent laws; and therefore a bankrupt law may contain those regulations which are generally found in insolvent laws, and an insolvent law may contain those which are common to a bankrupt law. (*a*)[1] The legislature of the Union possesses the power of enacting bankrupt laws; and those of the states the power of enacting insolvent laws; and a state has likewise authority to pass a bankrupt law. (*b*) But no state bankrupt or insolvent law can be permitted to impair the obligation of contracts: and there must likewise be no Act of Congress in existence on the subject, conflicting with such law. (*c*) There is this further limitation, also, on the power of the separate states to pass bankrupt or insolvent laws, that they cannot, in the exercise of that power, act upon the rights of citizens of other states. (*d*) At

(*a*) Marshall, Ch. J, in Sturges *v.* Crowninshield, 4 Wheaton, 195.

(*b*) Insolvent laws, quite coextensive with the English bankrupt system in their operations and objects, have not been unfrequent in our colonial and state legislation, and no distinction was ever attempted to be made in the same, between bankruptcies and insolvencies. Story's Com. on Const. U. S. vol. iii. sec. 1106.

(*c*) Sturges *v.* Crowninshield, 4 Wheaton, 122. See, also, Gibbons *v.* Ogden, 9 Id. 197, 227, 235, 238; Houston *v.* Moore, 5 Id. 34, 49, 52, 54. These cases have settled the doctrine that the power in Congress to pass bankrupt laws is not exclusive, but the same power may be exercised by the states respectively, under the restrictions which are mentioned in the text. Judge Story says that Judge Washington maintained at all times an opposite opinion in favor of the power being exclusive in Congress; and he says that his opinion was known to have been adopted *by at least one other of the judges.* Story's Com. on the Const. vol. i. p. 428, note. Since the passage of the Bankrupt Act of the United States, in 1841, it has been decided, that a state insolvent Act may exist in full vigor, so far as it does not impede the operation of the bankrupt law. They do not come in conflict until the bankrupt law attaches upon the person and property of the bankrupt, and that is not until it is judicially ascertained that the petitioner is a person entitled to the benefits of the Act, by being declared a bankrupt by a decree of the court. *Ex parte* Ziegenfuss, 2 Iredell's N. C. Rep. 463. This case has been overruled, and I think very justly, in Griswold *v.* Pratt, 9 Metcalf's Rep. 16, where it was adjudged, that while a bankrupt law of the U. S. is in force, it destroys the validity of the operation of a state insolvent law, even though no proceedings be had under it at the time. The one system supersedes the other, for they would, in their proceedings, be repugnant to each other.

(*d*) Ogden *v.* Saunders, 12 Wheaton, 213.

[1] See Towne *v.* Smith, 1 Wood. & M. R. 115.

*391 present, there is not any bankrupt *system in existence under the government of the United States, and the several states are left free to institute their own bankrupt systems, subject to the limitations which have been mentioned. (*a*) The objection to a national bankrupt system con-

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(*a*) Congress passed an Act, April 4th, 1800, establishing a uniform system of bankruptcy throughout the United States. The Act was limited to five years, and from thence to the end of the next session of Congress; but the Act was repealed within that period, by the Act of December 19th, 1803, and the system was not renewed until 1841.

An effort was made in Congress, in the spring of 1840, to reëstablish a uniform system of bankruptcy, and the subject received an able and thorough investigation and discussion, but Congress could not agree on the principles of the system, and the effort failed. The bill which was reported and debated, enabled debtors of every description and class to take advantage of it at their option, and to be thereby completely discharged from their debts without the coöperation or assent of any creditor. Some of the members of Congress were opposed to any bankrupt system on the part of the United States, as it would enlarge the powers of the federal courts to a great extent, and lead to the creation of a crowd of officers and agents to administer it, and probably to much abuse and corruption. They preferred that the administration of bankrupt and insolvent laws should remain with the state governments. The compulsory process of bankruptcy, at the instance of the creditor, was urged by others as essential to the system, and that the provision should even be extended so as to include corporations instituted under state authority for banking, manufacturing, commercial, insurance, and trading purposes. But this last provision was objected to as most inexpedient, it not absolutely beyond the purview of the constitution. It was apprehended that such a power would lead to infinite abuse, and become expensive and extremely oppressive, and would tend to break up all the moneyed and business institutions created under state laws, or render the power of control of them most formidable and dangerous. The advocates for the bill contended that bankruptcy was a general term, and meant failure, and was equally applicable to all persons of broken fortunes; that the constitution was not intended to be bound to the English system of bankruptcy, and that Congress had the same power as the British Parliament to extend the application of it, and that it might and ought to extend to all classes of debtors who had become disabled and overwhelmed in the peculiar and severe calamity of the times; that though the assent of at least a majority of the creditors to the debtor's discharge was deemed by the New York board of trade to be essential to the stability of credit, the rights of creditors, the claims of justice, and the reputation of the country, it was insisted upon, as a compensation for this omission, that the operation of the Act would be useful to creditors, though the debtor should be enabled to obtain the benefit of a discharge without their consent or action, for it would put an end to the pernicious practice of giving preference among creditors, and enable the assets of insolvents to be distributed equally among the creditors.

The bill was strongly opposed by other members of Congress on constitutional grounds reaching to the fundamental principles of the bill. It was contended that the power given to Congress to establish uniform laws on the subject of bankruptcy, was

sists in the difficulty of defining, to the satisfaction of every part of the country, the precise class of debtors who can, con-

one incidental to the regulation of commerce, and applicable only to merchants and traders, or persons essentially engaged, in various ways and modes, in trade and commerce. That the term bankruptcy was adopted in the constitution as it stood defined and settled in the English law, where it had a clear and definite meaning; that it was universally taken and understood in that sense, contemporaneously with the adoption of the constitution, and it received that practical construction, and none other, in the Bankrupt Act of 1800; that the English bankrupt laws discharge the bankrupt from his debts and contracts, and were coercive on the debtor, and put in action, at the instance of creditors, and at their instance only; that the proceeding was for the equal benefit of all the creditors, and its justice and policy, as applicable to that class of debtors, were founded on the peculiarly hazardous business of trade and commerce, and the necessity of large credits to sustain an extensive foreign and domestic trade; that there was a marked difference between bankrupt and insolvent laws, in the jurisprudence of England and of America, and which had been recognized by the Supreme Court of the United States; (*vide supra*, p. 390); that insolvent laws were left to the cognizance of the individual states, each of which had its own system of insolvent laws, and which the bill before the house would entirely supersede, for it was in fact a general and sweeping insolvent law, and it was apprehended that its operation on credit, and the popular sense of the legal and moral obligations of contracts, would be disastrous.

The effort to establish a national bankrupt law was renewed at the next session of Congress, and was successful. An Act of Congress "to establish a uniform system of bankruptcy throughout the United States," was passed the 19th of August, 1841. It was declared to apply to all persons whatsoever residing within the United States, who owed debts, not created in consequence of a defalcation as a public officer, or as executor, administrator, guardian, or trustee, or while acting in any other fiduciary character,[1] and who should by petition on oath, setting forth a list of their creditors and an inventory of their property, apply to the District Court for the benefit of the Act, and declare themselves unable to meet their debts and engagements. The Act was further declared to apply to all persons being merchants, or using the trade of merchandise, and all retailers of merchandise, and all bankers, factors, brokers, underwriters, or marine insurers, owing debts to the amount of $2,000, who should be liable to become bankrupts, upon petition of one or more of their creditors to the amount of $500, provided they had absconded, or fraudulently procured themselves or their property to be attached or taken in execution, or had fraudulently removed, or concealed, or assigned, or sold their property. The bankrupt, when duly discharged, was declared to be free from all his debts.[2] The first provision is a sweeping insol-

[1] As to what constitutes the *fiduciary character* contemplated by the Act, see Pankey *v.* Nolan, 6 Humph. R. 154; Bissell *v.* Couchaine, 15 Ohio R. 58.

[2] The discharge of one surety does not discharge him from a liability to contribute for moneys subsequently paid for the principal by the other. Goss *v.* Gibson, 8 Humph. (Tenn.) R. 197. Wallis *v.* Swinburne, 1 Wells. H. & Gor. R. 203. See further, as to the rights of a surety, Mace *v.* Wells, 7 How. U. S. 272.

A discharge in bankruptcy is no defence to an action for rent accruing after the decree,

sistently with the constitutional jurisdiction of Congress over the subject, be made the objects of it; and in the great expense, delay, and litigation which have been found to attend proceedings in bankruptcy; and in the still more grievous abuses and fraud which the system leads to, notwithstanding the vigilance and integrity of those to whom the administration of the law may be committed. To show the subtlety of the English distinctions on this subject, it may be here observed, that a farmer, a grazier, or drover, cannot, from their occupations, be bankrupts, for the statute of 5 Geo. II. ch. 30, exempted them; and yet if a farmer buys and sells apples, or potatoes or other produce of a farm, for gain, or manufactures brick for sale, and becomes a dealer in such articles, he becomes, like any other trader, subject to the English bankrupt laws. (*a*) So a farmer

vent law, and applies to all debtors, and upon their own voluntary application; the second is confined to merchants and traders, and the Act is put in operation only at the instance of the creditors. The numerous details of the statute, and the many questions which were raised, discussed, and decided in the District and Circuit Courts of the United States, in the execution of the Act, cannot be noticed in the limited space allowed to this note, nor would they be any longer interesting, since the entire statute was repealed by Congress on the 3d March, 1843. The provision in the Bankrupt Act which rendered it a general insolvent Act, and was the one almost exclusively in operation, gave occasion to serious doubts whether it was within the true construction and purview of the constitution, and it was that branch of the statute that brought the system, and I think justly, into general discredit and condemnation, and led to the repeal of the law. In the case of Kunzler *v.* Kohaus, and of Sackett *v.* Andross, 5 Hill's N. Y. Rep. 317, 327, the constitutionality and construction of the Bankrupt Act of Congress of 1841 were largely discussed, and it was held that the *voluntary* as well as the other branch of the Act was constitutional, and applied as well to debts created *before* as after its passage.[1] Mr. Justice Bronson, in a very elaborate opinion, dissented from both of those propositions. And Judge Wells, of the U. S. District Court of Missouri, in the case of Edward Klein, 2 N. Y. Legal Observer, 185, after a very full consideration of the subject, also decided that the provision in the Act of Congress of 1841, for the discharge of a *voluntary* debtor from his debts and future acquisitions, without payment or assent of his creditors, was unconstitutional.

(*a*) Mayo *v.* Archer, Str. Rep. 513. Wells *v.* Parker, 1 Term Rep 34.

though before the discharge. Prentiss *v.* Kingsley, 10 Barr's R. 120. See, also, Stinemets *v.* Ainslie, 4 Denio's R. 573. A covenant of warranty operating as an estoppel, is not discharged by a general discharge under the Bankrupt Act. Bush *v.* Cooper, 18 How. U. S. 82.

[1] The following cases are to a similar effect: Morse *v.* Hovey, 1 Barb. Ch. R. 404. Thompson *v.* Alger, 12 Met. R. 428. State Bank *v.* Wilborn, 1 Eng. (Ark.) R. 35. Loud *v.* Pierce, 25 Maine R. 233. Lalor *v.* Wattles, 3 Gilman's R. 225.

who becomes a dealer in horses, for the sake of gain, or an innkeeper, who sells liquor out of his house to all customers who apply for it, will become an object of the bankrupt laws. The question turns upon the person's common or ordinary mode of dealing in the case, and whether there be any trading carried on ultra his particular calling, as farmer, grazier, or drover. (*a*) If a man exercises a manufacture from the produce of his own land, as a necessary or usual mode of enjoying that produce, he is not a trader; but if the produce of his farm be merely the raw material of a manufacture, and that manufacture not the necessary mode of enjoying his land, he is a trader. (*b*) And if a person use the profession of a scrivener, receiving other men's money or estates into his trust or custody, he is a trader, liable to the Bankrupt Act of 6 Geo. IV. c. 16. And with respect to the * infirmities of the English bankrupt system, which *392 has been the growth of upwards of two centuries, and been constantly under the review of Parliament, and matured by the talents and experience of a succession of distinguished men in chancery, we may refer to the observations of Lord Eldon, when he succeeded to the great seal, in 1801, who took the earliest opportunity to express his strong indignation at the frauds committed under cover of that system. He remarked, (*c*) that the "abuse of the bankrupt law was a disgrace to the country, and that it would be better at once to repeal all the statutes, than to suffer them to be applied to such purposes. There was no mercy to the estate. Nothing was less thought of than the object of the commission. As they were frequently conducted

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(*a*) Patman *v.* Vaughan, 1 Term Rep. 572. Bartholomew *v.* Sherwood, Ibid. note. Bolton *v.* Sowerby, 11 East's Rep. 274. Wright *v.* Bird, 1 Price's Exch. Rep. 20.

(*b*) Wells *v.* Parker, 1 Term Rep. 34. A planter who gains by the raising of crops by slave labor, and who has a saw-mill and brick-yard as an appendage to a sugar plantation, in which he makes for sale planks and bricks, is not a *trader* within the bankrupt law of Louisiana of 1826. Foucher *v.* His Creditors, 7 La. Rep. 425. In Patten *v.* Browne, 7 Taunt. Rep. 409, this distinction was taken, that if a farmer buys an article, with the *direct* object of making a profit upon the resale of it, he is a trader within the bankrupt laws; but if purchase be made as *ancillary* to the more profitable occupation of the farm, and expenditure of the procedure of it, and mixing it with the produce for that purpose, he is not a trader.

(*c*) 6 Vesey, 1.

in the country, they were little more than stock in trade for the commissioners, the assignees, and the solicitor." (a)

The respective states, as we have already seen, may pass bankrupt and insolvent laws. The power given to the United States to pass bankrupt laws is not exclusive. This is now established by judicial decisions; (b) and the exercise of the power residing in the states to pass bankrupt and insolvent laws does not impair, in the sense of the constitution, the obligation of contracts made posterior to the law. (c) The discharge under a state law is no bar to a suit on a contract existing when the law was passed, nor to an action by a citizen of another state, in the courts of the United States, *393 *or of any other state than that where the discharge was obtained. The discharge under a state law will not discharge a debt due to a citizen of another state who does not make himself a party to a proceeding under the law. (d) It will only operate upon contracts made within the state between its own citizens or suitors, subject to state power.[1] The doc-

(a) The English bankrupt system has been much improved by the statute of Geo. IV. ch. 16, which was the consolidation of all the previous statutes of bankruptcy, and by the Act of 1 & 2 William IV. ch. 56. The improvements have, of course, given more simplicity and uniformity to the code, and rendered it, in several respects, more remedial. The system has been thoroughly illustrated by the treatises of Eden, Archbold, and Warrand. On the other hand, the bankrupt law of Scotland is said to have attained great excellence, by a slow and gradual course of improvement, suggested in the course of practice, and with the aid of combined wisdom of lawyers of profound knowledge, and merchants of large views and great experience. Bell's Com. vol. i. p. 17. The French law of bankruptcy, in the commercial code, is said, by M. Dupin, to be complained of equally by bankrupts and by their creditors.

(b) See *supra*, p. 390, note c.

(c) The parties to a contract are supposed to make the contract in reference to the *existing* laws in relation to the subject-matter, and the law itself becomes a part of the contract. Belcher ads. Commissioners of the Orphan House, 2 M'Cord's S. C. Rep. 23.

(d) Sturges *v.* Crowninshield, 4 Wheaton, 122. Ogden *v.* Saunders, 12 Id. 213. Braynard *v.* Marshall, 8 Pick. Rep. 194. Clay *v.* Smith, 3 Peters's S. C. Rep. 411. 3 Story's Com. Const. U. S. pp. 252–256. Norton *v.* Cook, 9 Conn. Rep. 314. Pugh *v.* Bussel, 2 Blackf. Ind. Rep. 394. Woodhull *v.* Wagner, Baldw. C. C. U. S. Rep. 296. Browne *v.* Stackpole, 9 N. H. 478. See, also, *supra*, vol. i. p. 422.

1 Cook *v.* Moffat, 5 How. U. S. 295. Larrabee *v.* Talbot, 5 Gill, 426. Woodbridge *v.*

trine of the Supreme Court of the United States in *Ogden* v. *Saunders*, is, that a discharge under the bankrupt law of one

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Allen, 12 Met. R. 470. Stone *v.* Tibbetts, 26 Maine R. 110. Towne *v.* Smith, 1 Wood. & M. R. 115. Long *v.* Hammond, 40 Maine, 204.

The doctrine of the Supreme Court of Massachusetts seems to be that if the discharge is given in the state where the contract is to be performed, the creditor is bound by it, whether he be a citizen of the same or of another state. May *v.* Breed, 7 Cush. 15. Scribner *v.* Fisher, 2 Gray, 43. In this last case the defendant in Massachusetts owed the plaintiff in New York, on a note made and payable in Massachusetts, and the suit on the note was barred by the defendant's discharge under the Massachusetts law. In Marsh *v.* Putnam, 3 Gray, 551, the same court hold that a certificate of discharge under the laws of Massachusetts is a bar to an action on a contract between citizens of that state, though made and to be performed in another state. In this case the express provision of the *lex fori* excluded considerations of comity, and the question was whether the law of the state conflicted with the constitution of the United States, as expounded by the Supreme Court. It was said that the doctrine of that court had been generally too broadly stated; that no cases similar in facts to Scribner *v.* Fisher, and Marsh *v.* Putnam, had ever come before it; and that though the language of the decisions and of the commentators would conflict with those cases, yet their reasoning would not. In New York and Maryland, cases similar to Scribner *v.* Fisher, were decided the other way at nearly the same time. Donnelly *v.* Corbett, 3 Seld. 500. Poe *v.* Duck, 5 Md. 1. The following statement of the precise points decided by the Supreme Court of the U. S. on the effect of state insolvent laws is taken substantially from the opinion of the court in Marsh *v.* Putnam. The power of Congress to pass a bankrupt law is not exclusive. Sturges *v.* Crowninshield, 4 Wheat. 122, and the exercise of that power by the states as to future contracts, does not impair their obligation. Ogden *v.* Saunders, 12 Wheat. 213. A contract made and to be performed in one state cannot, as against a citizen thereof, be discharged under the insolvent law of another state. McMillan *v.* McNeil, 4 Wheat. 209. Boyle *v.* Zacharie, 6 Pet. 635. Cook *v.* Moffatt, 5 How. 309. A discharge under the laws of a state where the contract was made, but not to be performed, is no bar to a suit, by a creditor, a citizen of another state at the time of the contract and discharge, whether brought in the Circuit Court of the United States, (Ogden *v.* Saunders,) or in the courts of another state than that of the origin of the contract. Shaw *v.* Robins, 12 Wheat. 369. A creditor who voluntarily makes himself a party to proceedings under the insolvent laws of another state, is bound by the result. Clay *v.* Smith, 3 Pet. 411.

If a bill be drawn in one state by a citizen, and in favor of a resident of the same, upon a person residing in another state; or if a note be made in one state, and indorsed to a citizen of another state, a discharge of the acceptor in the former case, or of the maker and indorser in the latter, under the insolvent laws of their own states, will be no bar to an action by the payee of the bill, or by the indorser of the note. Fiske *v.* Foster, 10 Met. R. 597. Savoye *v.* Marsh, Id. 594. See, also, Towne *v.* Smith, *supra.* And Whitney *v.* Whiting, 35 N. H. 457; Anderson *v.* Wheeler, 25 Conn. 603; Burrall *v.* Rice, 5 Gray, (Mass.) 539. But see Peck *v.* Hibbard, 26 Vt. 698.

If the contract be made between citizens of the same state, where, also, it was intended to be executed, either party, by removing into another state, can avoid the effects of a discharge of the other, under the insolvent laws of the state where the contract was made. Brigham *v.* Henderson, 1 Cush. (Mass.) R. 430. Id. 531, *note.* The mere intention of such removal before making the contract is of no importance. See, also, Stevens *v.* Norris, 10 Fost. 466. In Beal *v.* Burchstead, 10 Cush. 523, it was held that if the maker of a note moves into the state where it was made and payable, after its maturity and before

country does not affect contracts made or to be executed in another. The municipal law of the state is the law of the contract made and to be executed within the state, and travels with it wherever the parties to it may be found, unless it refers to the law of some other country, or be immoral, or contrary to the policy of the country where it is sought to be enforced. This was deemed to be a principle of universal law; and therefore the discharge of the contract, or of the party, by the bankrupt law of the country where the contract was made, is a discharge everywhere. (a) [1] There is not any bankrupt law, technically so called, existing in New York; but there is a permanent insol-

(a) Ogden v. Saunders, 12 Wheaton, 213. See, also, Sturges v. Crowninshield, 4 Idem. 122; M'Millan v. M'Neill, Ibid. 209; Le Roy v. Crowninshield, 2 Mason's Rep. 161, 162; Pugh v. Bussel, 2 Blackf. Ind Rep. 394. And see Comm. vol. i. pp. 419-422; Lord Stair's Institutions, vol. i. note a, p. 4, by I. S. More, the editor of the edition of 1832. This edition of that authoritative work of Lord Stair is rendered very valuable by the notes and illustrations of the learned editor. It is equally well established that the discharge of a contract by the law of a place where the contract was not made, or to be performed, will not be a discharge in any other country. In Phillips v. Allan, 8 Barnew. & Cress. 477, the discharge of an insolvent debtor by a Scotch court was held to be no defence to an action brought in England, by an English subject, for a debt contracted in England; but the rule would have been different if the creditor had come in for his dividend under the Scotch law, or the debt had been contracted in Scotland. The same rule was declared in Van Raugh v. Van Arsdale, 3 Caines's Rep. 154, and it has repeatedly been recognized in England and Scotland, as well as in this country. See Doug. Rep. 170; 1 H. Blacks. Rep. 693; 2 Ibid 553; 1 East's Rep. 6, 11; 5 Idem. 124; Lewis v. Owen, 4 Barnew. & Ald. 654; 2 Bell's Comm. 689-691; Woodhull v. Wagner, Baldwin's C. C. U. S. Rep. *296. Van Hook v. Whitlock, 26 Wendell, 43.

suit, his discharge obtained in that state bars an action on the note. See, however, Stat. of Mass. 1855, ch. 363.

Where a claim has been allowed, and debtor discharged, the creditor cannot afterwards impeach the discharge for fraud. Humphreys v. Scott, 31 Maine R. 192. When A. and B. were co-sureties, and B. was discharged in bankruptcy, and A. afterwards paid the amount of the bond, and sued for contribution, the discharge was no defence. Dole v. Warren, 32 Maine R. 94. A judgment reversed, after bankrupt's application, on a note, which might have been proved, is not barred. Pike v. McDonald, 32 Maine R. 418. Fisher v. Foss, 30 Maine R. 459.

There is no distinction between judgments *ex contractu* and judgments *ex delicto*; both are alike provable, and affected by the bankrupt law. *In re* Comstock, 22 Vermont R. 642.

An assignment, under the Massachusetts insolvent laws, is a transfer of moneys in the hands of the insolvent's attorney in New Hampshire. Hall v. Boardman, 14 N. H. 38.

[1] May v. Breed, 7 Cush. 15. Peck v. Hibbard, 26 Vt. 698. Long v. Hammond, 40 Me. 204.

vent law, enabling every debtor to be discharged from all his debts upon the terms and in the mode prescribed. The first general insolvent law of New York was passed in the year 1784, and alterations and amendments have from time to time been made, until the system attained all the consistency, provision, *and improvement that the nature of the subject *394 easily admits. (*a*)

Insolvent laws prevail throughout the Union, and constitute a system of an important and interesting character, and subject to diversified modifications, for the relief of the debtor. In the states of Maine, New Hampshire, Virginia, and Kentucky, they are confined to the relief of debtors charged in execution. In New Jersey, Delaware, Maryland, Tennessee, North and South Carolina, Georgia, Alabama, Mississippi, and Illinois, the insolvent laws extend to debtors in prison on mesne or final *process. In Massachusetts, New York, Connecticut, *395 Rhode Island, Pennsylvania, Ohio, Indiana, Missouri, and Louisiana, they are still more extensive, and reach the debtor whether in or out of prison. (*b*) The insolvent laws of

(*a*) With respect to the operation, value, and policy of the general system of insolvent law, it is observed, by the chancellor and judges of the Supreme Court of New York, in a *report* made by them to the legislature, January 22d, 1819, in pursuance of a concurrent resolution of the two houses, that, "judging from their former experience, and from observation in the course of their judicial duties, they were of opinion that the insolvent law was the source of a great deal of fraud and perjury. They were apprehensive that the evil was incurable, and arose principally from the infirmity inherent in every such system. A permanent Insolvent Act, made expressly for the relief of the debtor, and held up daily to his view and temptation, had a powerful tendency to render him heedless in the creation of debt, and careless as to payment. It induced him to place his hopes of relief rather in contrivances for his discharge, than in increased and severe exertion to perform his duty. It held out an easy and tempting mode of procuring an absolute release to the debtor from his debts; and the system had been, and still was, and probably ever must be, from the very nature of it, productive of incalculable abuse, fraud, and perjury, and greatly injurious to the public morals." See, on this subject, *supra*, vol. i. pp. 419–422. It was stated by the chief justice, in giving the opinion of the Supreme Court of the United States, in Sturges *v.* Crowninshield, 4 Wheaton, 122, that the insolvent laws of most of the states only discharge the person of the debtor, and leave his obligation to pay, out of his future acquisitions, in full force. The Insolvent Act of Maryland, of 1774, subjected to the former debts of the insolvent his future acquisitions by descent, gift, devise, bequest, or in a course of distribution. See 5 Harr. & Johns. 369.

(*b*) The statutes of Connecticut, Ohio, New Jersey, Pennsylvania, Illinois, North

New York enable the debtor, with the assent of two thirds in value of his creditors, and on the due disclosure and surrender of his property, to be discharged from all his debts contracted within the state, subsequently to the passing of the Insolvent Act, and due at the time of the assignment of his property, or contracted before that time, though payable afterwards. (*a*) The creditor who raises objections to the insolvent's discharge is entitled to have his allegations heard and determined by a jury. The insolvent is deprived of the benefit of a discharge, if,[1] knowing of his insolvency, or in contemplation of it, he has made any assignment, sale, or transfer, either absolute or condi-

Carolina, Tennessee, Georgia, and Missouri, *for the relief of insolvent debtors*, go only to discharge and exempt the person of the debtor from imprisonment. Statutes of Connecticut, 1838, p. 270. Statutes of Ohio, 1831. Statutes of Illinois, 1838. R. L. of Missouri, 1835, p. 328. Prince's Dig. of Statutes of Georgia, 2d edit. 1837, pp. 287, 293. Purdon's Dig. of Penn. Laws, 514. Elmer's Dig. 255. R. S. of New Jersey, 1847, tit. 9, ch. 1, 2, 3, 4, contains the whole system of provisions for the relief of debtors. North Carolina R. S. vol. i. 320. Statute Laws of Tennessee, p. 390. This is understood to be the limitation of insolvent laws in the greater number of the states. See *supra*, vol. i. p. 420. The new insolvent law of Massachusetts was passed in 1838, granting a complete discharge to debtors, whether in or out of prison, who comply with its provisions. The application for relief may be made by the debtor, or by certain of his creditors. It applies, of course, only to contracts made subsequent to its passage, and it resembles, in several of its features, the United States Bankrupt Act of 1800, and appears to be cautiously and wisely digested. See *infra*, p. 522, note. In Vermont, it is even a constitutional provision that the debtor shall not be continued in prison where there is not a strong presumption of fraud, after delivering up and assigning, *bonâ fide*, all his estate for the use of his creditors.

(*a*) Laws of N. Y. April 12th, 1813; February 28th, 1817; February 20th, 1823; and April 9th, 1833. Under the English Insolvent Debtor's Act, the discharged insolvent becomes liable to a surety who pays for him, after his discharge, an annuity due before. Abbot *v.* Bruere, 5 Bingham. N. C. 598. The insolvent laws of New York have been redigested and amended by the N. Y. Revised Statutes, vol. ii. pp. 15-23; but the Insolvent Act of April 12th, 1813, is declared to be *in force*, although consolidated in the Revised Statutes, vol. ii. pp. 15-23. See N. Y. R. S. vol. iii. p. 647. It appears, notwithstanding that *dictum* of the revisers, that the General Insolvent Act of 1813, and all the Acts amending the same, are in force *only in a very modified, if in any degree;* for under the General Repealing Act, N. Y. R. S. vol. iii. p. 133, sec. 115, and Ibid. p. 154, sec. 549, so much of the Insolvent Act of 1813, and the Acts amending it, as are not, and also that are, consolidated and reënacted in the Revised Statutes, are repealed! The system has been improved by more effectual provisions against fraud and abuse.

[1] At any time within two years before petitioning. Laws of 1854, c. 147.

tional, of any part of his estate, or has confessed judgment, or given any security with a view to give a preference for an antecedent debt to any creditor. (*a*)[1] The discharge applies to all debts founded upon contracts made within the state, or to be executed within it; and from debts due to persons resident within the state at the time of the publication of notice of the application for a discharge; or to persons not residing within the state, but who united in the petition for his discharge, or who accept a dividend from his estate. The discharge likewise applies to all liabilities incurred on contracts made after January 1st, 1830, by making or indorsing any promissory note or bill of exchange prior to his assignment, or incurred by reason of payments by any other party *to the paper, *396 made prior or subsequent to the assignment. The discharge likewise exonerates the insolvent from arrest and imprisonment thereafter, upon all debts existing prior to the assignment. Any fraud whatever, in relation to any proceedings under this statute, or its requisitions, renders the discharge null and void. (*b*)[2]

(*a*) N. Y. Revised Statutes, vol. ii. p. 20, sec 24. By the laws of Louisiana, an insolvent debtor cannot give preference. Hodge *v.* Morgan, 14 Martin's La. Rep. 61. By the Insolvent Act of Pennsylvania, of 16th June, 1836, the insolvent debtor is deprived of the benefit of the Act, if it appears that the insolvency arose from losses by gambling, or by the purchase of lottery tickets.

(*b*) N. Y. Revised Statutes, vol. ii. pp. 15–23. The fraud that goes to defeat the

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[1] The following decisions are under the *bankrupt* law of 1841; they may also have a bearing upon the effect of assignments under the *insolvent* laws. An assignment by a debtor in contemplation of bankruptcy, and to give preferences, is not absolutely void, but only so as to the assignee appointed under the Bankrupt Act. Seaman *v.* Stoughton, 3 Barb. Ch. R. 344.

In Beavis *v.* Garner, 12 Ala. R. 661, it was held, that the assignee of the bankrupt acquired no right to property of which the latter had made a fraudulent assignment, as the legal and equitable rights of the bankrupt, and those rights only, passed to the assignee.

If the assignment be made by the debtor, in consequence of the *act of the creditor*, it is not *voluntary* and invalid under the bankrupt laws. Van Casteel *v.* Booker, 2 Wels. H. & Gor. R. 691.

To show a payment by the debtor to be in contemplation of bankruptcy, something more than insolvency must be shown; and to be voluntary, the payment must originate with the debtor, the first step being taken by him, and not the creditor. *In re* Rowell, 21 Vermont R. 620. An assignment, giving preferences, is an act of bankruptcy. *Ex parte* Breneman, Crabbe, 456.

[2] See Lyon *v.* Marshall, 11 Barb. 241; Bell *v.* Leggett, 3 Seld. 176; Caryl *v.* Russell,

*397 *(2.) There are other provisions belonging to the insolvent system which are exclusively applicable to *im-*

relief under the insolvent laws of Pennsylvania, is the fraudulent concealment or conveyance of the estate, and not the fraudulent means by which the insolvent acquired possession of property, nor his unprincipled and extravagant waste of it. Case of Benney, 1 Ashmead's Rep. 261. In England, by the statutes of 1 Geo. IV., 3 Geo. IV., and 5 Geo. IV., the system of their insolvent laws was remodelled and greatly improved, and placed under the jurisdiction of the insolvent's court. The Insolvent Acts in England were consolidated by statute 7 Geo. IV. c. 57, and greatly amended by statute of 1 & 2 Vict. c. 110. They apply to persons in actual custody for debt, and the estate is vested in assignees, and the prisoner or his creditors may petition for an order to vest his estate in assignees. The main object of the last statute was to abolish imprisonment for debt *on mesne process*, except where fraud can be shown. It is, in many of its provisions, analogous to their bankrupt system. Voluntary preferences, by the insolvent, before or after imprisonment, are declared fraudulent. For debts fraudulently, improvidently, or maliciously contracted, and for damages arising upon torts, or acts *ex delicto*, the insolvent is liable to close imprisonment, and to be deprived of his discharge for a period not exceeding two years. The discharge only protects the person from imprisonment, and does not protect the future acquisitions and property of the debtor; and the Act enables the creditor to reach such property, whether in the funds, or existing in *choses in action*, or held in trust. In 1844, by 7 & 8 Vict. ch. 96, the English insolvent law was further meliorated and improved.[1] Imprisonment on execution was by statute abolished as to all debts not exceeding £20; and every debtor may be released from his debts upon surrender of his property, and without any imprisonment, be his debts of whatsoever amount, if he applies for the benefit of the Act while at liberty, and before execution. The assignment of the debtor's property includes all his estate, real and personal, at home and abroad, which is vested, or which may in future revert, descend, or come to him, by purchase, will, or otherwise, *before he shall have obtained the final order of discharge*, and also all debts due to him before such order, (wearing apparel, bedding, and implements not exceeding £20, excepted.) It was further declared, that after the final order to be given on the fair surrender of his property, *the future acquired property of the debtor was not to be taken*. But much complaint is made in England, by merchants and traders, against the operation of their bankrupt and insolvent laws, as being a fruitful source of fraud and abuse; and the true cause of the evil is said to be the abolition of arrest on mesne process. It is proposed to restore arrest on mesne process, guarding it carefully against abuse. A bill for that purpose was introduced into Parliament in 1846. It is

3 Kern. 194. By 12 & 13 Vict. c. 106, an arrangement may be entered into between an insolvent trader and his creditors, releasing him from his obligations, which shall be binding on all the creditors if signed by six sevenths in number or value. See Tetley *v.* Taylor, 8 E. L. & Eq. 370; McNaught *v.* Russell, 38 Idem. 520. Such an arrangement must dispose of the debtor's whole property without reservation. March *v.* Warwick, Ibid. 288. See some strictures on this provision in 15 Law Review, 49.

[1] In 1849 the law of bankruptcy was further amended and consolidated by the passage of the "Bankrupt Law Consolidation Act," 1849, 12 & 13 Vict. ch. 106. Chitty's Statutes, I. 203. And again amended by an Act of 17 & 18 Vict. ch. 119.

prisoned debtors, who may, in all cases free from fraud, be discharged from prison, and exempted from future arrest, without the hazard of any constitutional objection. Imprisonment is no part of the contract; and simply to release the prisoner does not impair the obligation, but leaves it in full force against his property. (*a*) * The English process of ex- *398

likewise proposed in the English discussions, and with much plausibility, if not reason, to abolish all process against goods and chattels, *except in bankruptcy*, and, as a substitute, to extend the bankrupt laws *to all classes of debtors*. See the London Law Review for Nov. 1846, vol. v. pp. 87–99, where the subject is considered at large. See vol. i. p. 422, as to the effect of the *cessio bonorum* in the civil law, and to which our insolvent laws are analogous. The learned commentator on the Partidas, (Greg. Lop. Gl. 3,) as cited in a note to the Institutes of the Civil Law of Spain, by Aso and Manuel, (b. 2, tit. 11, ch. 3, sec. 2, n. 49,) says that the future acquirements of the debtor would not be liable under the *cessio bonorum*, in the case of a *compulsory* cession, and in any case sufficient must be left for the debtor to live upon, *ne egeat*.

The laws of the individual states on the subject of bankrupt and insolvent debtors have hitherto been unstable and fluctuating; but they will probably be redigested, and become more stable, since the decisions of the Supreme Court of the United States have at last defined and fixed the line around the narrow enclosure of state jurisdiction. The commissioners appointed to revise the Civil Code of Pennsylvania, in their report, in January, 1835, pp. 52, 53, complain, in strong terms, of the existing state of things. Congress will not exert their constitutional power, and pass a bankrupt law, and no state can pass a bankrupt or insolvent law, except so far as regards their own citizens; and even then, only in relation to contracts made after the passage of the law. Foreign creditors, and creditors in other states, cannot be barred, while state creditors may be. The former preserve a perpetual lien on after-acquired property, except so far as the statutes of limitations interpose. State bankrupt and insolvent laws cannot be cherished under such inequalities. A difficulty exists in Massachusetts in respect to their attachment and insolvent laws. The process of attachment of the goods of the debtor on mesne process in that state, has existed since 1789, but their insolvent law dissolves the attachment, on the debtor being placed under the operation of that system, either by his voluntary act or by the act of his creditors, and which system aims at equal distribution among the creditors. Creditors suing in the federal courts are said to hold their attachments without having them dissolved, as they are in the state courts by the force of the provision in their insolvent system. The Law Reporter for March, 1846, vol. 8, p. 524 [1]

(*a*) Mason *v.* Haile, 12 Wheaton, 370. Marshall, Ch. J., 4 Wheaton, 201. Beers *v.* Haughton, 9 Peters's U. S. Rep. 329. The insolvent law of New York, in its application to imprisoned debtors, and as it existed prior to April, 1831, and April, 1840, may be seen in the N. Y. Revised Statutes, vol. ii. pp. 24, 39. But since imprisonment for debt in New York is now essentially abolished, a detail of the provisions of that system is no longer requisite.

[1] But, by Act of Congress, 1848, ch. 14, attachments in the courts of the United States are put upon the same footing as in the state courts.

ecution against the body, (and which we have generally followed in this country,) is intended to confine the debtor until he satisfies the debt. It is not a satisfaction strictly, but a means to procure it; though the language of the writ directs the defendant to be imprisoned to *satisfy* the plaintiff for his debt. (*a*)[1] In Scotland, the imprisonment on execution is avowedly to enforce payment and the discovery of funds; and it does not, like the English imprisonment, preclude an execution concurrently against the property. The Scottish law of imprisonment for debt is slow, cautious, and tolerant in its operation. (*b*) In this country, the progress of public opinion is rapidly tending to enlarge the remedies against property, and to abolish imprisonment for debt, except where the judgment is founded upon tort, misfeasance, or fraud. (*c*)

(*a*) Imprisonment on *ca. sa.* is no extinguishment of a lien of mortgage for the same debt. Davis *v.* Battine, 2 Russ. & Mylne, 76. It was said by the court, in Sir William Herbert's case, (3 Co. 11,) that at common law, and prior to the statutes of Hen. III., Ed. I., and III., the body of the debtor was not liable to execution for debt, except in cases of injuries accompanied with force, and for the king's debts. Sir William Blackstone, vol. iii. p. 281, has followed that opinion, and Sir Francis Palgrave, who has examined with great research the Anglo-Saxon institutions, says that no arrest of the person was allowed at common law, except when justified by a breach of the peace, or a contempt of the king's authority. The Anglo-Saxon or Teutonic law gave a *distringas* on neglect to obey a summons, by which the defendant's goods and chattels were seized as pledges to compel his submission to the judgment of the court. Rise and Progress of the English Commonwealth, vol. i. 181. But this position appears from Bracton, and from the history of legal process as detailed by Mr. Reeves, to be unfounded, if we consider the common law as it existed as early as the reign of Henry III. Sir F. Palgrave refers to the Anglo-Saxon common law. Bracton, 440, 441. 2 Reeve's Hist. Eng. Law, 439, 440.

(*b*) 1 Bell's Com. 8. 2 Idem. 537.

(*c*) In New York, by the Act of April 26, 1831, ch. 300, and which went into operation on March 1st, 1832, arrest and imprisonment on civil process at law, and on execution in equity founded upon contract, were abolished. The provision under that Act was not to apply to any person who should have been a non-resident of the state for a month preceding; (and even this exception was abolished by the Act of April 25th, 1840;) nor to proceedings as for contempt to enforce civil remedies; nor to actions for fines and penalties; nor to suits founded in torts, 7 Hill's Rep. 578; nor

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[1] Under the N. Y. Code of Procedure, an execution against the person directs the officer to commit the debtor to the jail of the county, "until he shall pay the judgment or be discharged according to law."

*The assignment of the insolvent passes all his interest, legal and equitable, existing at the time of executing *399

on promises to marry; nor for moneys collected by any public officer; nor for misconduct or neglect in office, or in any professional employment. The plaintiff, however, in any suit, or upon any judgment or decree, may apply to a judge for a warrant to arrest the defendant, upon affidavit stating a debt or demand due, to more than $50; and that the defendant is about to remove property out of the jurisdiction of the court, with intent to defraud his creditors; or that he has property or rights in action which he fraudulently conceals; or public or corporate stock, money, or evidences of debt, which he unjustly refuses to apply to the payment of the judgment or decree in favor of the plaintiff; or that he has assigned, or is about to assign or dispose of his property, with intent to defraud his creditors; or has fraudulently contracted the debt, or incurred the obligation respecting which the suit is brought. If the judge shall be satisfied, on due examination, of the truth of the charge, he is to commit the debtor to jail, unless he complies with certain prescribed conditions, or some one of them, and which are calculated for the security of the plaintiff's claim. Nor is any execution against the body to be issued on justices' judgments, except in cases essentially the same with those above stated. To be a resident of the state within the meaning of the Act of 1831, it was held that the person must have a fixed abode, and an intention to remain and settle, and not to be a transient visitor. Frost *v.* Brisbin, 19 Wendell, 11. But this decision ceases now to be of any application, inasmuch as the exception itself is repealed. By the New York Act of 1846, ch. 150, the defendant is liable for imprisonment as in actions for wrong, if he be sued and judgment pass against him in actions on contracts for moneys received by him, (and it applies to all male persons,) in a *fiduciary* character.[1]

The legislature of Massachusetts, in 1834 and 1842, essentially abolished arrest and imprisonment for debt, unless on proof that the debtor was about to abscond. As early as 1790, the constitution of Pennsylvania established, as a fundamental principle, that debtors should not be continued in prison after surrender of their estates, in the mode to be prescribed by law, unless in cases of a strong presumption of fraud. In February, 1819, the legislature of that state exempted women from arrest and imprisonment for debt; and this provision as to women was afterwards applied in New York to all civil actions founded upon contract. (N. Y. Revised Statutes, vol. ii. pp. 249, 428.) A provision to that effect had been recommended to the legislature by the chancellor and judges, in January, 1819. Females were first exempted from imprisonment for debt in Louisiana and Mississippi; and imprisonment for debt, in all cases free from fraud, is now abolished in each of those states. The commissioners in Pennsylvania, in their Report on the Civil Code, in January, 1835, recommended that there be no arrest of the body of the debtor, on mesne process, without an affidavit of the debt, and that the defendant was a non-resident, or about to depart without leaving sufficient property, except in cases of force, fraud, or deceit, verified by affidavit. This suggestion was carried into effect by the Act of the legislature of Pennsylvania of July 12, 1842, entitled, "An Act to abolish imprisonment for debt, and to punish fraudulent debtors." In New Hampshire, imprisonment on mesne

[1] The Non-imprisonment Acts do not extend to process by admiralty courts. Gardner *v.* Isaacson, Southern District of New York, 8 N. Y. Legal Observer, March, 1850.

400 * the * assignment, in any estate, real or personal; but no contingent interest passes, unless it shall become vested

process and execution for debt existed under certain qualifications, until December 23, 1840, when it was abolished by statute, in cases of contract and debts accruing after the first of March, 1841. In Vermont, imprisonment for debt, on contracts made after first January, 1839. is abolished, as to resident citizens, unless there be evidence that they are about to abscond with their property; so, also, the exception in Mississippi applies to cases of torts, frauds, and meditated concealment, or fraudulent disposition of property. Laws of Mississippi, by Alden & Van Hoesen, 1839, pp. 511, 512, 915, 916. In Connecticut, imprisonment for debt on contract is abolished, except in the usually excepted cases of fraud, &c, by statute of June 10, 1842. In Indiana, (R. S. 1838,) prison bounds for debtors are declared to be co-extensive with the county. This is reducing imprisonment to the mere *vox et præterea nil.* In Alabama, by statute of 1st February, 1839, imprisonment for debt is abolished, except in cases of fraud.

In Tennessee, by statute of 1831, ch. 40, and of January, 1840, no *ca. sa.* can issue to imprison for debt, without an affidavit that the defendant is about to remove, or has removed his property beyond the jurisdiction of the court, or that he has fraudulently conveyed or concealed it. A similar law was passed in Ohio and in Michigan, in 1838 and 1839. The power of imprisonment for debt, in cases free from fraud, seems to be fast going into annihilation in this country, and it is consid red as repugnant to humanity, policy, and justice. In addition to the states of Massachusetts, New Hampshire, Vermont, Connecticut, New York, New Jersey, Pennsylvania, Michigan, Ohio, Tennessee, Mississippi, Louisiana, and Alabama, already mentioned, imprisonment for debt is abolished in Delaware, Florida, Wisconsin, and Iowa, with the usual exception of all or most of the cases of contempts, fines, and penalties, promises to marry, moneys collected by public officers, misconduct in office, and frauds. By the new constitution of New Jersey, in 1844, imprisonment is abolished in actions for debt, or on any judgment upon contracts, unless in cases of fraud.[1] But imprisonment for debt is still retained, under mitigated modifications, in Maine, Rhode Island, Maryland, Virginia, North and South Carolinia, Georgia, Arkansas, Kentucky, Missouri, Illinois, Indiana, and the District of Columbia. See Kinne on Imprisonment for Debt, New York, 1842. Act of Congress, March 3, 1843, ch. 98. The constitution of Rhode Island of 1842, and which went into operation in May, 1843, declares that the person of a debtor, where there is not strong presumption of fraud, ought not to be continued in prison after he has delivered up his property for the benefit of his creditors. An Act of Congress of 14th January, 1841, abolished imprisonment for debt under process in the federal courts, in all cases in which by the laws of the state in which the court is held, such imprisonment has been abolished. In 1838, an Act was passed by the British Parliament, 1 and 2 Vict. c. 110, abolishing imprisonment for debt on *mesne process*, except under special order, when the debtor is about to abscond, and requiring the remedies against property to be exhausted before it can be permitted on final process. The execution against the debtor's property reaches the whole profits of the real estate, instead of a moiety

[1] By the constitution of California, no person can be imprisoned for debt, in any civil action, on mesne or final process, unless in cases of fraud.

within three years after making the assignment, and then it passes. (*a*) This I apprehend to be the general effect of the assignment, in every state, and under the English law. Possibilities, coupled with an interest, are assignable, but not bare possibilities, such as the expectancy of an heir. (*b*) The assignment does not affect property held by the debtor in trust(*c*) ; nor does the assignment by the insolvent husband affect the property settled to the separate use of the wife, free and clear of her husband. (*d*) It has been repeatedly held, that the insolvent's

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as before; and money or bank-notes, checks, bills of exchange, promissory notes, specialties and other securities for money, may be taken on *fieri facias*. So stocks, funds, or annuities, or any stock or shares in any public company, may be attached for the payment of the judgment creditor. The creditor has full power over all the debtor's property, and the latter is also liable, as before, to eventual imprisonment on execution.

But it is understood that the English commissioners appointed to inquire into the laws affecting bankrupts and insolvents, have recently (1840) made an interesting report on the subject, in which they condemn as unjust and impolitic the existing law, holding the future acquired property of insolvent debtors who are discharged, liable for their preëxisting debts; and they recommend that this distinction between the operation of bankrupt and insolvent laws be abolished; and also, that imprisonment for debt, on final process by *ca. sa.*, except in special cases, be also abolished. In 1842, the *cessio bonorum* Act was introduced into the British Parliament by Lord Brougham, abolishing virtually the practice of imprisonment for debt. In April, 1844, Lord Cottenham introduced a bill into the House of Lords for abolishing entirely imprisonment for debt on mesne process and on execution, in cases free from fraud or violence; and that the discharge of insolvents, as well as bankrupts, should protect all after-acquired property. It was during the Samnite war that the Roman law was passed prohibiting personal slavery for debt, and confining the creditor's remedy to the property of the debtor; but the insolvent debtor, nevertheless, forfeited all his political rights. Dr. Arnold's Hist. of Rome, vol. ii. 277.

(*a*) N. Y. Revised Statutes, vol. ii. p. 21. The English bankrupt laws have a more extensive and strict operation upon the bankrupt's property; for the assignment, whenever made by the commissioner, operates *by relation* so far as to carry to the assignees all the property which the bankrupt had at the time of the commission of an act of bankruptcy. *Vide supra*, p. 390, n. The bankrupt is incapable of affecting his estate by any act of his, after an act of bankruptcy, though before the issuing of the commission. Smallcombe *v.* Bruges, 13 Price's Exch. Rep. 136.

(*b*) Carlton *v.* Leighton, 3 Merivale's Rep. 667. Comegys *v.* Vasse, 1 Peters's U. S. Rep. 193, 220.

(*c*) Kip *v.* Bank of New York, 10 Johns. Rep. 63. Dexter *v.* Stewart, 7 Johns. Ch. Rep. 52. Yates & M'Intire *v.* Curtis, 5 Mason's Rep. 80.

(*d*) Adamson *v.* Armitage, Cooper's Eq. Rep 283. Wagstaff *v.* Smith, 9 Vesey, 520. See Mr. Ingraham's View of the Insolvent Laws of Pennsylvania, 2d edit. 223–227.

discharge applied only to debts existing when the petition, inventory, and schedule of debts were presented, and not so as to cover debts contracted between that time and the time of the discharge. The distinction is founded on obvious principles of justice; for the computation of the amount of the debts and creditors is founded upon the inventory and schedule accompanying the petition, and the assignment and discharge relate to them. (a) It is likewise the general policy of all in- *401 solvent * laws to distribute the property assigned ratably among all the creditors, subject, nevertheless, to existing legal liens, and priorities existing before the assignment; (b) and under the New York insolvent laws, a creditor cannot become a petitioning creditor in respect to any debt secured by a legal lien, unless he previously relinquishes that lien for the general benefit of the creditors. (c)

(3.) The case of absconding and absent debtors may be referred to this head of insolvency. The attachment law of New York, (like insolvent acts and the acts for the relief of debtors from imprisonment,) is a legal mode by which a title to property may be acquired by operation of law. (d) When the debtor, who is an inhabitant of New York, absconds, or is concealed, a creditor resident within or out of the state, to whom he owes one hundred dollars, or any two, to whom he owes one hundred and fifty dollars, or any three, to whom he owes two hundred dollars, may, on application to a judge or commissioner, and on due proof of the debt and of the departure or concealment, procure his real and personal estate to be attached; and on due public notice of the proceeding, if the debtor does not, within three months, return and satisfy the creditor, or appear and offer to contest the fact of having absconded, or offer to appear

(a) Ernst v. Sciaccaluga, Cowp. Rep. 527. Pease v. Folger, 14 Mass. Rep. 264. M'Neilly v. Richardson, 4 Cowen's Rep. 607. Ingraham on Insolvency, 168, 169.

(b) This is the case in most, and perhaps now in all the states, though equality of distribution was understood not to exist some few years past in Maine, New Hampshire, and Vermont, and that the race of diligence among creditors was kept up.

(c) N. Y. Revised Statutes, vol. ii. pp. 36, 46. Harth v. Gibbes, 4 M'Cord's Rep. 8.

(d) N. Y. Revised Statutes, vol. ii. pp. 3-14. The provisions of the statute are minute and full of details, and a general outline only is given in the text. See, also, N. Y. Statute of May 8, 1845, ch. 153, amending the same.

and contest the validity of the demand, and give the requisite security, then trustees are to be appointed, who become vested with the debtor's estate; and they are to collect and sell it, and settle controversies, and make dividends among all his creditors in the mode prescribed. From the time of the notice, all sales and assignments by the debtor are declared to be void. (*a*) If the debtor resides out of the state, and is indebted on a contract made within the state, or to a creditor residing within the state, although upon a contract made elsewhere, his property is liable to be attached and *sold in like manner: but *402 the trustees are not to be appointed until nine months after public notice of the proceeding. (*b*)[1] Perishable goods, other than vessels, when attached under the Absconding Debtor Act, may be immediately sold and converted into money; and if the sheriff, under the attachment, seizes property claimed by third persons, he is to summon a jury, and to take their inquisition as to the title to the property claimed. If any American vessel belonging to the debtor be attached under these proceedings, it may be released on the claimant of the vessel giving security to pay the amount of the valuation of the vessel to the trustees or to the debtor, as the case may be; and if it be a foreign vessel, claimed by a third person, the attaching creditor must give security to prosecute the attachment, and pay the damages, if it should appear that the vessel belonged to the claimant.

It has been decided that a creditor, having an unliquidated

(*a*) The Colony Act of New Brunswick transfers to the trustees all rights to action of the debtor existing at the time of their appointment. Ritchie *v.* Boyd, Kerr's N. B. Rep. 264.

(*b*) The personal representatives of a deceased debtor are not liable to be proceeded against under the attachment laws in New York. Jackson *v.* Walsworth, 1 Johns. Cas. 372. In the matter of Hurd, 9 Wendell, 465. But the proceedings by attachment may be instituted by assignees of the debt in their own names. Beasley *v.* Palmer, 1 Hill's Rep. 482.

[1] In case of an attachment against a non-resident debtor, all creditors, resident and non-resident, are entitled to a share of the assets, regard being had to any assignments under foreign laws, from which they may have derived any benefit. *In re* Coates and Hilliard, 13 Barb. 452.

demand resting in contract, is a creditor within the Absconding Debtor Act, and competent to apply for the attachment. (*a*) It was formerly held that the creditor who instituted proceedings against an absconding debtor must be a resident within the state; (*b*) but the statute declares, that any creditor residing in or out of the state, shall be deemed a creditor, within the Act, and he may proceed by attorney. Under the former statute laws of New York, the process by attachment did not apply in case of a foreign creditor against a debtor residing abroad, and whose debt was not contracted within the state. (*c*) The same provision still exists under the new revised statutes. Any creditor may proceed against an absconding or concealed debtor, being an inhabitant of the state, or against any non-resident debtor, if the contract was made in New York; but if *403 *the contract was made elsewhere, then the creditor must be a resident of the state. (*d*) [1]

(*a*) Lenox *v.* Howland, 3 Caines's Rep. 323. This was under the Act of 1801, and the N. Y. Revised Act of 1830 covers the very case.

(*b*) Case of Fitzgerald, 2 Caines's Rep. 318.

(*c*) *Ex parte* Schroeder, 6 Cowen's Rep. 603.

(*d*) N. Y. Revised Statutes, vol. ii. p. 3, secs. 1, 2, 6, 7. Laws of N. Y., May 8th, 1845, ch. 153. Fitch's case, 2 Wendell, 298. In the matter of Brown, 21 Id. 316. The attachment process for reaching the property of absconding and absent and non-resident debtors was a favorite measure of justice with the colonial legislature; but in respect to non-resident debtors, it was strongly opposed by the governor and council in some of the states, as being different from the mode of recovery allowed in like cases in England. Royal instructions were communicated to the colonial governors, to refuse assent to such attachment laws, and the subject was for some time a matter of discussion and warmth between the governor and house of assembly of North Carolina. The great objection on the part of the executive power was, that the attachment laws, as contended for by the colony, did not place the English and American creditors on an equal footing, but allowed the American creditor the preference, in like manner as if he had obtained for his own benefit a judgment and execution. 2 Martin's Hist. N. C. 302. Attachment laws against the property, real and

[1] A non-resident creditor, who is only temporarily in New York, may sue out an attachment against his debtor, though never within the United States, upon a debt contracted abroad. In the matter of Marty, 2 Barb. S. C. Rep. 436. The case of Fitzgerald, cited *supra*, is declared to have been overruled. A partnership may attach property of a foreign debtor on a contract made abroad, although one member of the firm is a foreigner residing abroad. Renard *v.* Hargous, 2 Duer, 540, S. C. 3 Kern. 259. If one of two joint debtors is a non-resident, attachment may issue against him alone. Baird *v.* Walker, 12 Barb. 298.

Debtors imprisoned in New York in a state prison for a term less than their natural lives, or imprisoned in any peniten-

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personal, of absconding and non-resident debtors, prevailed throughout the several United States; but the statute laws are not uniform on this point.

In England the proceeding by foreign attachment is used in London, Bristol, Liverpool, and Chester; but it has fallen into disuse in Oxford, Exeter, and other places.

In the New England states the trustee process has in many respects the operation of the domestic as well as foreign attachment, and it operates in a greater or less degree upon persons as well as property. The strict trustee process extends to the goods, effects, and credits of the principal debtor, in the hands of his agent, trustee, or debtor, and who, as trustee, is summoned to appear and answer. The first process in civil actions against the debtor is not only to compel appearance, but to attach the goods and estate of the debtor, and hold them in pledge to pay the debt or damages recovered. The strict trustee process does not extend to the real estate in the hands of the trustee. (Cushing's Treatise on the Trustee Process, 1833, pp. 6–16.)

The Massachusetts Revised Statutes of 1836, part 3, tit 4, ch. 109, contain very specific, minute, and remedial provisions relative to the *process of foreign attachment or trustee process.* All personal actions, except detinue and replevin, and actions sounding in tort, may be commenced by this process, which authorizes the attachment of the goods and estate of the principal defendant in his own hands, and also in the hands of trustees or garnishees. Every person having goods, effects, or credits, of the defendants intrusted to or deposited in his possession, may be summoned as a trustee, and the property in his hands attached and held to respond the final judgment in the suit. But there are limitations to the demands attachable by the trustee process: (1.) No person is to be adjudged a trustee, by reason of having drawn, accepted, made, or indorsed, any negotiable bill, draft, note, or other security; (2.) nor by reason of any money or other thing received or collected by him as sheriff, or other officer, by execution or other process in favor of the principal defendant; (3.) nor by reason of any money in his hands, and for which he is accountable, as a public officer, to the principal defendant; (4.) nor by reason of any money or other thing due from him to the principal defendant, unless due absolutely, and without depending on any contingency; (5.) nor by reason of any debt due from him on a judgment, so long as he is liable to an execution on that judgment, (6.) nor as guardian for the debts of his ward. If a legacy accrue to the wife during coverture, it is, like her choses in action, liable to be attached by the trustee process, at a suit of a creditor of the husband. though not reduced to possession by him. Holbrook *v.* Waters, 19 Pick. Rep. 354. Gassett *v.* Grout, 4 Metcalf's Rep. 486. By the Act of 1838, ch. 163, authorizing proceedings against insolvent debtors, upon their voluntary application, or upon the application of a creditor, the proceedings are confined to resident debtors. Claflin *v.* Beach, 4 Metcalf's Rep. 392.

In Maine, the law concerning foreign attachment is essentially the same under the Act of February 28th, 1821, ch. 61, and the several subsequent Acts in addition thereto. The statute of 1835, ch. 188, gave the trustee process against third persons holding the debtor's property by way of mortgage or pledge. The proceedings against trustees of debtors are of the same import in New Hampshire, by the Act of July 3d, 1829. The process reaches debts, choses in action, stocks, &c., in the hands of third

tiary or county jail for a criminal offence, for a term more than one year, are liable to the like proceedings against

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persons. So, also, in Vermont, by the several statutes of October 1st, 1797, November 10th, 1807, November 6th, 1817, and November 10th, 1830, the trustee process is given to creditors against persons possessed of money, goods, chattels, rights or credits of concealed or absconding debtors, or of debtors residing out of the state, or removed out of the state, leaving effects within it. The Revised Statutes of Vermont, 1839, p. 188. It has, however, been held, and very justly, that a person residing out of the state, and coming within it for a temporary purpose, is not liable to be summoned as a trustee of an absconding, concealed, or absent debtor. Baxter *v.* Vincent, 6 Vermont Rep. 614. The same principle applies to the trustee process in Massachusetts. Ray *v.* Underwood, 3 Pick. Rep. 302. From the time of service of process on the trustee, it fixes the property or debt in his hands, as a stakeholder for the party ultimately entitled. But it will not hold choses in action previously assigned with notice. The attaching creditor acquires priority according to the order of time. The Massachusetts practice in respect to the trustee process goes further than that of Connecticut or Vermont, and gives it against any person as the trustee of his resident neighbor. Leach *v.* Cook, 10 Vermont Rep. 239. Neither in Vermont or Ohio can the foreign attachment be sustained, unless all the debtors are non-residents or have absconded. Leach *v.* Cook, *supra.* Taylor *v.* McDonald, 4 Ohio Rep. 149.

In Connecticut, the effects and debts of absconding, or absent or non-resident debtors, in the hands of any agent, factor, trustee, or debtor, may be attached by any creditor by the process of foreign attachment. Statutes of Connecticut, 1838, p. 287. But *choses in action*, as notes not negotiable, are not goods and chattels liable to the process of foreign attachment, or liable to be sold on execution. Fitch *v.* Waite, 5 Conn. Rep. 117. Grosvenor *v.* F. & M. Bank, 13 Id. 104. It lies, also, against debtors imprisoned for debt, who shall not, within three months, be admitted to take the poor man's oath; and debtors discharged from imprisonment are to be deemed absconding debtors, so as to allow the creditor to proceed against their goods and effects in the hands of their attorney, agent, trustee, or debtor. Statutes of Connecticut, 1838, pp. 293, 294.

In Rhode Island, under the statute of January, 1822, the trustee process lies against the attorney, agent, factor, trustee, or debtor, of absent or non-resident, or concealed debtors; and also against the personal estate of any incorporated company established without the state, and being indebted, and having personal estate in the possession of any person or corporate body within the state. Seamen's wages are exempted from the attachment process, prior to the termination of the voyage.

In New Jersey, the attachment issues by any creditor, foreign or domestic, against absconding or non-resident debtors; and the statute is minute in its provisions, and is construed liberally for the benefit of creditors. The attachment becomes a lien from the time of executing the same. It reaches all the debtor's property and effects in the possession of the garnishee or debtor's debtor. The property attached is distributed, ratably, among all the creditors who come in on due notice; and in this respect it resembles the New York attachment law. Elmer's Digest, 20-31. R. S. New Jersey, 1847, p. 48.

In Pennsylvania, the process of *domestic* attachment is provided by statute against

their estates as in the case of absconding debtors. (a) The court in which proceedings under the Absconding Debtor Act are pend-

absconding and concealed debtors, and resident debtors who are absent. Trustees are appointed, and the proceeds ratably distributed among all the creditors who come in and prove their demands. Purdon's Digest, 277, 282. The process of *foreign* attachment is for the exclusive benefit of the attaching creditor, and it may issue at the suit of any creditor, resident or non-resident. Mulliken *v.* Aughinbaugh, 1 Penn. Rep. 117. It issues against the estate, real and personal, of non-resident debtors, and of debtors confined for crimes. Process may be awarded against any person who has property or effects, or money of the debtor in possession; and the attachment binds all the estate, real and personal, of the debtor in his own hands, or in those of his trustee, debtor, or garnishee. Purdon's Dig. 45, 46, 435. The *foreign* attachment can only be sued out against a debt presently demandable, but a *domestic* attachment like a commission of bankruptcy under 6 George IV., can be sued out for a debt not due, for it is a process of distribution among creditors. 4 Watts & Serg. 201. But under the attachment laws of Pennsylvania, stock of the United States, standing in the name of the debtor on the books of the treasury, cannot be attached. Neither the United States, nor the officers of the treasury, in their official capacity, are amenable to the process of law or equity. Opinions of the Attorneys-General, vol. i. 657–665, (Oct 20th, 1828.) The very clear and able argument of Mr. Wirt, the Attorney-General, would seem to be equally applicable to the laws of every state; and the only limitation to the principle is, where the United States held the stock as stakeholders, ready to pay to the rightful claimant; and a voluntary submission, on terms, to the process, is recommended, to have the rightful claim judicially ascertained.

In Ohio, the process of attachment lies at the instance of any creditor, resident or non-resident, and whether the debtor has absconded or is a non-resident; and the statute regulates proceedings against the garnishee, in whose possession the property may be, or who owes money to the original debtor. Chase's Statutes of Ohio, vol. ii. p. 1321; and in Indiana and Illinois, the foreign attachment lies against the estate of non-resident debtors, and against their effects and property in the hands of a garnishee, and the proceeding is for the benefit of the plaintiff; but in Illinois, if the process be against the estate of a non-resident debtor, the creditor must be a resident. Revised Laws of Indiana, edit. 1838, pp. 73–79. Revised Laws of Illinois, edit. 1833, pp. 82, 83. So in Maryland, under the Act of 1825, the creditor must be a resident of the United States. Wever *v.* Baltzell, 6 Gill & Johns. 335. Baldwin *v.* Neale, 10 Id. 274. The laws of several of the states are restrictive as to the character of the plaintiff. In North Carolina and Tennessee, the creditor, in the case of an absconding debtor, need not be a resident; but in the case of an attachment against a non-resident debtor, he must be. 1 Minor's Ala. Rep. 14, 69. North Carolina Stat. 1777, ch. 115. N. C. Revised Statutes, vol. i. 71. Tennessee Act of 1794. 1 Yerger's Rep. 101. 6 Idem. 473. By the old attachment law of Alabama, only resident citizens could commence suits by attachment, but a subsequent statute gave the power equally to non-resident plaintiffs. 2 Ala. R. N. S. 326. In Tennessee, no attachment will lie against property, when both creditor and debtor are non-residents, unless judgment has been first obtained, and execution issued in the courts of the jurisdiction where the defendant was a resident; nor in cases in which personal service of process cannot be made, nor

(a) N. Y. Revised Statutes, vol. ii. p. 15.

ing, has an equitable jurisdiction over all claims between the trustees and the creditors. The trustees are liable to be called

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will an attachment at law lie. In those special cases, the non-resident creditor may, by a bill in chancery, cause stocks and choses in action, and other property belonging to the non-resident defendant, or held in trust for him, to be applied to his debt. Stat. 1801, ch. 6. Stat. 1832, ch. 11. Garget *v.* Scott, 9 Yerger, 244, where the reason of their statute law is clearly and justly vindicated. Stat. 1836, ch. 43. In Virginia, Missouri, and Louisiana, the foreign attachment lies, though both the creditor and debtor reside out of the state. Williamson *v.* Bowie, 6 Munf. Rep. 176. Posey *v.* Buckner, 3 Missouri Rep. 604. Flower *v.* Griffith, 12 La. Rep. 345. 5 Idem. 300. The statute of Missouri seems to apply to all creditors, and the attachment and proceeding *in rem*, and against property in the hands of garnishees, apply when the debtor is a non-resident, or has absconded, or concealed, or absented himself, or is about to remove his property out of the state, or fraudulently to convert it. Revised Statutes of Missouri, 1835, p. 75.

In Virginia, the domestic attachment lies against the absconding debtor, and also against non-resident debtors for debts not exceeding $20, and against a garnishee, though the debt be not due. The foreign attachment lies against absent debtors; and resident debtors of the foreign debtor may be prosecuted as garnishees. 1 Rev. Code, edit. 1814, p. 160. 2 Idem. 98. It is grounded upon two facts: non-residence of the debtor, and his having effects in Virginia, and the proceeding is conclusive against parties and privies. Mankin *v.* Chandler, 2 Brockenbrough, 125. In the case of non-resident debtors, it is a general principle that all the proceedings are construed strictly, for the greater safety of the absentee, to whom notice may not have reached. State Bank *v.* Hinton, 1 Dev. N. Carolina Rep. 397. In Kentucky, the lands of a *non-resident* debtor may be appropriated by attachment by the creditor, if the debtor has no personal property. 9 Dana's Rep. 98, 266. So a bill in equity will lie to sequester the effects of *absent* debtors in the hands of persons resident in the state. Statutes, 1796, 1827, 1837. These statutes give the remedy against the lands and goods of non-resident and absent debtors. 9 Dana's Rep. 307, 308. 3 B. Monroe, 119.

In South Carolina, their foreign attachment law is founded on, and has received construction from the custom of London. Smith *v.* Posey, 2 Hill's Rep. 471. See Rice's valuable Digest on the Cases decided in that State, and in which the decisions, under the title of "attachment (foreign)," are fully and clearly stated.

In Georgia, the same process of domestic attachment lies when the debtor is absconding; and if he is about to remove, it lies, though the debt be not due. The foreign attachment lies when the debtor is a non-resident, and also in favor of a non-resident creditor. It reaches debt and credits in the hands of the garnishee, and is for the benefit of the plaintiff in the attachment. Prince's Digest, 2d edit. 1837, pp. 30–42. The same statute provisions in Alabama, Aikin's Dig. 2d edit. pp. 37–40.

In Louisiana, they have the like process of attachment as in the other states, when the debtor absconds, or is about to remove, or is non-resident. Third persons, who have funds and effects of the debtor in hand, may be cited to answer upon interrogatories; and if the garnishee has funds of the debtor, the creditor, after judgment against the debtor, may pursue them by judgment and execution against the garnishee. Proseus *v.* Mason, 12 La. Rep. 16. The debtor about to remove may be arrested and held to bail, though the debt be not due. Desha *v.* Solomons, 12 La. Rep. 272. Ibid.

to account at the instance of either the debtor or creditor. So the assignees, under the Insolvent Act, are * declared *404 to be trustees; and where there are two trustees, either of them may collect the debts; and where there are more than two, the powers appertaining to the trust may be exercised by any two of them. But no suits in equity are to be brought by the assignees of insolvent debtors, without the consent of the majority of the creditors in interest, unless the sum in controversy exceeds $500. They are to sell the assets at auction, and may allow a reasonable credit on good security. They are to redeem mortgages and pledges, and conditional contracts, and settle accounts, and compound with debtors under the authority of the officer appointing them. They are to call a general meeting of the creditors; and the mode of distribution is specially declared. They are to declare dividends; and dividends unclaimed for a year are to be deemed relinquished. They are to account upon oath, and are allowed a commission of five per cent. on all moneys received; and they may be discharged from their trust by the proper authority on their own application, and new assignees appointed in their stead. (a) These trustees, in

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479. If the garnishee be a consignee of goods, and has made advances on them, he may claim a preference as a creditor of consignor, if the attachment be levied while the goods are *in transitu*, and before delivery to the consignee. Wilson *v.* Smith, 12 La. Rep. 375. Gardiner *v.* Smith, Ibid. 370.

In Mississippi, there is the like process of foreign and domestic attachment against non-resident and absconding debtors, and debtors preparing to remove, though the debt be not due. Debts and credits of the debtor in the hands of third persons may be attached by process of summons or garnishment. The party suing out a foreign attachment must be a resident: R. Code of Mississippi, 1824, pp. 157–168. The process of attachment in most of the states is for the exclusive benefit of the attaching creditor. But a court of equity has a jurisdiction of a bill filed by a non-resident plaintiff against a non-resident debtor, *if there be also a resident defendant.* Comstock *v.* Rayford, 1 Smedes & Marshall, Miss. R. 423. Ibid. 584, S. P.[1]

(a) N. Y. Revised Statutes, vol. ii. pp. 39–51.

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[1] In Iowa, property not exempt from execution may be attached before or during suit on affidavit, that plaintiff believes defendant to be a foreign corporation or a non-resident, or about to conceal, remove, or fraudulently convey his property. Code of Iowa, (1851,) p. 264. In California, the property of the defendant may be attached as security for judgment in any action on a contract to pay money within the state, not secured by mortgage, or in any action on a contract in which the defendant is a non-resident. Laws of California, 1850–53, p. 539.

many respects, resemble commissioners under the English bankrupt laws; and the proper remedy against them is, either by a bill in chancery, or an application to the equitable powers of the court in which the proceedings are pending, to compel an account and an adjustment. It was held, in *Peck* v. *Randall*, (a) that the creditor could not maintain a suit at law against the trustees of an absconding debtor before the demand had been adjusted and a dividend declared. In England it is well settled in the analogous case of a claim for dividends on the bankrupt's estate, that a suit at law cannot be sustained for a dividend, and that the creditor applies to the court of chancery for assistance to obtain it. (b)

A grave and difficult question has been frequently discussed in our American courts, respecting the conflicting *405 * claims arising under our attachment laws, and under a foreign bankrupt assignment. If a debtor in England, owing a house in New York, as well as creditors in England, be regularly declared a bankrupt in England, and his estate duly assigned, and if the house in New York afterwards sues out process of attachment against the estate of the same debtor, and trustees are appointed accordingly, the question is, which class of trustees is entitled to distribute the fund, and to whom can the debtors of the absent or bankrupt debtor safely pay. In such a case, there are assignees in England claiming a right to all the estate and debts of the bankrupt, and there are trustees in New York claiming the same right. This question was considered in *Holmes* v. *Remsen*, (c) and the English and Scotch, and other foreign authorities examined; and the conclusion was, that by the English law, and by the general international law of Europe, the proceeding which is prior in point of time is prior in point of right, and attaches to itself the right to take and distribute the estate. It was considered, that as the English assignees in that case were first appointed, and the assignment of the bankrupt's estate first made to them, *that* assignment

(a) 1 Johns. Rep. 165.

(b) *Ex parte* White, and *Ex parte* Whitchurch, 1 Atk. Rep. 90. Assignees of Gardiner v. Shannon, 2 Sch. & Lef. 229.

(c) 5 Johns. Ch. Rep. 460.

carried the bankrupt's property, wherever situated; and it consequently passed the debt due by a citizen of this state to the English bankrupt; so that a payment of such a debt to the English assignees was a good payment in bar of a claim for that same debt, by the trustees, under our Absconding Act. This *rule appeared to be well settled, (a) and to *406 be founded in justice and policy, and the comity of nations. It rested on the principle of general jurisprudence that personal property was deemed, by fiction of law, to be situated in the country in which the bankrupt had his domicil, and to follow the person of the owner; and it was to be administered in bankruptcy according to the rule of the law of that country, as if it was locally placed within it. No doubt was entertained, that if the appointment of trustees under the New York Act had been the first in point of time, the title of the trustees would have been recognized in the English courts, as controlling the personal property in England. By the same rule, the English assignees, being first in time, were held entitled to control the personal property of the debtor existing in New York.

But whatever consideration might otherwise have been due to the opinion in that case, and to the reasons and decisions on which it rested, the weight of American authority is decidedly

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(a) The authorities cited in Holmes *v.* Remsen, to show that the rule contended for in that case was incontrovertibly established in the jurisprudence of the United Kingdoms of Great Britain and Ireland, are Pipon *v.* Pipon, Amb. Rep. 25; Case of Wilson, before Lord Hardwicke, cited by Lord Loughborough, in 1 H. Blacks. Rep. 691; Solomons *v.* Ross, Ibid. 131, note; Jollett *v.* Deponthieu & Baril, Ibid. 132, note; Neal *v.* Cottingham & Houghton, Ibid.; Phillips *v.* Hunter, 2 Idem. 402; Sills *v.* Worswick, 1 Idem. 665; Lord Thurlow, in the case *Ex parte* Blakes, 1 Cox's Rep. 398; Lord Kenyon, in Hunter *v.* Potts, 4 Term Rep. 182; Lord Ellenborough, 5 East's Rep. 131; Stein's case, 1 Rose's Cas. in Bankruptcy, App. 462; Selkrig *v.* Davis & Salt, 2 Dow's Rep. 230; 2 Rose's Cas. in Bankruptcy, 291. By the Scotch law, the foreign assignment will not prevent a subsequent attachment in Scotland by a Scotch creditor, unless notice of the assignment be given to, or had by the creditor. No such notice is requisite to the operation of the assignment under the English law. The English doctrine applies equally to voluntary and *boná fide* assignments of personal property by the owner domiciled abroad, to assignments under bankrupt and insolvent statutes, and to the distribution of the movable property of testators and intestates by will, and under the law of distribution. The cases all rest on the same general principle giving a universal operation to transfer, or the disposition of personal property, made or existing at the owner's domicil, wherever that property may be situated, and when not bound by any local lien at the time.

the other way; and it may now be considered as part of the settled jurisprudence of this country, that personal property, as against creditors, has locality, and the *lex loci rei sitæ* prevails over the law of the domicil with regard to the rule of preferences in the case of insolvent's estates. The laws of other governments have no force beyond their territorial limits; and if permitted to operate in other states, it is upon a principle of comity, and only when neither the state nor its citizens would suffer any inconvenience from the application of the foreign law. (*a*) A prior assignment in bankruptcy, under a foreign law, will not be permitted to prevail against a subsequent attachment by an American creditor of the bankrupt's effects found here; and our courts will not subject our citizens to the inconvenience of seeking their dividends abroad when they have the *407 means to satisfy them under their own control. * This was the rule in Maryland prior to our Revolution, according to the opinion of Mr. Dulany, reported in *Burk* v. *M'Clain;* (*b*) and afterwards, in 1790, it was decided, in *Wallace* v. *Patterson,* (*c*) that property of the bankrupt could be attached here, notwithstanding a prior assignment in bankruptcy in England. The same doctrine was declared in Pennsylvania, (*d*) after an elaborate discussion of the question. The court in that state considered that an assignment abroad, by act of law, had no legal operation *extra territorium,* as against the claims of their own citizens. But the foreign assignee in bankruptcy may sue in Pennsylvania in the name of the bankrupt, for the assets of the estate, and recover them, except as against the rights of the American creditor. (*e*) The same doctrine was declared in

(*a*) Parsons, Ch. J., in Greenwood *v.* Curtis, 6 Mass. Rep. 378. Porter, J., in Olivier *v.* Townes, 14 Martin's La. Rep. 99–101.

(*b*) 1 Harr. & M'Henry, 236.

(*c*) 2 Idem. 463.

(*d*) Milne *v.* Moreton, 6 Binney's Rep. 353. See Mulliken *v.* Aughinbaugh, 1 Penn. Rep. 117, to the same point. See, also, Ogden *v.* Gillingham, Baldw. Rep. C. C. U. S. 38; Lowry *v.* Hall, 2 Watts & Serg. 129.

(*e*) Merrick's Estate, 2 Ashmead, 485. S. C. 5 Watts & Serg. 20. This is the scope of the American cases; and the New York case of Abraham *v.* Plestoro, 3 Wendell, 538, went further when it ruled the foreign assignment in bankruptcy void, even as against a British creditor, not domiciled here. They do not go so far in Pennsylvania. Lowry *v.* Hall, *supra.* Mulliken *v.* Aughinbaugh, 1 Penn. Rep. 117.

North Carolina as early as 1797. (*a*) In South Carolina the question arose in the case of the *Assignees of Topham* v. *Chapman*, in 1817; (*b*) and the court in that case followed some prior decisions of their own, and the case of *Taylor* v. *Geary*, decided in Connecticut as early as 1787; (*c*) and they held that law, justice, and public policy all combined to give a preference to their own attaching creditors. So, in Virginia and Kentucky, under their statute laws, all real and personal property within the state, even debts and choses in action, are held to be bound by the attachment laws of the state, though the owner should execute an instrument in control of it at his domicil abroad. The rule of courtesy is held to be overruled by positive law. The law of the *locus rei sitæ* overrules the law of the domicil in this case, and debts due to absentees have so far locality, and are subject to attachment by the creditors of such absentees. But the rule is not carried so far as to apply to absolute sales, *bonâ fide* for a valuable consideration, of choses in action, accompanied with assignment and delivery of the evidences of the debt. (*d*) The point arose in the Supreme Court of Massachusetts, in *Ingraham* v. *Geyer*, in 1816; (*e*) and they would not allow even a voluntary assignment by an insolvent debtor in another state, to control an attachment in that state, of the property of the insolvent, made subsequently to the assignment, and before payment to the assignees; and the court denied that any such indulgence was required by the practice or comity of nations. (*f*) The opinion in the case of *Holmes* v. *Rem-*

(*a*) M'Neil *v.* Colquhoon, 2 Haywood's Rep. 24.

(*b*) Const. Rep. S. C. 283. See, also, Robinson *v.* Crowder, 4 M'Cord's Rep. 519, to the same point.

(*c*) Kirby's Rep. 313.

(*d*) Huth *v.* Bank of United States in Chan., Louisville, Kentucky, August, 1843.

(*e*) 13 Mass. Rep. 146.

(*f*) See, also, to the same point, Borden *v.* Sumner, 4 Pick. 265; Blake *v.* Williams, 6 Id. 286; Fall River Iron Works *v.* Croado, 15 Id. 11; Fox *v.* Adams, 5 Greenleaf's Rep. 245; Olivier *v.* Townes, 14 Martin's La. Rep. 93; Norris *v.* Mumford, 4 Id. 20; The Brig Watchman, in the District Court of Maine, Ware's Rep. 232; Saunders *v.* Williams, 5 N. H. Rep. 213; Mitchel *v.* M'Millan, 3 Martin's La. Rep. 676, to the same point. But in Goodwin *v.* Jones, 3 Mass. Rep. 517, Ch. J. Parsons held to the English doctrine; and in Bohlen *v.* Cleveland, 5 Mason's Rep. 174, an assignment was held to prevail over a trustee or attachment process, as against creditors living in the

sen was also questioned by one of the judges of the *408 * Supreme Court of New York, in a suit at law between the same parties. (*a*) And still more recently, in the Supreme Court of the United States, (*b*) the English doctrine (for it is there admitted to be the established English doctrine) was peremptorily disclaimed, in the opinion delivered on behalf of the majority of the court. (*c*)[1]

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same state with the debtor. It is likewise held, in Rogers *v.* Allen, 3 Ohio Rep. 488, that an assignment by an insolvent debtor in one state will not affect the title to lands in another state in derogation of the *lex rei sitæ*. In South Carolina, a *bonâ fide* foreign assignment in trust for creditors, takes precedence of a subsequent attachment levied within the state, but not if executed under the operation of a statute of bankruptcy. Green *v.* Mowry, 2 Bailey's Rep. 167.[2]

(*a*) Platt, J., in 20 Johns. Rep. 254.

(*b*) Ogden *v.* Saunders, 12 Wheaton, 213. In Harrison *v.* Sterry, 5 Cranch's Rep. 289, the Supreme Court of the United States had long previously held that the bankrupt law of a foreign country could not operate a legal transfer of property in this country. The doctrine rests on the same footing between one state and another. An assignment *in invitum* under the law of one state or nation, has no operation in another, even with respect to its own citizens. Abraham *v.* Plestoro, 3 Wendell, 538. Johnson *v.* Hunt, 23 Id. 90, 91.

(*c*) It was the received doctrine in England, according to the opinion of counsel, as early as 1715, that the English creditors of an insolvent debtor residing in Holland, could attach and recover by execution levied on his effects in England, without being responsible to the curator in Holland, who had entered upon his trust *prior* to the attachment in England. See opinions of R. Raymond, J. Jekyll, and others, in the Appendix, 254–256, of Mr. Henry's Treatise on Foreign Law. In Blake *v.* Williams, 6 Pick. Rep. 286, Lord *v.* The Brig Watchman, in the District Court of Maine, Ware's Rep. 232, Abraham *v.* Plestoro, 3 Wendell, 538, and Johnson *v.* Hunt, 23 Idem. 87, the question was again discussed, and the decisions made in entire conformity with the general doctrine now prevalent in the United States. The authorities for the contrary and more liberal doctrine in the English, Scottish, and Irish courts, are collected in Bell's Commentaries, vol. ii. pp 681–687, as well as in the case of Holmes *v.* Remsen, *supra*, 405. Mr. Bell says that the rule giving effect to conveyances, made for the purpose of collecting and distributing among creditors the funds and estate of the debtor, according to the law of his residence and seat of trade, does not rest in any legislative enactment, but upon those principles of international law which guide the connection between states, and prescribe the authority which is to be allowed by each to the institution and laws of another. The whole doctrine of the international effect of bankruptcy is a consequence of the general principle of univer-

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[1] As the effect of foreign bankrupt laws is admitted only from a principle of comity, they can be allowed no operation with us, where they were intended to be local, or where they secure privileges to local over foreign creditors. Very *v.* McHenry, 29 Maine R. 206.

[2] See Larrabee *v.* Talbott, 5 Gill, R. 426; M'Carty *v.* Gibson, 5 Gratt. 307.

IV. *By intestacy.*

The last instance which was mentioned of acquiring title to goods and chattels by act of law, was the case of intestacy. This is when a person dies,[1] leaving personal property undisposed of by will; and in such case, the personal estate, after the debts are paid, is distributed to the widow, and among the next of kin. To avoid repetition and confusion, I shall be obliged to confine myself essentially to the discussion of the *leading principles of the English law, and assume *409 them to be the law of the several states, in all those cases in which some material departure from them in essential points cannot be clearly ascertained.

This title will be best explained by examining—1. To whom the administration of such property belongs, and to whom granted; 2. The power and duty of the administration; and 3. The persons who succeed to the personal estate by right of succession.

(1.) *Of granting administration.*

When a person died intestate, in the early periods of the English history, his goods went to the king as the general trustee or guardian of the state. This right was afterwards transferred by the crown to the popish clergy; and, we are told, it was so flagrantly abused that Parliament was obliged to interfere and take the power of administration entirely from the church, and confer it upon those who were more disposed to a faithful execution of the trust. This produced the statutes of

sal jurisprudence, that personal property, wherever situated, is regulated by the law of the bankrupt's domicil; while, on the other hand, real property is governed by the law of the territory in which it is situated. The law on this vexed subject of the effect to be given to foreign assignments is examined, and all the authorities and arguments *pro* and *con* collected and reviewed in Story's Commentaries on the Conflict of Laws, pp. 336-357.

In Canada, an English commission of bankruptcy operates as a voluntary assignment by the bankrupt, but rights and privileges acquired by the provincial creditors are not affected by the commission or assignment. Bruce *v.* Anderson, Stuart's Lower Canada Rep. 127.

[1] A person sentenced to imprisonment for life, is declared civilly dead in New York. 2 R. S. (3d edit.) sec. 28. In Ohio, it has been held that letters of administration cannot be granted on the estate of such a person. Frazer *v.* Fulcher, 17 Ohio R. 260.

31 Edw. III. ch. 11, and 21 Hen. VIII. ch. 5, from which we have copied the law of granting administrations in this country. (*a*) The power of granting administration, and of superintending the conduct of the administration, was still left in the hands of the bishop or ordinary, in each diocese. In our American law we have assigned this, as well as other secular matters, to the courts and magistrates of civil jurisdiction. (*b*) Before the Revolution, the power of granting letters testamentary and letters of administration resided in New York, in the colonial

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(*a*) Hensloe's case, 9 Co. 38 *b*. 2 Blacks. Com. 494-496.

(*b*) In some of the states the jurisdiction concerning the probate of wills and the administration of testators' and intestates' estates is vested in the county courts. In others, it is confided to courts of special jurisdiction, under the various names of the court of probate, the registers's court, the orphans' court, the court of the ordinary, and the surrogates' court. The county courts of Alabama, when sitting as courts of probate, are denominated Orphans' Courts, and they have a very extensive jurisdiction over the estates of deceased persons. In Indiana, by Act of February 17, 1838, the court of probates in each county consists of one judge, elected by the people septennially, and the court has exclusive jurisdiction in matters of probate of wills, and administration, and guardianship, and the settlement of decedent's estates, and concurrent jurisdiction in all suits at law and in equity in favor of and against heirs, executors, administrators, and guardians, where the amount in controversy exceeds $50, and in partition and dower, and it may authorize guardians to sell real estate to pay debts, and support infants, lunatics, &c. It may command jury trials in proper cases. The probate jurisdiction is plenary and highly important, and the statute conferring the powers is very comprehensive and seems to be well digested. Revised Statutes of Indiana, 1838, pp. 172, 459. A court of probates in Mississippi, is established in each county, and has the like enlarged and discretionary jurisdiction, in all matters of wills and of administration, and of sales and distribution of the estates of decedents; and, as far as the jurisdiction extends, it is exclusive, and has powers as ample as a court of chancery. 2 Smedes & Marshall, 326, 330, 333. Farve *v.* Graves, 4 Id. 707. The Act in Missouri, concerning executors and administrators, is comprehensive and their powers and duties are well defined. The jurisdiction resides in the county courts. Revised Statutes of Missouri, 1835, p. 40. So in Kentucky and North Carolina, the county courts have exclusive jurisdiction to establish wills of real and personal estates. Hunt *v.* Hamilton, 9 Dana's Rep. 91. 1 N. C. Revised Statutes, 1837, pp. 620, 621. The Revised Statutes of each state, and especially where the revisions have been recent, contain a special detail of the jurisdiction and power of probate courts. We can only allude occasionally and by way of *illustration*, to the local statutes. The law of Maryland on Statutory Testamentary Law is collected by Judge Dorsey, and the volume is enriched by a reference to the decisions of the courts on the subject. In New Jersey, the governor, by the constitution, until 1844, was *ex officio* the ordinary as well as the chancellor of the state, and he consequently had jurisdiction to take proof of wills and to grant letters testamentary, and letters of administration. But by the constitution of 1844, the chancellor is declared to be the ordinary or surrogate-general and judge of the prerogative court.

governor, as judge of the prerogative court, or court of probates of the colony. It was afterwards vested in the court of probates, consisting of a single judge, and so continued until 1787, when surrogates were authorized to grant letters testamentary and letters of administration of the estates of persons dying within their respective counties. If the person died out of the state, or within *the state, not being an inhabitant *410 thereof, the granting of administration was still reserved to the court of probates. (a) This practice continued until the Act of March 21, 1823, (b) when the court of probates was abolished, and all the original powers of that court were transferred to the surrogates; and each surrogate has now jurisdiction, exclusive of every other surrogate, within his county, when the testator or intestate was at his death an inhabitant of the county, in whatever place he may have died; or not being an inhabitant of the state, died in the county, leaving assets therein; or, not being an inhabitant of the state, died abroad, leaving assets in the county of the surrogate; or not being an inhabitant of the state, and dying out of it, assets of such testator or intestate should thereafter come into the county; or when no jurisdiction is gained in either of the above cases, real estate, devised by the testator, is situated in the county. (c) The first judge of the county acts in cases in which the surrogate is disqualified to act; [1] and the county treasurer in each county acts as a public administrator in special cases. There is likewise a public administrator in the city of New York, with enlarged jurisdiction in special cases of intestates' estates. He is authorized to act as public administrator in cases where there are effects in the city, of persons dying intestate, and leav-

(a) L. N. Y. sess. 1, ch. 12, and sess. 10, ch. 38. Goodrich v. Pendleton, 4 Johns. Ch. Rep. 552.

(b) Sess 46, ch. 70.

(c) N. Y. Revised Statutes, vol. ii. p. 73, sec. 23. N. Y. Act, 60th sess. ch. 460, sec. 1. In England, generally speaking, all ecclesiastical testamentary jurisdictions are limited in their authority to property locally situated within their district. Crosley v. Archdeacon of Sudbury, 3 Hagg. E. R. 199. In Tennessee, letters of administration granted not in the county of the decedent's residence and domicil are void. Wilson v. Frazier, 2 Humphreys, 30.

[1] By the constitution of 1846, the county judge performs the duties of surrogate where the population of the county does not exceed 40,000.

ing no widow or next of kin competent and willing to administer. (a) [1]

Administration is directed, by the New York Revised Statutes, to be granted to the husband on the wife's personal estate, and in other cases to the widow and next of kin, or to some one of them, if they, or any of them, will accept, in the following order: first, to the widow; second, to the children; third, to the father; fourth, to the brothers; fifth, to the sisters; sixth, to the grandchildren; seventh, to any other of the next of *411 kin who would be entitled to a share in *the distribution of the estate. (b) Under the English law, (and the law of New York, and it is presumed the law of the other states is the same,) (c) the surrogate has the discretion to elect among the next of kin, any one in equal degree, in exclusion of the rest, and to grant to such person sole administration.[2] So, under the English law, he may grant administration to the widow or next of kin, or to both jointly, at his discretion. (d) To guard against imposition or mistake in issuing letters of administration prematurely, the surrogate is required to have satisfactory proof that the person of whose estate administration is claimed is dead, and died intestate; and when application is made to administer, by any person not first entitled,

(a) N. Y. R. S. vol. ii. p. 79. Ibid. vol. ii pp. 117–133. By the Act of April 20, 1830, in amendment of the Revised Statutes, further provision is made for the case in which the first judge of the county cannot act as surrogate. The trust devolves on the district-attorney of the county, and eventually on the chancellor. In New Jersey, if the intestate leaves no relations to administer, the ordinary grants administration on due security to any proper applicant. R. S. N. J. 1847, p 345.

(b) N. Y. Revised Statutes, vol. ii. p. 74, secs. 27, 29. The rule in England is to grant administration to the husband on the wife's estate, and in other cases to the widow or next of kin, or both, at discretion. The nearest of kin to the intestate has preference; and of persons in equal degree, the ordinary may take which he pleases. The nearness of kin is computed according to the civil law. 2 Blacks. Com. 504.

(c) N. Y. Revised Statutes, vol. ii. p 74, sec. 28.

(d) Fawtry v. Fawtry, 1 Salk. Rep. 36. Anon. Str. Rep. 552. Case of Williams, 3 Hagg. E. R. 217. The N. Y. Revised Statutes, vol. ii. p. 74, sec. 27, seems to have destroyed this discretion. But the Massachusetts Revised Statutes, 1836, and the New Jersey statute of 1795, Elmer's Dig. 165, leave it as in the English law.

[1] The city is *directly* liable for a *devastavit* by the public administrator, and for the costs in a suit wantonly brought by him. Matthews v. The Mayor, &c. of New York, 1 Sandf. (Law) R. 132.

[2] See Sheldon v. Wright, 1 Seld. 497.

there must be a written renunciation of the party having the prior right to administer, or a citation to show cause is to be first issued to all such persons, and duly served or otherwise published. (a)

According to the provision in the New York Revised Statutes, if none of the relatives, or guardians of infant relatives, (for the guardians of minors who are entitled may administer for them,) will accept the administration, then it is to be given to the creditors of the deceased; and the creditor first applying, if otherwise competent, is to be preferred. (b) If no creditor applies, then to any other person legally competent. (c) In the city of New York, the public administrator has perference after the next of kin; and in the other counties, the county treasurer has preference next after creditors. (d) In the case of a married woman dying intestate, the husband is entitled to administration in preference to any other person;[1] and he is liable, as administrator, for the debts of his wife, only to the extent of the assets received by him. If he does not administer on her estate, he is presumed to have assets, and is liable for the debts. (e)

(a) N. Y. Revised Laws, vol. ii. p. 74, sec. 26. Ibid. p. 76, secs. 35, 36. In England, an executor who has renounced, may retract before administration is actually granted to another.[2] M'Donnell v. Pendergast, 3 Hagg. E. R. 212. And in New York, the surrogate may, with the consent of the person entitled, join one or more competent persons with him in the administration. When administration is granted to two or more persons, it being an entire thing, if one dies, the entire authority remains with the survivors, the same as in the case of executors. Lewis v. Brooks, 6 Yerger's Tenn. Rep. 167.

(b) In North Carolina the greatest creditor is, in such case, entitled to the preference. Act, 1792.

(c) The same general rules are prescribed in the Massachusetts Revised Statutes of 1836, and exist throughout this country.

(d) N. Y. Revised Statutes, vol. ii. p. 74, sec. 27. Where persons not inhabitants of the state of New York die, leaving assets in the state, if no application for letters of administration be made by a relative entitled thereto, and legally competent, and letters testamentary or of administration have been granted by competent authority in any other state, the person so appointed, on producing such letters, is entitled to letters of administration in preference to creditors, or any other person, except the public administrator in the city of New York. Ibid. p. 75, sec. 31.

(e) N. Y. Revised Statutes, vol. ii. p. 74, sec. 27. Ibid. p. 75, secs. 29, 33; and *vide supra*, pp. 135, 136.

[1] See Randall v. Shrader, 17 Ala. 333.

[2] So in New York. Robertson v. McGeoch, 11 Paige's R. 640.

Under the English law, at least until lately, if the husband dies leaving the goods of the former wife unadministered, the *412 right of * administration *de bonis non* belongs to the next of kin of the wife; though the right of property belongs to the representatives of the husband. The principle of the English statute of 21 Hen. VIII. was to vest the administration *de bonis non* in the person who was next of kin at the time of the intestate's death, and who was possessed of the beneficial interest in the personal estate. The case of *Hole* v. *Dolman*, in 1736, was an anomalous case, and established an exception to the general rule; for the original administration to a *feme covert* was granted to her next of kin, in preference to the representative of the deceased husband, who survived her, and in whom the interest was vested. (*a*)

When there are several persons of the same degree of kindred to the intestate entitled to administration, they are perferred in the following order: first, males, to females;[1] second, relatives of the whole blood to those of the half blood; third, unmarried, to married women; and when there are several persons equally entitled, the surrogate, in his discretion, may grant letters to one or more of them. (*b*) No person convicted of an infamous crime, or incapable by law of making a contract, nor a non-resident alien, or minor, or *feme covert*,[2] or person deemed incom-

(*a*) 1 Hagg. E. R. 341, in notes. 2 Idem. 631. Suppl. 150, 165. The recent doctrine in Betts *v.* Kimpton, 2 B. & Adolphus, 273, is also that administration *de bonis non* of the wife's choses in action left unadministered by the husband, goes to the next of kin of the wife, to be administered, however, for the benefit of the husband's representatives. See *supra*, 136. But in the still later case of Fielder *v.* Hanger, 3 Hagg. E. R. 769, the more reasonable rule is at last adopted, that the administration on the estate of a deceased wife follows the interest, and on the husband's death goes to his representatives.

(*b*) N. Y. Revised Statutes, vol. ii, p. 74, sec. 28. The statute law of New Jersey of 1795, follows closely the English law on the subject of administration. Elmer's Digest, 165.

1 But males who are minors and reside out of the state will not be preferred to adult females resident in the state. Wickwire *v.* Chapman, 15 Barb. 302

2 Under the laws of Maryland, a married woman may act as executrix or administratrix. Bunnerman *v.* Weaver, 8 Md. 517. And in Mississippi, the husband of a woman, who is entitled to administer upon an intestate estate, does not, by the marriage, succeed to her right. Richards *v.* Mills, 31 Mississippi, (2 George,) 450.

petent by the surrogate by reason of drunkenness, improvidence, or want of understanding, is entitled to administer;[1] but the husband is entitled to administer in the right and behalf of his wife; and with the consent, in writing, of the party entitled, one or more competent persons may be associated by the surrogate with an administrator. (*a*) The husband who administers on his wife's estate is now bound, (though contrary to the English law and the former law of New York,) to give a bond, in the same manner as other administrators; yet he is not bound, in consequence of it, to distribute the estate after the debts are paid; but he continues to enjoy it according to the rules of the common law. (*b*)

*If letters of administration should happen to have *413 been unduly granted, they may be revoked,[2] and administration may be granted upon condition, or for a limited time, or for a special purpose; as for the collection and preservation of the goods of the deceased; and it is the received doctrine, that all sales made in good faith, and all lawful acts done either by administrators before notice of a will, or by executors or administrators, who may be removed or superseded, or become incapable, shall remain valid, and not be impeached on any will appearing, or by any subsequent revocation or superseding of the authority of such executors or administrators. (*c*)

The nearness of kin, under the English law, is computed according to the civil law, which makes the intestate himself the *terminus a quo*, or point whence the degrees are num-

(*a*) Ibid. vol. ii. p. 75, sec. 32, 34. Act of N. Y. April 20, 1830.

(*b*) New York Revised Statutes, vol. ii. sec. 29. Ibid. p. 98, sec. 79. See *supra*, p. 135

(*c*) Shep. Touch. by Preston, 464. N. Y. Revised Statutes, vol. ii. p. 76, sec. 38. Ibid. p. 79, secs. 46, 47. It is a general rule in the English law, that the grant of letters of administration relates back to the death of the intestate, so as to authorize the administrator to bring trover or trespass for goods of the intestate. Year Book, 36 Hen. VI. fo. 7. Long *v.* Hebb, Sty. 341. Sharpe *v.* Stallwood, C. B. 7 Jurist, Part 2, 492.

[1] See Coope *v.* Lowerre, 1 Barb. Ch. R. 45. A professional gambler is such a person. McMahon *v.* Harrison, 10 Barb. 659. 2 Seld. 443.

[2] Owings *v.* Bates, 9 Gill. 463. See, also, Stoker *v.* Kendall, Busbee, L. 242. Cole *v.* Dial, 12 Texas, 100.

bered; and, therefore, the children and parents of the intestate are equally near, being all related to him in the first degree; but in this instance the surrogate has not his option between them, but must prefer the children. (*a*) And from the children and parents the next degree embraces the brothers and grandparents, and so on in the same order. The law and course in those states which follow the English law must be to grant administration, first, to the husband or wife; second, to the children, sons or daughters; third, to the parents, father or mother; fourth, to the brothers or sisters of the whole blood; fifth, to the brothers or sisters of the half blood; sixth, to the grandparents; seventh, to the uncles, aunts, nephews, and nieces, who stand in equal degree; eighth, to cousins. (*b*) Grandmothers are preferred to aunts, as nearer of kin; for the grandmother stands in the second degree to the intestate, and the aunt in the third. (*c*) If *414 none of the next of kin will accept, * the surrogate may exercise his discretion whom to appoint; and he usually decrees it to the claimant who has the greatest interest in the effects of the intestate. (*d*) If no one offers, he must then appoint a mere trustee *ad colligendum*, to collect and keep safe the effects of the intestate; and this last special appointment gives no power to sell any part of the goods, not even perishable articles; nor can the surrogate confer upon him that power. (*e*) This very inconvenient want of power is supplied by the *New York Revised Statutes*; (*f*) and an administrator, *ad colligendum*, (who is called in the statute a collector,) may, under the direction of the surrogate, sell perishable goods, after they shall have been appraised.

(2.) *Of the power and duty of the administrator.*

The administrator must enter into a bond before the judge of probate, (under whatever name the competent court may be

(*a*) 2 Vern. Rep. 125, arg. 2 Blacks. Com. 504.
(*b*) Shep. Touch. by Preston, vol. ii. p. 453. Durant *v.* Prestwood, 1 Atk. Rep. 454.
(*c*) Blackborough *v.* Davis, 1 P. Wms. 41.
(*d*) Tucker *v.* Westgarth, 2 Addams's Rep. 352.
(*e*) 1 Rol. Abr. tit. Executor. Shep. Touch. by Preston, vol. ii. p. 488.
(*f*) Vol. ii. p. 76, sec. 39.

known,) with sureties for the faithful execution of his trust; and being thus duly appointed, it is his duty to proceed forthwith to the execution of his trust. (*a*) His powers and duties under the common law of the land may be summarily comprehended in the following particulars: 1. He is to make an inventory of the goods and chattels of the intestate, in the presence and with the assistance of appraisers, who, in New York, Massachusetts, and probably in other states, are to be appointed by the probate court, and sworn; and under the English law they are selected by the executor or administrator, from the creditors, or next of kin, or discreet neighbors. (*b*) Two copies of this inventory are to be made and indented, and one copy is to be lodged with the surrogate, under the attestation of the administrator's oath, and the other is to be retained. (*c*) This *inven- *415

(*a*) N. Y. Revised Statutes, vol. ii. p. 77, sec. 42. Under the N. Y. Revised Statutes, vol. ii. p. 70, secs. 6, 76, the surrogate, if he deem the circumstances of the case to require it, may require an executor to give security. If he be about to remove out of the state, he may, in that case, also require it. See Wood *v.* Wood, 4 Paige's Rep. 299. In Tennessee, executors must give security equally with administrators, before they can lawfully act. Act of 1813. 4 Yerger's Rep. 20. By the Massachusetts Revised Statutes of 1836, and the Revised Statutes of Vermont, 1839, p. 260, the executor as well as the administrator, before he enters on his trust, must in all cases give bond, with sufficient surety, to the judge of probate, for the faithful execution of his trust, and, as a consequence, the executor of an executor has no authority to administer on the estate of the first testator. The English rule in equity is, that if an executrix who has infant children marries a second husband in necessitous circumstances, and there is danger of waste, a receiver will be appointed. Dillon *v.* Lady Mount Cashell, 3 Bro. P. C. 341. Middleton *v.* Dodswell, 13 Vesey, Jr. 268. And this is the rule of equity in South Carolina, (Stairley *v.* Rabe, 1 McMullan, Eq. 22.) and would probably be followed if the case arose in the equity courts in the other states.

(*b*) The administration bond only binds the administrator to administer the assets within the state, and not goods in another jurisdiction. Governor *v.* Williams, 3 Iredell's N. C. Rep. 152.

(*c*) N. Y. Revised Statutes, vol. ii. p. 82, sec. 1. Ibid. p. 84, secs. 15, 16. The New York statute specifies the nature of the assets which shall go to the executor or administrator; and it has followed, in this respect, the rule of the common law. They are the interest of the deceased in leases for years; things annexed to the freehold, for the purpose of trade or manufacture; growing crops raised annually by labor and cultivation, excepting grass and fruit not gathered; rents accrued, debts and things in action, though secured by mortgage, and movable property and effects. N. Y. Revised Statutes, vol. ii. p. 82, sec. 6. Evans *v.* Iglehart, 6 Gill & Johnson, 171, 189, 190, S. P. In Massachusetts, mortgage debts, before foreclosure, are personal assets in the hands of the executors and administrators of the mortgagee. Massachusetts

tory is intended for the benefit of the creditors and next of kin; and the administrator will be obliged to account for the property mentioned in it;[1] and he will also be obliged to show good cause for not collecting the debts that are mentioned to be due, unless he had the precaution to note them in the inventory as desperate. He is liable also to have the letters of administration revoked, (and it is the same with the letters testamentary

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Revised Statutes, 1836. Certain necessary domestic articles for family use, as looms, stoves, pictures, school-books, wearing apparel, bedding, table furniture, and a small number of necessary domestic animals, are not to be appraised, but to remain for the use of the widow and children.[2] New York Revised Statutes, vol. ii. p. 83, secs 9, 10. There is a similar exception in Massachusetts, Connecticut, Ohio, and probably in other states, in favor of the widow and family, and it extends to such small necessary family articles as are exempt from execution. The widow and children in Ohio, if any under fifteen years of age, or the children only, if no widow, are entitled to sufficient provisions or other property for their support for twelve months from the intestate's death, without having the same accounted for as part of the inventory. Statutes of Ohio, 1831. The Ohio statutes as to emblements, declare that those sowed after March 1, and before December 31, shall go to the executor or administrator, if the decedent died within that period; but that those growing on the land on March 1, or between December 31 and March 1, shall go to the heir, devisee, or remainderman, or reversioner, if the decedent died within that period.

In Massachusetts, Connecticut, (Revised Statutes of Massachusetts, 1836, and of Connecticut, 1821,) and probably in those other states where the distribution of real and personal property is the same, the inventory is to exclude equally the real and personal estate.

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[1] An executor *de son tort* (i. e , a stranger who takes upon himself to act as executor without any just authority, 2 Bla. Com. 507) is only liable for assets which comes to his hands, and is not chargeable for reducing assets to possession. Kinard *v.* Young, 2 Rich. Eq. 247. Such executor is liable to account only to the executor or administrator, and not the next of kin. Muir *v.* Trustees of L. & W. Orphan House, 3 Barb. Ch. R. 477. His sale of goods will not change the title, though he afterwards administer. Wilson *v.* Hudson, 4 Harring. R. 168. A fraudulent donee, in possession after testator's death, is liable as executor *de son tort.* Sturdivant *v.* Davis, 9 Ired. R. 365. He cannot sue (when there is a rightful executor) nor be sued, except for fraud. Francis *v.* Welch, 11 Ired. R. 215. For his powers as to persons dealing with him *bonâ fide*, see Thompson *v.* Harding, 20 Eng. L. & Eq. 145.

An administrator may compound with the creditor, and receive a less sum than is due the estate, if such a course was *judicious* and beneficial, or not prejudicial to the estate. Wyman's Appeal, 13 N. Hamp. R. 18. Kee *v.* Kee, 2 Gratt. R. 116. Mitchell *v.* Trotter, 7 Gratt. 136. Woolfork *v.* Sullivan, 23 Ala. 548. One of several executors may enter into an amicable action, and submit to arbitration, so as to bind the estate. Lank *v.* Kinder, 4 Harring. R. 457. Kendall *v.* Bates, 35 Me. 357.

[2] The widow of the decedent is entitled to her reasonable support out of the estate during her quarantine; but there is no statute provision in New York for the support of the children of an insolvent decedent. Johnson *v.* Corbett, 11 Paige's R. 265.

of an executor,) if an inventory be not duly made and returned. And if any one or more of the executors or administrators returns the inventory, those who neglect to do it cannot afterwards interfere with the administration until they redeem their default. (*a*) [1]

After completing the inventory, the duty of the administrator is, to collect the outstanding debts, and convert the property into money, and pay the debts due from the intestate.[2] He must sell the personal property, so far as it may be necessary for the payment of debts and legacies, beginning with articles not required for immediate family *use, nor specifically bequeathed. (*b*) [3] In paying *the debts, the order pre- *416

(*a*) N. Y. Revised Statutes, vol. ii. p. 85, secs. 17–23.

(*b*) The English rule is to convert the assets into cash by a public sale; and this was the rule declared in Covenhoven *v.* Shuler, 2 Paige, 122. But in Maryland, unless the sale of the assets be necessary to pay debts and legacies, or to make a satisfactory distribution, the rule is for the executors and administrators to divide the property specifically *in kind* between legatees and distributees. Evans *v.* Iglehart, 6 Gill & Johnson, 171. By the N. Y. Revised Statutes, vol. ii. p. 87, secs. 25, 26, the executor may sell at either public or private sale; and he is allowed, except in the city of New York, to sell on credit not exceeding one year, with approved security; and he will be exempted from responsibility for loses, if he acts in good faith and with ordinary prudence. The statute has not defined what was intended by *approved* security. The English rule in equity is, that the executor must not rest on *personal* security; and if he does, it is at his own peril. But there are exceptions to the severity of that rule; and it will depend upon circumstances whether, under the New York statute, an executor or administrator acting in good faith, be bound to answer for the eventual failure of personal security. See a discussion of the subject in Smith *v.* Smith, 4 Johns. Ch. Rep. 284, 629.[4] The weight of the modern English authority is, that investing trust moneys in personal security is a breach of trust. Lord Hardwicke, in Rider *v.* Bickerton, 3 Swanst. Rep. 80, note. Lord Kenyon, in Holmes *v.* Dring, 2 Cox's Cases, 1. Lord Loughborough, in Adye *v.* Feuilleteau, 3 Swanst. Rep. 84, note.

[1] Jerome *v.* Jerome, 18 Barb. 24.

[2] He has no right to take land in payment of debts due the testator; and if he takes bills, it will be at his peril, if he neglects to convert them into some property less perishable. Weir *v.* Humphries, 4 Ired. Eq. R. 264. Bailey *v.* Dilworth, 10 S. & M. R. 404. See Powell *v.* Stratton, 11 Gratt. 792.

[3] In New York, the administrator of a person who made a sale of property fraudulent as to creditors, may maintain an action against the vendee, as his possession is made *wrongful* by statute. McKnight *v.* Morgan, 2 Barb. S. C. Rep. 171.

[4] Bogart *v.* Van Velsor, 4 Edw. Ch. 718. Moore *v.* Hamilton, 4 Flor. 112. Hogan *v.* De Peyster, 20 Barb. 100. Smyth *v.* Burns, 25 Miss. 422.

scribed by the rules of the common law is, to pay, first, funeral charges, (*a*) and the expense at the probate office; next, debts due to the state; then debts of record, as judgments, recognizances, (*b*) and final decrees; next, debts due for rent and debt by specialty, as bonds and sealed notes; and lastly, debts by simple contract. Causes of action arising *ex delicto*, for wrongs for *personal* injuries, die with the person, and do not survive against his representatives. Executors and administrators are the representatives of the personal *property* of the deceased, and not of his wrongs, except so far as the tortious act complained of was beneficial to his estate. (*c*) The civil law

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Lord Eldon, in Walker *v.* Symonds, Ibid. 63. Where the will directed the executors *to put on interest, to be well secured*, £500, and they invested it in stock of the Bank of the United States, and it was lost by the bankruptcy of the bank, it was held to mean security by mortgage or judgment on realty, and that the bank security was no better than personal security, and the executors were held responsible for the money. Nyce's estate, 5 Watts & Serg. R. 254. An executor is responsible if he invests trust moneys otherwise than upon real security or in government stock. Bank stock will not do. Ackerman *v* Emott, by Parker, V. Ch., in 4 Barb. S. C. Rep. 626. But the executor may place money where the testator had been accustomed to place it, and without being responsible, if he acts with good faith. Tamlyn's Rep. 279. In Gray *v.* Fox, Saxton's N. J. Ch. Rep. 259, the question what is due security in respect to trustees loaning money was learnedly discussed; and it was declared to be a well settled rule in the English chancery, and was adopted in New Jersey, that the loaning of trust moneys, and especially where infants were concerned, on *private or personal* security, was not due security, and such loans were at the risk of the trustees. The trustee must take adequate real security, or an investment in public stocks or funds. This was the opinion of the chancellor of New York, in Smith *v.* Smith, above cited. In Stickney *v.* Sewell, 1 Mylne & Craig, 8, executors were empowered to lend money on real or personal security; and it was held that money should be advanced to the amount only of two thirds of the value of freehold land, of a permanent value, and not upon houses or buildings, which are fluctuating; and the executor was held answerable for the deficiency.

(*a*) As against creditors, the rule of law is, that no more shall be allowed for funeral expenses than is absolutely necessary, regard being had to the degree and condition in life of the deceased person. Hancock *v.* Podmore, 1 B & Adol. 260. Palmes *v.* Stephens, R. M. Charlton's Geo. Rep 56. In Louisiana, the privileged claim of the lessor, as against the estate of the deceased lessee, comes in immediately after the funeral charges. Devine *v.* Pecquet, 4 Rob. Rep. 366.

(*b*) A recognizance, as of special bail, is of higher dignity than a debt by specialty, and has preference. Moon *v.* Pasteur, 4 Leigh's Rep. 35.

(*c*) Hambly *v.* Trott, Cowp. 371. The People *v.* Gibbs, 9 Wendell, 29. Hench *v.* Metzer, 6 Serg. & Rawle, 272. But for *devastavits* or wrongs to property, the personal representatives of the deceased, who committed the tort, were made answerable

gave no preference to creditors, except as to debts incurred for

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by the statute of 30 Car. II. ch. 7, and 4 and 5 W. & M. ch. 24; and doubtless the same law exists in this country. Executors and administrators are also made liable to answer for injuries to real property, in the character of torts or trespasses. N. Y. Revised Statutes, vol. ii. p. 114, sec. 4. Respecting the liabilities of co-executors, it is understood that one executor is not chargeable for a *devastavit* of his co-executor, and is chargeable only for the assets which have come to his own hands. Cro. E. 318. Str. 20. 4 Dessau. S. C. Rep. 65, 92, 199. 5 Conn. Rep. 19, 20. 11 Johns. Rep. 16, 21. 5 Johns. Ch. Rep. 296. 5 Pick. Rep. 104. 2 Molloy's Ch. Rep. 186. But he is answerable for the acts of his co-executor when there has been connivance or negligence, or when he delivers over assets, or makes payment directly to his co-executor. 7 East's Rep. 246. 2 Molloy's Rep. 186.[1] So one executor may dispose of the assets and bind the estate by sale or discharge. 9 Cowen, 34.[2] Preston on Abstracts of Title, vol. ii. 22, 23. 11 Johns. Rep. 21. 9 Paige's Rep. 52. 4 Hill's N. Y. Rep. 492. The better opinion would seem also to be, that administrators stand on the same ground in these respects as to their powers and responsibilities. 2 Vesey, 267. 1 Wendell, 583. 4 Wash. C. C. U. S. 186. 11 Johns. Rep. 21. Gayden *v.* Gayden, 1 McMullan's S. C. Rep. 435. But where a note or other security is given to two or more executors jointly after testator's death, the title is in all of them equally as if given to them as trustees, and the concurrence of all is necessary to transfer the title to the same. Smith *v.* Whiting, 9 Mass. Rep. 334. Hertell *v.* Bogert, 9 Paige's Rep. 52. In the case of Jones's Appeal, 8 Watts & Serg. 143, it was forcibly illustrated by the chancellor, that joint trustees are not answerable for the defaults of each other in cases of ordinary prudence and diligence in the trustee sought to be charged for his co-trustee.[3]

It was held by Lord Hardwicke, in 1 Atk. 526, that an executor was not bound in law or equity to plead the statute of limitations, to a demand otherwise well founded. But that *dictum* was shaken by a contrary *dictum* of Bailey, J., in M'Culloch *v.* Dawes, 9 Dowl. & Ryl. 40. It is therefore left as an unsettled point, and the executor must at least exercise a very sound discretion in the case. But more recently it is held, in Hodgdon *v.* White, 11 N. H. Rep. 208, that the administrator is not bound to plead the statute of limitations to a demand otherwise well founded.[4] This is the sound doctrine.

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[1] Mesick *v.* Mesick, 7 Barb. 120. Hall *v.* Carter, 8 Geo. 388.

[2] Or release mortgaged premises from the lien of a mortgage. Stuyvesant *v.* Hall, 2 Barb. Ch. R. 151. Hoke *v.* Fleming, 10 Ired. R. 263. Shaw *v.* Berry, 35 Me. 279. Money collected by an attorney for an administrator, it is said, in Sloan *v.* Johnson, 14 S. & M. R. 47, are not assets for the administrator *de bonis non.* It must be accounted for by the prior administrator.

[3] Banks *v.* Wilkes, 3 Sandf. Ch. R. 99. Atcheson *v.* Robertson, 3 Rich. Eq. 132. But if an administrator be guilty of a want of due care in preventing the default of his co-administrator, the rule is otherwise. Johnson *v.* Corbett, 11 Paige, R. 265. Hengst's Appeal, 24 Penn. 413.

[4] So held in Kennedy's Appeal, 4 Barr's R. 149. Miller *v.* Dorsey, 9 Md. 317. Batson *v.* Murrell, 10 Humph. 301. Ritter's Appeal, 23 Penn. 95. *Contra*, Patterson *v.* Cobb, 4 Flor. 481, *q. v.* and cases cited. See, also, West *v.* Smith, 8 How. R. 402, 412.

In Missouri a qualified doctrine prevails. Wiggins *v.* Lovering, 9 Mo. R. 262.

funeral expenses, and the expenses of the administration, and debts by mortgage. The heir paid himself first, and he might pay the first creditor who came. All the assets were considered as equitable. (a) When debts are in equal degree, the administrator may pay which he pleases first, and he may always prefer himself to other creditors in an equal degree. If a creditor commences a suit at law or in equity, he obtains priority over other creditors in equal degree, but an administrator may go and confess judgment to another creditor in equal degree, and thereby defeat the creditor who first sued, by pleading the judgment, and *nil ultra*, &c. (b) [1]

The New York Revised Statutes (c) have made some *417 essential alterations in the English law, and in the *former law of New York, as to the order of payment of the debts of the deceased. The order now established is as follows: 1. Debts under the law of the United States; 2. Taxes assessed; 3. Judgments and decrees according to priority; 4. Recognizances, bonds, sealed instruments, notes, bills, and unliquidated demands and accounts, without any preference between debts of this fourth class. Nor is a debt due and payable entitled to preference over debts not due; nor does the commencement of a suit for the recovery of any debt, or the obtaining judgment thereon against the executor or administrator, entitle such debt to any preference over others of the same class. Debts not due may be paid, according to the class to which they belong, after deducting a rebate of legal interest upon the sum paid, for the unexpired time. The surrogate is authorized to give a preference to rents due and accruing upon leases held by the testator or intestate at his death, over debts

(a) Dig. 11, 7, 45. Ibid. 35, 2, 72. Code, 6, 30, 22, secs. 4, 5, 9. Wood's Institutes of the Civil Law, 186, 187. Brown's View of the Civil Law, vol. i. p. 307.

(b) Williams's Executors, 679, 1213, 1214. See Shep. Touch. by Preston, vol. ii. pp. 475–480. Bac. Abr. tit. Executors and Administrators, L. 2, for a succinct view of the rules of the common law, touching the order of paying debts by executors and administrators.

(c) Vol. ii. p. 87, secs. 27, 28, 29, 30.

[1] See Lawson v. Hansbrough, 10 B. Mon. 147. Moye v. Albritton, 7 Ired. Eq. 62. Burruss v. Fisher, 23 Miss. 228.

of the fourth class, whenever he shall deem the preference beneficial to the estate. In suits against executors and administrators, the judgment, if there be a proper plea in the case, is to be entered only for such part of the assets as shall be a just proportion to other debts of the same class; and the execution is to issue only for a just proportion of the assets applicable to the judgment; and no execution is to issue until an account has been rendered and settled, or the surrogate shall otherwise order. (a) No executor * or administrator can *418 retain for his own debt, until it has been proved to and allowed by the surrogate, and it is not entitled to any preference over debts of the same class. (b) The executor or admin-

(a) N. Y. Revised Statutes, vol. ii. p. 88, secs. 31, 32. The surrogate may decree the payment of debts, upon the application of a creditor, at any time after six months from the granting of the letters testamentary or of administration, and the payment of any legacy or distributive share, on the application of the party entitled, after the expiration of a year; and he may enforce payment by causing the bond of the executor or administrator to be prosecuted. On judgments obtained at law, against any executor or administrator, application may be made to the surrogate, who is to cite the defendant, and having ascertained the sufficiency of the assets, to order execution. N. Y. Revised Statutes, vol ii. p. 116, secs. 18–22. Ibid. p. 220. In Connecticut, the statute of limitations is suspended in personal actions for one year from the creditor's death, in favor of his executors and administrators. Acts of 1833 ch. 13. In England, it is a rule in chancery that the personal representatives have one year to pay legacies, except where explicit directions are given by the testator.[1] Lord Eldon, 6 Vesey, 539. The statute law in this country, in several of the states, is the same. N. Y. Revised Statutes, vol. ii. p. 90, sec. 43. In New Jersey, the statute of June 12th, 1820, prohibits suits against executors and administrators of insolvents, for debts due from the deceased, until six months from the death of the deceased, unless in cases of fraud, or for the physician's bill, funeral charges, and judgments against the decedent. By the Massachusetts Revised Statutes, in 1836, the creditor is not to sue the executor or administrator until the expiration of one year, except in special cases.[2] It is a well-settled rule, that the time allowed by statute to executors and administrators, before suit brought, is excluded from the computation of time in the statute of limitations. Moses v. Jones, 2 Nott & M'Cord, 259. Dowell v. Webber, 2 Smedes & Marshall, 452. In England, it was decided, in the Prerogative Court of Canterbury, in 1754, that a creditor had a right to call for an inventory, but that the court had no jurisdiction at his suit to examine the particulars of an account. Brown v. Atkins, 2 Lee, by Philimore, p. 1.

(b) N. Y. Revised Statutes, vol. ii. p. 88, sec. 33.

1 An executor cannot relieve himself of responsibility by paying over a legacy to the guardian of the legatee before it is due. Swope v. Chambers, 2 Gratt. R. 319.

2 Provisions of this sort have no force against the claims of the United States. U. S. v. Backus, 6 McL. 443.

istrator may, by public notice, call upon the creditors to exhibit, within six months, their accounts and vouchers, verified by affidavit. The executor or administrator may go on and close the trust as to claims not exhibited within the time; and he will not be chargeable for any due disposition of the assets prior to a suit on such claims, though the next of kin or legatees may be liable to refund to such creditors. If claims be exhibited and disputed, they may be referred to referees by consent; and if not, the creditor must sue thereon within six months, or be barred forever. (*a*)[1]

(*a*) N. Y. Revised Statutes, vol. ii. p. 88, secs. 34-42. An executor or administrator may plead the statute of limitations, and will not be precluded from the benefit of the plea, though he may have previously acknowledged the debt, for he may have made it without due consideration, and in ignorance of the true state of the case. Nor is he bound to plead the statute, for he may know the debt to be just. The plea rests in his discretion.[2] Fritz *v.* Thomas, 1 Wharton, 66. Nor is he liable to creditors, if he exercises a reasonable discretion in compromising a debt. Pennington *v.* Healy, 1 Crompton & Meeson, 402. In New York, the surrogate is authorized by statute, 70th sess. ch. 81, to permit executors and administrators to compromise and compound debts due to their testator or intestate.[3] The jurisdiction of the courts of equity to superintend the administration of assets, and decree a distribution of the residue, after payment of the debts and charges, has been long established. Mathews *v.* Newby, 1 Vern Rep. 133. Howard *v.* Howard, Ibid. 134. And when relief is sought in chancery by a creditor on a creditor's bill, it has been the settled doctrine of the court ever since the great case of Morrice *v.* The Bank of England, (Cases Temp. Talb. 217,) that upon a decree being obtained, it was in the nature of a judgment for all the creditors, and the court will not permit any particular creditor, by proceeding at law, to disturb that administration of the assets.[4] All the creditors are entitled, and should have notice for that purpose, to come in and prove their debts before the master; and on motion of either party, an injunction will be granted to stay all proceeding of any of the creditors at law. This subject was largely discussed, and the authorities and precedents examined, and the principle adopted, (and I believe for the first time in this country,) in Thompson *v.* Brown, 4 Johns. Ch. Rep. 619; and the decree in that case, which is given in the report of it, was drawn by the chancellor as explanatory of the relief to be afforded. The English rule and practice in chancery is still the same, with progressive enlargement. Drewry *v.* Thacker, 3 Swanst.

[1] Baggott *v.* Boulger, 2 Duer, 160. Dolbeer *v.* Casey, 19 Barb. 149.

[2] See *ante*, p. [416,] note.

[3] See *ante*, p. [415,] note, as to the right of an administrator to compound debts.

[4] It must be a very uncommon case to induce a court to open the account of an administrator after the lapse of twenty years. Taylor *v.* Benham, 5 How. U. S. 233. Where an administrator has settled an estate, and paid over the money in pursuance of the order of a court, and a will is subsequently discovered and proved, the executor cannot compel the administrator to an account. Relief may be had in equity against the distributees for the money received. Barkaloo *v.* Emerick, 18 Ohio R. 268.

These alterations, in New York, in the rules at common law, are generally dictated by justice and policy; and those respecting equality of payment have long been the prevailing doctrine in the distribution of assets in chancery. The surrogates are clothed with new and enlarged powers, which are very convenient to the public in the settlement of these ordinary and popular trusts. To guard against the undue assumption of power, surrogates are restrained from exercising any power or jurisdiction whatever, not expressly given by statute. (*a*) But I forbear to enlarge further on the subject. My principal object, in this part of the present lecture, was rather to notice the descent and distribution of personal property than to discuss the general powers and duties of executors and administrators; and it may here be generally observed, that what has been said concerning the rules of law as to the inventory, the collection of the property, and the payment of debts, applies equally to executors and administrators.

In the jurisprudence of the other states, the administration of the assets is likewise subject to various local modifications. * In a few of the states, the English order of *419 preference is preserved. (*b*) In most of them, that order

Rep. 544. Clarke *v.* Earl of Ormonde, 1 Jacob's Rep. 108. But in ordinary cases, the plain, prompt, and cheap decretal administration of the assets in the probate courts is much to be preferred. The principal English cases and doctrine on the subject of the distribution and marshalling of assets in equity, are collected and digested in Mr. Justice Story's Com. on Eq. Jurisprudence, ch. 9. See, also, Mr. Ram's "Practical Treatise of Assets, Debts, and Incumbrances," which is the most ample view of any we have on the administration and distribution of assets in law and equity, supported by an overwhelming mass of cases on the subject.

(*a*) N. Y. Revised Statutes, vol. ii. p. 221. The statute of New York, 1837, ch. 460, gave new and specific directions to surrogates relative to the proving of wills, and taking new security from administrators and guardians, and revoking the trust of administrators and guardians, and relative to their accounting, &c.

(*b*) In Virginia, North Carolina, South Carolina, Kentucky, Delaware, Georgia, and Indiana, the English order of preference is preserved, with the exception of a few slight variations. Thus, in South Carolina, no preference is given among debts in equal degree, except that mortgages, judgments, and executions are paid as legal liens, according to seniority. In Virginia and Kentucky, debts due on protested foreign bills are placed on a footing with judgments. By Act of Virginia, of March, 1831, debts due by specialty, and promissory notes, and other writings of decedent, are taken to be of equal dignity. In North Carolina, specialty and simple contract debts are placed on an equality. See Griffith's Law Register, h. t.; 12 Wheaton, 594;

is entirely disturbed, and a more just and equitable rule of distribution adopted. Expenses of the last sickness, including the physician's bill, and funeral and probate charges, have everywhere the preference; and generally debts due to the United States and the state are next preferred,[1] and then all other debts are placed on an equality, and paid ratably in the case of a deficiency of assets; but with the exception, no doubt, of legal liens, if there be any such recognized by law. (*a*) In Louisiana, there is a particular detail of the order of priority, which is special and peculiar, and minute even beyond the rule of the common law. (*b*) In Maryland, judgments and decrees have preference, and all other debts are equal; and in Missouri, expenses of the last sickness, debts due to the state, and judgments, have preference, and all other debts are placed on an equality. (*c*) In Pennsylvania, the order of administration is, to pay, 1. Physicians, funeral expenses, and servants' wages; 2. Rents not ex-

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Chappell *v.* Brown, 1 Bailey's S. C. Rep. 528; Braxton *v.* Winslow, 4 Call's Rep. 308; Mayo *v.* Bentley, Ibid. 528, Lidderdale *v.* Robinson, 2 Brockenbrough, 165; Bomgaux *v.* Bevan, Dudley's Geo. Rep. 110; Palmes *v.* Stephens, R. M. Charlton's Geo. Rep. 56.

(*a*) This is the case in the states of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New Jersey, Ohio, Indiana, Illinois, Tennessee, Mississippi, and Alabama, with some small variations. Thus, in Alabama, debts due to sureties are preferred; and in New Jersey, debts due to the United States have preference, and debts due and judgments entered during the life of the decedent have preference. In Ohio, after funeral expenses and the expenses of the last sickness, a sum is allowed for the support of the widow and children for one year, and then liens on the land, by mortgage and judgment, are preferred. The residue of the assets are distributed ratably among the creditors. In Georgia, after debts due to the public, are payable judgments, mortgages, and executions; the eldest first; next rents; then bonds and other obligations; and, lastly, open accounts. Act of Georgia, December, 1792. Act of New Jersey, 1820. Revised Laws of New Jersey, 766. Griffith's Reg. *passim.* Dane's Abr. of American Law, vol. i. p. 560. Public Acts of Connecticut, 1821. 5 Hammond's Rep. 483. Statutes of Ohio, 1831. Massachusetts Revised Statutes, 1836. Revised Laws of Indiana, 1838, pp. 181, 186, and of Illinois, edit. 1833, p. 648. In Tennessee, by Act of 18th October, 1833, ch. 36, the assets of persons dying insolvent are directed to be distributed ratably among all the creditors.

(*b*) Civil Code of Louisiana, art. 1051-1061.

(*c*) Griffith's Law Register, h. t.

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[1] The priority of the United States cannot be affected by statutes of distribution, nor by probate decrees. United States *v.* Duncan, 4 McL. 607.

ceeding one year; 3. Judgments; 4. Recognizances; 5. Bonds and specialties; 6. All other debts equally, except debts due to the state, which are to be last paid. (a)

*3. *Of the distribution of the personal estate.* *420

1. When the debts are paid, the administrator (the husband as administrator excepted) is bound, under the English statute of distributions, of 22 and 23 Charles II. ch. 10, after the expiration of a year from the granting of administration, to distribute the surplus property among the next of kin. (b) He is

(a) Frazer v. Tunis, 1 Binney's Rep 254. The physician's bill first to be paid is not confined to medicine and attendance in the last sickness. Rouse v. Morris, 17 Serg. & Rawle, 328. But by statute of 24th February, 1838, in Pennsylvania, no preference is now given to judgment over bond and simple contract creditors in the distribution of the assets of decedents. Foreign judgments rank as simple contracts only. Judgments of other states rank in the same grade as judgments in the state. 4 Watts & Serg. 314. The preference given by the laws of almost all countries, in the payment of debts to the expenses of the last sickness, and funeral, and the wages of servants, is founded on considerations of humanity and decorum. The last item of privileged debts is usually confined to menial servants, and to the current wages of the last term of the contract. This is the rule in Scotland. 2 Bell's Com. 162–165. The Massachusetts Revised Statutes, in 1836, go into a minute and very specific detail of the duties of executors and administrators, in collecting, settling, and disposing of the estate of the deceased. Considering the burden, and the incessant calls for the assumption of those trusts, such details are judicious, very useful, and even benevolent. The established rule in the administration of the assets of the deceased persons, *in regard to creditors*, is to be drawn from the laws of the country where the assets are, and where the executor or administrator acts, and from which he derives his authority, and not by that of the domicil of the deceased. The residue of the assets is distributed according to the law of the domicil. Marshall, Ch. J., in Harrison v. Sterry, 5 Cranch's Rep. 299. Tilghman, Ch. J., in Milne v. Moreton, 6 Binney's Rep. 361. Chase, Ch. J, in De Sobry v. De Laistre, 2 Harr. & Johnson, 224. Smith v. Union Bank of G. 5 Peters's U. S. Rep. 523, 524. Varnum v. Camp, 1 Green's N. J. Rep. 332. Story's Com. on the Conflict of Laws, sec. 513. See, also, *infra*, pp. 454, 455. But many of the foreign jurists, to whom Judge Story refers, maintained that the law of the domicil of the debtor, even in a conflict of the rights and privileges of creditors, ought to overrule the jurisprudence of the *situs* of the effects.

(b) Mr. Robertson, in his Treatise on Personal Succession, Edinburgh, 1836, ch. 1 to 6, has gone fully, and with great research and learning, into the history of the law of successions in England, Scotland, and Ireland, and has traced the gradual relaxation of the restrictions on the power of bequests, and the alterations and improvements in the administration and distribution of intestates' estates, down to the present time. This interesting treatise is republished in the Law Library, vol. xii. edited by Thomas I. Wharton, Esq., of Philadelphia, and which is an extremely useful and

first to account to the ordinary court of probates, surrogate or other proper jurisdiction, and which, in several of the United States, is appropriately termed the orphans' court. It is held, that he is not bound to distribute without a previous order for that purpose; (a) and the statute of distributions makes it the duty of the court of probates to decree distribution. (b) The

valuable compilation to the American bar, for they have, by means of it, a ready access to a selection of the best English treatises on the various branches of the law.

(a) Archbishop of Canterbury v. Tappen, 8 Barnw. & Cress. 151.

(b) By the New York Revised Statutes, the executor or administrator is bound, after the expiration of eighteen months, to account before the surrogate, under the penalty of attachment and a revocation of his power. N. Y. Revised Statutes, vol. ii. p. 92, sec. 52. In accounting, he must verify by vouchers, and may be examined upon oath; and his oath will, if uncontradicted, supply the place of vouchers as to items, each of which does not exceed $20, and not exceeding, in the whole, in behalf of any one estate, $500. Ibid. secs. 54, 55. This was adopting the rule in chancery, which had established that a defendant, on accounting before a master, might verify, on his own oath, items not exceeding in each case $20, and not exceeding in the whole £100 sterling. Remsen v. Remsen, 2 Johns. Ch. Rep. 501. The executor or administrator may be allowed for property perished or lost without his fault, and he is not to gain by the increase, nor lose by the decrease of the property, without his fault. He is also entitled, besides his necessary expenses, to the same rate of commission of five, two and a half, and one per cent, which had been adopted by the chancellor in 1817; though, if a compensation be provided by the will, it is to be taken as a full satisfaction, unless the executor elect to take the allowance provided by law.[1] N. Y. Revised Statutes, vol. ii. p. 93, secs. 58, 59. 3 Johns. Ch. Rep. 44. The commissioners who revised the statutes of Massachusetts in 1835, reported a similar allowance to be made. By statute of 17th April, 1838, the Revised Statutes of Massachusetts on this point were repealed; and the court in which the accounts of executors and administrators are settled, are to allow their reasonable expenses, and a just and reasonable compensation for their services. Assignees in trust are allowed an equitable compensation for their services, according to circumstances. Jewett v. Woodward, 1 Edw. Ch. Rep. 195. In Maryland, the commission is from five to ten per cent, in the discretion of the court. 1 Peters's U. S. Rep. 562. 1 Harr. & Gill, 13, 84. In Pennsylvania, the ordinary commission is five per cent., but it may exceed or be less than that, in the discretion of the court, according to circumstances. For receiving and paying out money it is two and a half per cent, and sometimes an additional half per cent. is held to be a sufficient compensation for trouble. In the Estate of Miller, 1 Ashmead's Rep. 323. Pusey v. Clemsen, 9 Serg. & Rawle, 204. Stevenson's Estate, 4 Wharton, 98. In Louisiana, the commission to syndics cannot exceed five per cent., by Act of 1817. That to executors is two and a half per cent.

[1] The commission must be apportioned among the executors according to their respective services. Act of 1849, ch. 160, White v. Bullock, 20 Barb. 91. The administrator may be allowed counsel-fees for the successful defence of his right of administration. *Ex parte* Young, 8 Gill, 285.

statute declares, that after the debts, *funeral charges, *421 and just expenses are deducted, a just and equal distribution of what remaineth clear of the goods and personal estate of the intestate shall be made among the wife and children, or children's children, if any such there be; or otherwise the next of kin to the intestate, in equal degree, or legally representing their stocks; that is to say, one third part of the surplusage to the wife of the intestate, and all the residue, by equal portions, to and amongst the children of the intestate and their representatives, if any of the children be dead, other than such child or children who shall have any estate by settlement, or shall be advanced by the intestate in his lifetime, by portion equal to the share which shall, by such distribution, be allotted to the other children to whom such distribution is to be made. And if the portion of any child who hath had such settlement or portion, be not equal to *the share due to the other *422 children by the distribution, the child so advanced is to be

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on the whole amount received, and is shared among them all. Civil Code, art. 1676. In South Carolina, the established commission is five per cent., with a further allowance to be assessed by a jury, in a case of extraordinary care and trouble. Logan *v.* Logan, 1 M'Cord's Ch. Rep. 1. In England, it is a principle in equity, that if the testator, by will, gives a compensation, the executor is not entitled to any other which may be allowed by law, unless he promptly elects to prefer it. 3 Merivale's Rep. 24. The mode of contesting the accounts before the surrogate, by the creditors, legatees, and next of kin, is specially detailed in the New York statutes. N. Y. Revised Statutes, vol. ii. p. 93, secs. 60–70. And the manner of accounting before the surrogate by executors and administrators is also detailed in the case of Gardner *v.* Gardner, 7 Paige, 112. The decree of the surrogate on the final settlement of the executor's accounts is final, (subject to an appeal to the chancellor,) as to payments to creditors, legatees, next of kin, and concludes all parties. Wright *v.* Trustees of Methodist Episcopal Church, 1 Hoffman's Ch. Rep. 214, 215.

In Pennsylvania, the registers' courts have a similar jurisdiction over the estates of testators and intestates; and the orphans' court has a species of equity jurisdiction over executors and administrators, guardians, and minors. Case of Patterson's Estate, 1 Watts & Serg. 293. But the practice and rules in the orphans' tribunals were represented to be in a state of deplorable confusion; (Duncan, J., 11 Serg. & Rawle, 432;) and in January, 1831, the commissioners appointed to revise the statute code of Pennsylvania, reported new revised statutes, containing a consolidation of all the statutes, with the suggestion of improvements in relation to the registers' and orphans' courts. In Ohio, testamentary jurisdiction, or probate powers, and the appointment and control of guardians, are annexed to the courts of common pleas in their respective counties. Acts of 1831.

made equal with the rest. (*a*) If there be no children, or their representatives, one moiety of the personal estate of the intestate goes to the widow, and the residue is to be distributed equally among the next of kin, who are in equal degree, and those who represent them; but no representation is admitted among collaterals, after brothers' and sisters' children; (*b*) and in case there be no wife, then the estate is to be distributed equally among the children; and if no child, then to the next of kin, in equal degree, and their lawful representatives, in the same manner already mentioned. It is further provided, that if any child shall die intestate after the death of the father, and without wife or children, and in the lifetime of the mother, every brother and sister, and their representatives, shall have an equal share with her.

This is the substance of the English statute of 22 and 23 Charles II, which was borrowed from the 118th novel of Justinian; and except in some few instances mentioned in the statute, it is governed and construed by the rules of the civil law. (*c*)

(2.) The next of kin is determined by the rule of the civil law; and under that rule the father stands in the first degree, the grandfather and the grandson in the second; and in the collateral line, the computation is from the intestate up to the common ancestor of the intestate, and the person whose relationship is sought after, and then down to that person. According to that rule, the intestate and his brother are related in the second degree, the intestate and his uncle in the third degree. (*d*) The half blood are admitted equally with the whole blood, for

(*a*) Under this statute the widow cannot come into hotchpot and claim collation of advancements to the children. She only takes her share of what remains after deducting the advancements. Ward *v.* Lant, Prec. in Chancery, 182, 184. Kircudbright *v.* Kircudbright, 8 Vesey, 51. This is also the law in Tennessee, under the North Carolina statute of 1784, adopted in that state. Brunson *v.* Brunson, Meig's Rep. 630.

(*b*) The construction of the statute which declares that there shall be no representation among collaterals, after brothers' and sisters' children, is, that it means the children of the brothers, and sisters of the intestate. If, therefore, the intestate dies without issue, and leaves an aunt, and children of uncles and aunts, the aunt succeeds to the whole estate. Bowers *v.* Littlewood, 1 P. Wms 593.

(*c*) See vol. i. p. 542, note; and also, Carter *v.* Crawley, T. Raym. Rep. 496. Palmer *v.* Allicock, 3 Mod. Rep. 58. Edwards *v.* Freeman, 2 P. Wms. 436.

(*d*) Sir John Strange, in Lloyd *v.* Tench, 2 Ves. 213.

they are equally as near of kin; and the father succeeds to the whole personal estate of a *child, who dies intestate, and without wife or issue, in exclusion of the brothers and sisters; and the mother would have equally so succeeded as against the collaterals, had it not been for a saving clause in the act, which excludes her from all but a ratable share. She is excluded, lest, by remarrying, she would carry all the personal estate to another husband, in entire exclusion, forever, of the brothers and sisters; but she still takes the whole personal estate, as against more remote relations of the intestate. (a) The K. B. declared, in *Blackborough* v. *Davis*, (b) that the father and mother had always the preference before the brothers and sisters, in the inheritance of the personal estate, as being esteemed nearer of kin; and for the same reason, the grandmother is preferred to the aunt. The grandmother is preferred, not because she is simply in the ascending line, for, under the statute of distributions, a nearer collateral will be

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(a) It has been decided in Maryland, in Griffith v. Griffith, 4 Harr. & M'Henry, 101, and Coomes v Clements, 4 Harr. & Johns. 480, that by the common law of England, as it existed at the time of the colonization of Maryland, and by the common law of Maryland, the widow is entitled to a reasonable share of her husband's personal estate, after payment of his debts; and which reasonable part was one third, or one half, according to circumstances; and it was a right paramount to the power of the husband, and he could not deprive her of it by will. In Pennsylvania, under the Act of 1807, a widow is entitled to a distributive share of the residue of her husband's estate undisposed of by his will, in common with the next of kin; and if there be no widow or next of kin, the state will take in preference to the executor, who holds such a residuum as a mere trustee. Darrah v. M'Nair, 1 Ashmead, 236. At common law, such residuum went to the executor. The courts of equity then interfered, and gave it to the next of kin, if they could, even by a strained construction of the will, make out such an intention. The widow in such cases came in, of course, for her share with the next of kin. The Pennsylvania law wisely puts an end to all matter of construction, and equitably gives at once, and in all cases, the undisposed surplus to the next of kin. In Virginia, the executor is not, in any case, entitled to the *residuum* of personal property undisposed of by will. It goes to the next of kin. Paup v. Mingo, 4 Leigh's R. 163.[1]

(b) 1 P. Wms. 41. 2 Ves. 215.

[1] The rule as to the undisposed revenue is thus expressed in Ellcock v. Mapp, 16 E. L. & Eq. 27: "Where there appears a plain implication or strong presumption that the testator by naming an executor, meant only to give the office of executor, and not the beneficial interest, the person named is considered as trustee for the next of kin."

preferred to a more remote lineal, but because she is nearer of kin, according to the computation of the civilians, by one degree. And in *Moor* v. *Barham*, decided by Sir Joseph Jekyll, (*a*) the grandfather on the father's side, and the grandmother on the mother's side, take in equal moieties by the statute of distribution, as being the next of kin in equal degree; and the half blood take equally with the whole blood. A brother and grandfather of the intestate are equally near of kin, and each related in the second degree, and therefore it would seem, from the directions in the statute, that they would take equally; *424 but it has been *decided in England, and it is also said to be the better construction of the novel of Justinian, that the brother of the intestate will exclude the grandmother of the intestate. This was so decided in *Pool* v. *Wilshaw*, in 1708; and Lord Hardwicke, in *Evelyn* v. *Evelyn*, (*b*) followed that determination as being correct, though it may be considered an exception to the general rule. He said it would be a very great public inconvenience to carry the portions of children to a grandfather, and contrary to the very nature of provisions among children, as every child may properly be said to have *spes accrescendi*. This question was very much debated among the civilians in their construction of the 118th novel of Justinian; and the generality of them, of whom Ferriere and Domat are of the number, were of opinion that the grandfather and the brother took equally; but Voet was of a different opinion; and his opinion, though without any strong foundation in reason, is the one prevailing in the English courts. (*c*)

The question whether the half blood took equally with the whole blood, under the statute of distributions, was debated in the case of *Watts* v. *Crooke*; (*d*) and it was determined in chancery that they were of equal kin, and took equally with the whole blood; and the decree was affirmed upon appeal to the

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(*a*) Cited in 1 P. Wms. 53.

(*b*) 3 Atk. Rep. 762. Amb. Rep. 191. Burn's Eccl. Law, vol. iv. p. 307.

(*c*) Voet, Com. ad Pand. lib. 38, tit. 17, sec. 13. Dr. Irving, in his Introduction to the Study of the Civil Law, 4 edit. London, 99–101, contends that the reasoning of Voet and the decision in England were fallacious and erroneous, and not founded on a true construction of the novel.

(*d*) Shower's Cases in Parliament, 108. 2 Vern. 124, S. C.

House of Lords.(*a*) So posthumous children, whether of the whole or half blood, take equally as other children, under the statute.(*b*)

As the statute of distribution says that no representation shall be admitted among collaterals after brothers' and sisters' *childen, it was held, in *Pett* v. *Pett*, (*c*) that a brother's grandchildren could not share with another brother's children. And, therefore, if the intestate's brother A. be dead, leaving only grandchildren, and his brother B. be dead, leaving children, and his brother C. be living, the grandchildren of A. will have no share, and cannot take. One half of the personal estate will go to the children of B., and the other half to C. But if all the brothers and sisters and their children be dead, leaving children, those children cannot take *by representation*, for it does not extend so far; but they are all *next of kin*, and in that character they would take *per capita*. Representation in the descending lineal line proceeds on *ad infinitum*, restrained by no limits. It has also been decided, that if the intestate leaves no wife or child, brother or sister, but his next of kin are an uncle by his mother's side, and son of a deceased aunt, the uncle takes the whole, and the representation is not carried down to the representatives of the aunt.(*d*) *425

It is the doctrine under the statute of distributions, that the claimants take *per stirpes* only when they stand in unequal degrees, or claim by representation, and then the doctrine of representation is necessary. But when they all stand in equal degree, as three brothers, three grandchildren, three nephews, &c., they take *per capita*, or each an equal share; because, in this case, representation, or taking *per stirpes*, is not necessary to prevent the exclusion of those in a remoter degree; and it would

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(*a*) In Maryland, so late as 1827, in the case of Seekamp *v*. Hammer, it was decided that under the Act of 1798, the half blood took equally with the whole blood in the distribution of the personal estate of an intestate. 2 Harr. & Gill, 9.

(*b*) Burnet *v*. Mann, 1 Ves. 156.

(*c*) 1 Salk. Rep. 250. 1 P. Wms. 25, S. C. Duvall *v*. Harwood, 1 Harr. & Gill, 474, S. P.

(*d*) Bowers *v*. Littlewood, 1 P. Wms. 593. Parker *v*. Nims, 2 N. H. Rep. 460. Porter *v*. Askew, 11 Gill & Johnson, 346.

be contrary to the spirit and policy of the statute, which aimed at a just and equal distribution. (*a*) Uncles and aunts and *426 nephews and nieces, stand in the same third *degree, and take equally *per capita.* (*b*) If a person dies without children, leaving a widow and mother, brother and sister, and two nieces by a deceased brother, then, according to the established doctrine, the widow would take a moiety, and the mother, brother, and sister would each take one fourth, and the two nieces the other one fourth of the remaining moiety. This point was ruled in *Keylway* v. *Keylway;* (*c*) and the doctrine was declared to be correct by Lord Hardwicke, in *Stanley* v. *Stanley.* (*d*)

(3.) The distribution of personal property of intestates in

(*a*) Walsh *v.* Walsh, Prec. in Ch. 54. Davers *v.* Dewes, 3 P. Wms. 50. Stent *v.* M'Leod, 2 M'Cord's S. C. Ch. Rep. 354. Hallett *v.* Hare, 5 Paige, 316. Nephews and nieces, under the statute of descents in South Carolina, of February, 1796, which abolished primogeniture, and distributed real and personal property in the same manner, would, in the case stated, take *per stirpes*, contrary to the rule in the English law.

(*b*) Durant *v.* Prestwood, 1 Atk. Rep. 454. Lloyd *v.* Tench, 2 Ves. 213. Buissieres *v.* Albert, 2 Lee, 51. (Eng. Eccle. Rep. vol. vi. p. 30, edit. Philadelphia, 1841.)

(*c*) 2 P. Wms. 344.

(*d*) 1 Atk. Rep. 457. The English doctrine of distribution of personal property, according to the statutes of 22 and 23 Charles II., and 29 Charles II., and 1 James II., is fully and clearly explained by Ch. J. Reeve, in his Treatise on the Law of Descents, under the head of Introductory Explanation. It is the most comprehensive, neat, and accurate view of the English law on the subject that I have anywhere met with.

Mr. Robertson, in his learned Treatise on the Law of Personal Succession, p. 386, (12 Law Library, 214,) thinks that the Scottish rules of succession in regard to personal estate require revision, and are not just or expedient, as they (1.) limit the power of a husband or father to make a will; (2.) allow brothers and sisters and their descendants to exclude the father from the succession, though he be the nearest in blood, and allow uncles and aunts and their descendants to exclude the grandfather; (3.) exclude the mother entirely from any share in the succession of her child; (4.) totally exclude maternal relations from the succession; (5.) totally exclude representations in every case in regard to the succession of personal estate; (6.) disable bastards from disposing of their personal estate by will.[1]

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[1] (7.) Among collaterals, kindred of the full blood exclude those of the half blood in the same line of succession. Robertson on Succession, p. 379. Graham *v.* The Public Administrator, 4 Bradford, (N. Y.) 127.

the United States has undergone considerable modification. In many of them the English statute of distributions as to personal property is pretty closely followed. (*a*) * In *427

(*a*) This is the case in Tennessee, North Carolina, Maryland, Delaware, New Jersey, and Vermont. The English statute of distributions was adopted in New Jersey, by an Act of Assembly, as early as 1681. (Smith's Hist. of New Jersey, 130,) and is reënacted in 1847. N. J R. S. p. 355. The New York Revised Statutes, which went into operation on the 1st January, 1830, have essentially reënacted the English statute of distributions, which had been adopted, and continued the law of the state down to that period; and, for greater precision, they have particularly specified the course of distribution. After the account is rendered and finally settled, the surrogate decrees distribution of the surplus of personal estate, and decides all questions arising thereon. The distributions are, 1. One third thereof to the widow; and the residue, by equal portions, among the children, and such persons as legally represent them, if dead. 2. If no children, or their representatives, one moiety to the widow, and the residue to the next of kin. 3 If no descendant, parent, brother, or sister, nephew or niece, the widow takes the whole surplus. If there be a brother or sister, nephew or niece, and no descendant or parent, the widow takes the whole surplus, if it does not exceed two thousand dollars. If it does, she takes her moiety, and two thousand dollars only. 4. If no widow, the surplus goes equally to the children, and those that represent them. 5. If no widow or children, or their representatives, the surplus goes to the next of kin, in equal degree, and their representatives. 6. If no children, or their representatives, or father, a moiety of the surplus goes to the widow, and the other moiety in equal shares, to the mother and brothers and sisters of their representatives. 7. If there be a father, and no child or descendant, he takes a moiety if there be a widow, and the whole if there be none. 8. If there be a mother, and no child, or descendant, or father, brother, sister, or representative of a brother or sister, the mother takes a moiety if there be a widow, and the whole if there be none. And if the intestate was an illegitimate, and left no child, descendant or widow, the mother takes the whole, and shall be entitled to administration. N. Y. Act of May 13th, 1845, ch. 236. 9. When descendants or next of kin are in equal degree, they take *per capita*. 10. When they stand in unequal degrees, they take *per stirpes*. 11. No representation is admitted among collaterals, after brothers' and sisters' children. 12. Relatives of the half blood take equally and in the same manner as those of the whole blood. 13. Posthumous children take equally as if born in the lifetime of the person they represent. (N. Y. Revised Statutes, vol. ii. p. 96, sec. 75.) Any advancement to a child, by settlement or portion of real or personal estate, equal or superior to his share, will exclude him and his descendants from the distribution; and if the same was not equal, he will be entitled only to so much as will supply the deficiency. The maintaining or educating, or giving money to a child, without a view to a portion or settlement in life, is not to be deemed an advancement; nor does the provision as to advancement apply, if there be any real estate of the intestate to descend to his heirs. (N. Y. Revised Statutes, vol. ii. p. 97, secs. 76, 77, 78.) The most striking feature in the new provisions introduced into the New York Revised Statutes on the subject of intestate estates, and of testamentary matters, is the enlarged and equitable jurisdiction conferred upon the surrogates in their respective counties. This branch of our jurisprudence will apply more frequently than any other, and with great force and

a majority of the states the descent of real and personal property is to the same persons and in the same propor-

interest, to family concerns; and it will rise into correspondent importance, and awaken much public solicitude. It is in analogy to the powers vested in the ordinary in England, and in the orphans' courts or other testamentary jurisdictions in the United States. The surrogate, under the New York statutes, has concurrent jurisdiction with chancery, to call executors and administrators to account. But a *prior* suit pending in chancery by the complainant, is a bar to the proceeding before the surrogate. So a decree in chancery for the benefit of claimant upon the estate of the decedent is a bar to a proceeding before the surrogate for an account. Rogers *v.* King, 8 Paige's Rep. 210. It was further held, in Heyer *v.* Burger, 1 Hoffman's Ch. Rep. 1, that the surrogate had the sole jurisdiction to try the validity of a will of personal estate, and that chancery had no original jurisdiction in the case. The surrogate in New York has the like power touching the payment and distribution of the proceeds of real estate, when the will is proved in his office, as in the case of the personal estate. N. Y. R. S. vol. ii p. 109, sec. 57. Decrees of surrogates for the payment of money by an executor, administrator, or guardian, as well as decrees in chancery, are liens on real estate in any county, on the transcripts or certificates of the same being filed with the clerk thereof, and entered and docketed on the books for docketing judgments therein. Laws of N. Y. April 1, 1844, ch. 104. In Mississippi, the probate courts in each county have exclusive jurisdiction in all testamentary and administration matters, in dower, and in lunacy, &c. Carmichael *v.* Browder, 3 Howard, Miss. 255; but not against the sureties in an administration bond. Green *v.* Turnstall, 5 Id. 638. The surrogate's courts in New York, with all their enlarged powers, are courts of inferior jurisdiction, and a party seeking to make the title to real estate under their proceedings, must show affirmatively that they had jurisdiction. Bloom *v.* Burdick, 1 Hill's N. Y. Rep. 130.

In New Jersey, by the constitution of 1844, the chancellor is declared to be the ordinary or surrogate-general, and judge of the prerogative court, and has ample jurisdiction in granting letters testamentary, of administration, and of guardianship; in compelling executors, administrators, and guardians, to account in his prerogative court, and to control them, and to decree distribution, and the payment of legacies, and to try contested facts by a jury and before a master, and to decree the sale of real estate to pay debts. The Orphans' Court consists of the judges of the Court of Common Pleas in each county, and seems to be clothed with similar and concurrent jurisdiction, and with power to award partition of land among heirs and devisees. It is the more ordinary and proper tribunal for the settlement of the accounts of executors and administrators. 1 Green's N. J. Ch. Rep. 480. R. S. of New Jersey, of 1847, tit. 7, ch. 5. The surrogate of each county is the register of the orphans' court, and an essential member of it, and has also power concurrent with the orphans' court to grant letters testamentary, of administration and of guardianship, in cases arising within his county, and to hold courts in matters cognizable before him, with appeal to the orphans' court. The orphans' court seems to be the most efficient of the consistorial jurisdictions. The prerogative court or ordinary, the orphans' courts and the surrogates, all have jurisdiction in testamentary and administration cases. Acts of 2d March, 1795, 13th June, 1820, and the Acts supplementary thereto. See Elmer's Digest, pp 165, 359–370, 382, 444. New Jersey seems to have doubled and trebled her consistorial courts. See N. J. R. S. of 1847, tit. 7, ch. 5.

tions, and the regulation is the same in substance *as the English statute of distributions, with the exception of the widow, as to the real estate, who takes one third for life only, as dower. In Georgia, the real and personal estate of the intestate is considered as altogether of the same nature and upon the same footing, both in respect to their statute of distributions and the descent of property. Prin. Dig. 229, 1 Kelly, R. 540. The half blood take equally with the whole blood, as they do under the English statute of distributions. (a) Such a uniform rule in the descent of real and personal property gives simplicity and symmetry to the whole *428

(a) This is essentially the case in Maine, New Hampshire, Vermont, Rhode Island, Connecticut, (but there the whole blood are, in certain cases, preferred to the half blood, and even when in equal degree,) New Jersey, Pennsylvania, Virginia, (but there the half blood inherit only half as much as the whole blood,) Indiana, Illinois, Michigan, Kentucky, (by the Kentucky statutes, if part of the collateral kindred be of the whole blood, and part of the half blood, the latter inherit only half so much as those of the whole blood, and the ratio of apportionment has reference to the individuals of the two classes, and not the classes collectively. Nixon *v.* Nixon, 8 Dana, 7,) Missouri, (but there brothers and sisters, and parents, take equally,) Mississippi, (but there brothers and sisters, and their descendants, take before parents,) South Carolina, (but there parents, and brothers and sisters, take equally: and a brother of the half blood does not share with a mother. First cousins of the whole and half blood are, however, next of kin in equal degree, and take equally of the estate of the intestate,) Georgia and Alabama. (In Alabama, brothers and sisters take before parents; and when in equal degree, the whole blood is preferred to the half blood. See Griffith's Law Register, h. t.; 1 Greenleaf's Rep. 151; 2 N. H. Rep. 461; Dana's Abridgment, vol. iv. pp. 538, 539; Statutes of Connecticut, 1784, p. 51; Ibid. 1821, p. 207; Ibid. 1838, p. 235; 5 Conn. Rep. 233; 1 M'Cord's R 161, 456; Edwards *v.* Barksdale, 2 Hill's S. C. Ch. Rep. 417; Reeve's Law of Descents, *passim;* Statutes of Georgia, December 23d, 1789, and December 12th, 1804; Territorial Act of Michigan, April 12th, 1827; Purdon's Penn. Dig. 550, 551, Aikin's Alabama Dig. 2d edit. pp. 128, 151.) In Louisiana, the legal heirs of the intestate are, 1. Children and their descendants, without distinction of sex or primogeniture. They inherit *per capita*, when in the same degree, and *per stirpes* when in different. If no descendants, then the parents take equally one half of the estate, and the brothers and sisters, and their descendants, the other half. If the father or mother only survive, the survivor takes only one fourth; and if no parents, brothers and sisters, and their descendants, take the whole. Civil Code, 898, 907, 908. In Ohio, by the Act of 1831, the widow is entitled to the whole personal estate, after the debts are paid, if there be no children; and if there be any, she takes one half, if the estate amounts only to $400, and if it exceeds that sum, she takes only one third of such surplus. Statutes of Ohio, 1831. In other respects the personal estate goes (1.) to the issue and their representatives; (2.) to brothers and sisters and their representatives of the whole blood; (3.) to brothers and sisters and their representatives of the half blood;

doctrine of descent. The English statute of distributions, being founded in justice and on the wisdom of ages, and fully

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(4.) to the father; (5.) to the mother; (6.) to the next of kin of the blood of the intestate. When in equal degree they take *per capita*, otherwise *per stirpes*. Ibid

In Georgia, widow and children take equal shares, unless she elects to take her common-law dower, and then she takes no further of the real estate, and a child's portion of the personal estate. If no issue, widow takes a moiety of the estate, and the other moiety goes to the next of kin. If neither, the estate, real and personal, goes to the next of kin in equal degree, but no representation among collaterals beyond brothers and sisters' children. A father, and if dead, the mother, while unmarried, takes on the same footing as a brother or sister. So that, by the statute law of Georgia, the widow and children stand in the first degree of consanguinity; parents and brothers and sisters in the second degree. Act of Georgia, December 12, 1804, and December 23, 1826. Prince's Dig 2d edit. 1837, pp. 233, 234. In South Carolina, their statute of distributions of 1791 gives to the husband only a ratable share, being one third, as one of the heirs at law, or distributees of his wife's personal estate, though in England the husband takes the wife's entire choses in action as her administrator. In Massachusetts, the distribution of the personal estate of intestates is somewhat special. After the allowance of her apparel, &c., to the widow, and funeral charges and debts paid, the residue goes, (1.) to the husband, if the intestate was a married woman. (2.) To the widow one third part, and residue to his issue. (3.) If no issue or lineal descendants, then one half to the widow, and residue to the father. (4.) If no father, then to the mother and brothers and sisters equally, and to their issue *per stirpes*, if any one of them be dead, leaving a brother or sister surviving. (5.) If all the brothers and sisters be dead, then to the mother in exclusion of their issue. (6.) To the next of kin. (7.) If no kindred, the whole to the widow. (8.) If no husband, widow or kindred, the personal estate escheats. Mass. Revised Statutes, 1836, part 2, tit. 4, ch. 64, sec. 1. I do not undertake to mark minutely, or in detail, the many smaller variations from the English law of distributions, which have been made by the statute law of the different states. Such a detail would be inconsistent with the plan of these lectures, which were intended as an elementary sketch of the general principles and outlines of the law. To descend to minutiæ on every subject, would render the work too extensive and too uninteresting for the study of those persons for whom it is prepared. The law concerning wills, and the rights and duties of executors, administrators, and guardians, and of the orphans' courts, and the law of distribution of intestates' estates, are detailed minutely and distinctly in the Mississippi Revised Code of 1824, pp. 27-70, and which was made and reported by George Poindexter, Esq., and adopted in 1822; and it equals in this respect any of the old statute codes on the subject. But the whole subject has been remodelled, and expressed with more precision, and with the introduction of the late improvements in some of the American states, by P. Rutilius R. Pray, Esq., who, by authority, digested and reported, in 1836, the statute law of Mississippi, under the title of "Revised Statutes of the State of Mississippi." It appears to be a work of much labor, research, and judgment, and does credit to the abilities and discretion of the author. I am, however, informed, that so late as January, 1839, this revised code had not been ratified or enacted, and whenever I have had occasion, in these volumes, to refer to the statute law of Mississippi, I have recurred to the revised code of 1824, or to the new edition of the Laws of Mississippi, published in 1839, by Alden & Van

and profoundly illustrated by a series of judicial decisions, was well selected, as the most suitable and judicious basis on which to establish our American law of descent and distribution.

(4.) There has been much discussion as to the rule of distribution of personal property, when the place of the domicil of the intestate, and the place of the situation of the property were not the same. But it has become a settled *principle of international jurisprudence, and one founded on a comprehensive and enlightened sense of public policy and convenience, that the disposition, succession to and distribution of personal property, wherever situated, is governed by the law of the country of the owner's or intestate's domicil at the time of his death, and not by the conflicting laws of the various places where the goods happened to be situated. The principle applies equally to cases of voluntary transfer, of intestacy and of testaments. (a) [1] On the other hand, it is equally settled in the law of all civilized countries, that real property, as to its tenure, mode of enjoyment, transfer, and descent, is to

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Hoesen, and which is in effect a republication of the code of 1824, with the subsequent statutory additions and amendments. The doctrine of descent, and consequently, in a great degree, of distribution, in the different states, has been minutely illustrated and ably discussed, by the late Ch. J. Reeve, of Connecticut, in his laborious Treatise on the Law of Descent in the several United States of America. This work does honor to his memory; but it is not calculated to suit the taste of those general readers who have not mathematical heads, by reason of the numerous algebraical statements of hypothetical cases with which the work abounds, and by which it is perplexed.

(a) Stanley v. Bernes, 3 Hagg. Eccl. R. 373. Ferraris v. Hertford, 3 Curteis, 468. Desesbats v. Berquier, 1 Binney, 336. The construction of wills as to real property is to be given according to the *lex rei sitæ*, and as to personal property according to the *lex domicilii*, unless it be manifest that the testator had the law of some other country in view. Story on the Conflict of Laws, secs. 465, 474. Harrison v. Nixon, 9 Peters, 503. See, also, 1 Jarman on Wills, edit. Boston, 1845, ch. 1, pp. 1-10, where the numerous authorities are referred to. It is also a declared principle that although personal property is, as to the succession, controlled by the laws of the domicil, yet each state is competent to regulate within its own territory that succession in personal and real property at its pleasure. Story's Conflict of Laws, secs. 23, 447. Jones v. Marable, 6 Humphrey, 116.

[1] Grattan v. Appleton, 3 Story's R. 755. Leach v. Pillsbury, 15 N. H. 137. Williams v. Williams, 5 Md. 467. Lawrence v. Kitteridge, 21 Conn. 577. Spraddling v. Pipkin, 15 Mis. 118. Graham v. The Public Administrator, 4 Bradford, (N. Y.) 127.

be regulated by the *lex loci rei sitæ.* (*a*) Personal property is subject to that law which governs the person of the owner. Debts and personal contracts have no locality—*debita sequuntur personam debitoris.* Huberus lays down this to be the common and correct opinion, though the question had been frequently agitated in the courts in his day; (*b*) and Bynkershoek says the principle had become so well established that no one dared to question it; *adeo recepta hodie sententia est, ut nemo ausit contra hiscere.* (*c*) The same principle would seem to be the acknowledged law in Germany and France; (*d*) and Vattel (*e*) considers the rule to be one that is dictated by the law of nations.

(*a*) *Communis et recta sententia est in rebus immobilibus servandum esse jus loci in quo bona sunt sita.* Hub. tom. i. lib. 3, tit. 13, De Success.'s. p. 278. In Story's Com. on the Conflict of Laws, secs. 424–428, the authorities, foreign and domestic, are numerously collected in favor of the proposition that real or immovable property is exclusively governed by the territorial law of the *situs.* The point is too clear for discussion. But by the Revised Statutes of the state of Michigan, 1840, lands lying in Michigan may be conveyed by the owner residing in another state or territory, or in a foreign country, according to the laws of such state or country.

(*b*) Prælec. part 1, lib. 3. De Success. ab Inst. Collat. tom. i. p. 278, sec. 20. Ibid part 2, lib 1, tit. 3. De Conflictu Legum, tom. ii. p. 542, sec. 15.

(*c*) Quæst. Jur. Priv. lib. 1, ch. 16. See, also, the opinion of Grotius on the point, given at Rotterdam, October 31, 1613, on consultation, and cited at large in Henry on Foreign Law, App. 196.

(*d*) Voet, lib. 38, tit. 17, sec 34. Heinecc. Opera, tom. ii. p. 972. De Testamenti Factione Jure Germ sec. 30 Opinion of M. Target on the Duchess of Kingston's Will, 1 Coll. Jurid. 240. Toullier, Droit Civil Français, tom. i. No. 366. Merlin, Répertoire de Jurisprudence, tit Loi, secs. 6, 3. See, also, *supra*, p 67, and *infra*, vol. iv. pp. 441, 513, as to the rule when applied to personal and when applied to real property. The general utility of this doctrine, that personal property has no *situs* in contemplation of law, and is attached to the person of the owner wherever he is, and governed by the law of the owner's domicil, does not fail, as Mr. Justice Story has observed, to recommend itself to all nations by its simplicity, its convenience, and its enlarged policy. But the doctrine is sometimes controlled by local law, and the case of foreign assignments in bankruptcy is an instance. *Vide supra*, pp. 404–408. So, in Louisiana, delivery has been held necessary to the complete transfer of personal property, as against creditors and purchasers, though the transfer be made by the owner in his foreign domicil, where the transfer would be good without delivery. Norris *v.* Mumford, 4 Martin's Rep. 20. Ramsey *v.* Stevenson, 5 Ibid. 23. Fisk *v.* Chandler, 7 Idem. 24. Olivier *v.* Townes, 14 Idem. 93, 97–103. These decisions have not met the approbation of some of our most distinguished civilians. Livermore's Dissertations, pp. 137–140. Story's Com. on the Conflict of Laws, sec. 385, *et seq.*

(*e*) Droit des Gens, b. 2, ch. 7, sec. 85, ch. 8, secs. 103, 110.

This principle was understood to be settled in England, in the time of Lord Hardwicke, in the cases of *Pipon* v. *Pipon*, and of *Thorne* v. *Watkins*; (*a*) and Lord Thurlow observed in the House of * Lords in the case of *Bruce* v. *Bruce*, (*b*) *430 that to hold that the *lex loci rei sitæ* was to govern as to personal property, when the *domicilium* of the intestate was in a different country, would be a gross misapplication of the *jus gentium*. And yet, notwithstanding all this weight of authority in favor of the solidity and universality of the principle, the point was permitted to be very extensively and learnedly debated before Lord Loughborough, in the case of *Bempde* v. *Johnstone*; (*c*) and he said that the question had been decided and settled, and the law clearly fixed in England, by repeated decisions in the House of Lords; and that by those decisions the law of the intestate's domicil at the time of his death carried the distribution of his personal property wherever it was situated. The law of Scotland was once different; but the court of sessions was now conformed to the English decisions. (*d*) He

(*a*) 2 Vesey, 35. Amb. Rep. 25. See also the decision of Lord Mansfield before the privy council in 1762, on appeal in the case of Burn *v.* Cole, Ibid. 415.

(*b*) 2 Bos. & Pull. 229, note. The decision in the House of Lords, in the great case of Bruce *v.* Bruce, is considered as settling the law, both in England and Scotland, in favor of the law of the domicil in the distribution of the personal estate of intestates, and that the actual *situs* of the goods was of no moment. The decree of the court of sessions in Scotland was affirmed. So the very important and very litigated case of Hoy *v.* Lashley, which arose in the court of sessions in 1791, and was carried by appeal to the House of Lords, and which led to collateral issues and subsequent appeals, and to the most learned and able discussions, settled, among other things, the points, that the succession in personal estates of every description, wherever situated, was regulated by the law of the domicil; and that parties marrying and having their domicil in England, and then changing their domicil to Scotland, changed their rights and those of their children, and subjected them to the succession of the law of Scotland. Robertson on Personal Succession, ch. 8, sec. 1, pp. 118-150, (Law Library, vol. xii.) Brown *v.* Brown, on appeal, Ibid. p. 193. 4 Wilson & Shaw's Appeal Cases, 28.

(*c*) 3 Vesey, 198.

(*d*) The rule, as stated in the text, may lead, and has led, to the anomalous result, that the same person may be legitimate as to the real estate of his father, and illegitimate as to the personal. Thus, by the Scotch law, the marriage in Scotland of Scotch parents, legitimates their previously born bastard issue; but it is not as yet so by the English law. And if the father of such issue removes and dies domiciled in England, leaving real and personal estate in Scotland as well as in England, the issue being legitimate by the Scotch law and illegitimate by the English, cannot take the real or per-

admitted, however, that if the point had been quite new and open, it would be susceptible of a great deal of argument, whether, in the case of a person dying intestate, having property in different places, and subject to different laws, the law of each place should not obtain, in the distribution of the property situated there; and many foreign lawyers, he said, had held that proposition. Afterwards, in *Somerville* v. *Lord Somerville*, (*a*) the rule as above settled was declared, by the master of the rolls, to apply to all cases where the fact of the domicil was not in dispute. But in the case of *Curling* v. *Thornton*, (*b*) Sir John Nicholl doubted whether a British natural-born subject could shift his *forum originis* for a foreign domicil, in complete derogation of his rights under the British law; and he said it must be at least complete and total, to make his property in England liable to distribution according to the foreign law, and the party must have declared and carried his intention into full effect. (*c*)

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sonal estate of his father by the English law, either as heir or next of kin, but he would take the real estate of his father in Scotland, according to the *lex rei sitæ*, and would not take the personal, because the Scotch courts would, by the comity of nations, be bound to recognize, in the distribution of the personal estate, the *lex domicilii*. And thus, as an English lawyer humorously observes, the same person would, by the same court, and by this paradox in the law, be deemed legitimate as to the real estate, and illegitimate as to the personal—"legitimate as to the mill, illegitimate as to the machinery—born in lawful wedlock as to the barn, but a bastard as to the grain within it."

(*a*) 5 Vesey, 750.

(*b*) 2 Addams's Rep. 15.

(*c*) The inference from the case is, that the English property of British subjects, resident abroad, and dying there intestate, follows the course of distribution directed by the English laws. As to the general rule, that the disposition and distribution of personal property are governed by the law of the owner's domicil at the time, see Sill *v.* Worswick, 1 H. Blacks. Rep 690; Potter *v.* Brown, 5 East's Rep. 130; Stanley *v.* Bernes, 3 Hagg. Eccl. Rep. 373, Story's Com on the Conflict of Laws, ch. 9. In Garland *v.* Rowan, 2 Smedes & Marshall's Miss. R. 617.[1] The general rule of the distribution of the personal estate of intestates, according to the law of the domicil of the intestate, was held to apply equally to the widow's share of the personal estate. In the case of Sill *v.* Worswick, Lord Loughborough observed, that it was a clear proposition of every country in the world, where law held the semblance of science, that personal property had no locality, and was subject to the law of the country where the owner had his domicil But the general rule is subject to some qualification as to

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[1] Sherwood *v.* Wooster, 11 Paige's Rep. 441.

*5. The rule, as settled in England, and by the general usage of nations, as to the succession and dis- *431

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stocks and other property, which may be required to be transferred in the mode prescribed by local regulations. Story, sec. 383. Erskine, in his Institutes, b. 3, tit. 9, sec. 4. And Pothier, in his Court d'Orleans, c. 1, sec. 2, n. 23, considered that interests in public stocks, or local companies, &c., were governed by the *lex loci rei sitæ*. But they are now clearly subject, like other personal property, to the law of the domicil. Robertson on Personal Succession, pp. 84, 85, (12 Law Lib.) Jarman on Wills, vol. i. p. 2. What facts constitute a domicil of the person has been a question frequently discussed. There is no fixed or definite period of time requisite to create it. The residence to create it may be short or long, according to circumstances. It depends on the actual or presumed intention of the party.[1] It is said, in Moore *v.* Darrall, 4 Hagg Eccl. Rep. 346, that domicil does not depend on residence alone, but on a consideration of all the circumstances of each case. The domicil may be in one state, and the actual residence in another. Frost *v.* Dickinson, 19 Wendell, 11. But a man can have but one domicil for the purpose of succession. He cannot have more than one domicil at the same time, for one and the same purpose; and every person has a domicil somewhere. A person being at a place, is *primâ facie* evidence that he is domiciled there; but it may be explained, and the presumption rebutted.[2] The place, where a man carries on his established business or professional occupation, and has a home and permanent residence, is his domicil; and he has all the privileges, and is bound by all the duties, flowing therefrom. Code Civil, art. 103. Tanner *v.* King, 11 La. Rep. 175. Opinion of the judges in 5 Metcalf, R. 587. It is the home of the party, the place of his principal establishment, which constitutes the domicil. The definition of a domicil, in the writings of the jurists generally, is taken from the civil law. *In eodem loco singulos habere domicilium non ambigitur, ubi quis larem rerumque ac fortunarum suarum summam constituit, unde rursus non sit discessurus si nihil avocet; unde cum profectus est, peregrinari videtur; quod si rediit, peregrinari jam destitit.* Code, lib. 10, tit. 39, 1, 7. See, also, Dig. 50, 1, 27, 1; Ibid. lib. 50, tit. 16, 1, 203. Though his family reside part of the year at another place, such place is regarded only as a temporary residence, and the home domicil for business takes away the character of domicil from the other. The original domicil of the party always continues until he has fairly changed it for another, even though he has intentionally forsaken it. There must be intention and act united, to effect a change of domicil.[3] A new domicil is not acquired by residence, unless taken up with an intention of abandoning the former domicil. Bradley *v.* Lowry, 1 Speer's S. C. Eq. Rep. 1. Attorney-General *v.* Dunn, 6 Meeson & W. 511. Hallowell *v.* Saco, 5 Greenleaf, 143. Putnam *v.* Johnson, 10 Mass. R. 488. And it was held, in De Bonneval *v.* De Bonneval, 1 Curteis, 856,

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[1] See High Appellant, 2 Doug. (Mich.) R. 515. In this case, the subject of domicil is largely discussed.

[2] Ennis *v.* Smith, 14 How. U. S. 401.

[3] State *v.* Hallett, 8 Ala. R. 159. White *v.* Brown, 1 Wallace, Jr. R. 217. Horne *v.* Horne, 9 Iredell, 99. Hardy *v.* DeLeon, 5 Tex. 211. Ringgold *v.* Bailey, 5 Md. 186. Layne *v.* Pardee, 3 Swan, 232. Glover *v.* Glover, 18 Ala. 367. Brewer *v.* Linnaeus, 36 Me. 428. Hoskins *v.* Matthews, 35 E. L. & Eq. 532. Brown *v.* Smith, 11 Ibid. 6. Hairston *v.* Hairston, 27 Miss. 704.

tribution of personal property, has repeatedly been declared to constitute a part of the municipal jurisprudence of this

that where A. quitted France, in 1792, and resided in England until 1814, and then returned to France, and from that time resided occasionally in both countries, he had not, thereby, abandoned his original domicil. A *dwelling-place or home* means some permanent abode or residence, with intention to remain, and has a more restricted meaning than domicil, as used in international law. 19 Maine Rep. 293. The *forum originis*, or domicil of nativity, remains until a subsequent domicil is acquired *animo et facto*. Somerville *v.* Somerville, 5 Vesey, 750. Balfour *v.* Scott, cited Ibid. p. 757. In this last case, the domicil of birth had been shifted, by election and residence, to a domicil in England, which controlled the personal estate. Case of Dr. Munroe, 5 Madd. Ch. Rep. 379. Harvard College *v.* Gore, 5 Pick. Rep. 370. Case of James Casey, 1 Ashmead's Rep. 126.[1] A woman, on marriage, takes the domicil of her husband. The husband's change of domicil changes that of his wife; and the parent also possesses the power of changing the domicil of his infant child by changing his own.[2] Under the English settlement law, minor children take the domicil of the father; and if the mother also, being a widow, changes her domicil, her minor children change theirs also, but not if she acquires a new domicil by remarriage. Cumner *v.* Milton, 2 Salk. Rep 528. Woodend *v.* Paulspury, 2 Lord Raym. 1473. Freetown *v.* Taunton, 16 Mass. Rep. 52. See, also, *supra*, p. 227, note, on the right of the surviving parent, whether father or mother, to transfer the domicil of the minor children, if done in good faith. If a party has two contemporary domicils, and a residence in each alternately, of equal portions of time, the rule which Lord Alvanley was inclined to adopt was, that the place where the party's business lay should be considered his domicil. Lord Thurlow, in Bruce *v.* Bruce, 2 Bos. & Pull. 229, note. 3 Vesey, 201, 202. 5 Ibid. 786–789. See 1 Johns. Cas. 366, note, and 4 Cowen's Rep. 516, note, for a collection of authorities on this question of domicil. See, also, *supra*, vol. i. pp. 74–81, as to the domicil for commercial purposes, and in the purview of the law of nations. Domicil is distinguished by the various situations to which it is applied. There is a *political*, a *civil*, and a *forensic* domicil. There is a domicil arising from *birth*, and from the *domestic* relations, and from *election*. Bynk. Quæst. Jur. Priv. lib. 1, ch. 16. Henry on Foreign Law, App. 181–209. Code Napoleon, Nos. 102–111. Répertoire de Jurisprudence, art. Domicile. Toullier, Droit Civil Français, tom. i. p. 318. Story's Com. on the Conflict of Laws, ch. 3. Burge's Com. on Colonial and Foreign Laws, vol. i. ch. 2, tit. Domicile. A *resident* and *inhabitant* mean the same thing. But *inhabitancy* and *residence* do not mean the same thing as *domicil*, when the latter is applied to successions to personal estates; but they mean a *fixed and permanent abode*, a dwelling-house for the time being, as contradistinguished from a mere temporary locality of existence. Roosevelt *v.* Kellogg, 20 Johns. Rep. 208. Ch. Walworth, 8 Wendell's Rep. 140. See, also, 4 Wendell, 603. Residence, combined

[1] Anderson *v.* Laneuville, 29 E. L. & Eq. 59.

[2] If the husband and wife are living, separated by the decree of a competent court, the change of the husband's domicil does not change that of the wife. Vischer *v.* Vischer, 12 Barb. R. 640. Williams *v.* Dormer, 9 E. L. & Eq. 598.

As to domicil of minors, see Heistand *v.* Kuns, 8 Blackford, R. 345; Allen *v.* Thomason, 11 Humph. 536.

country. (*a*) The difficulty has been not in the rule itself, but in the application and execution of it. In *Topham* v. *Chapman*, (*b*) it was said, that though the distribution was to be according to the laws of the country of the domicil of the intestate, yet that his debts in a foreign country must be collected and paid according to the law of that country. Administration must be granted where the debts were; for an administrator has no power beyond the jurisdiction in which he received his letters of administration; and the home creditors must first be paid before the administrator could send the surplus fund to the country of the proper domicil of the intestate. (*c*) Much dis-

with intention, constitutes a domicil. Whether the residence be long or short is immaterial, provided the intention of residence is wanting in the one case and exists in the other.[1] Code Napoleon, art. 103. Toullier, vol. i 323, art. 372. Hennen *v.* Hennen, 12 La. Rep. 190. Guier *v.* O'Daniel, 1 Binney, 349, note.

(*a*) Dixon *v.* Ramsay, 3 Cranch's Rep 319. United States *v.* Crosby, 7 Idem. 115. Blanc *v.* Drummond, 1 Brockenbrough's Rep. 62. Kerr *v.* Moon, 9 Wheaton, 565. Desesbats *v.* Berquier, 1 Binney's Rep. 336. Decouche *v.* Savetier, 3 Johns. Ch. Rep. 210. Holmes *v.* Remsen, 4 Idem. 469, 470. Dawes *v.* Boylston, 9 Mass. Rep. 337. Harvey *v.* Richards, 1 Mason's Rep. 408. Crofton *v.* Ilsley, 4 Greenleaf's Rep. 134. Stent *v.* M'Leod, 2 M'Cord's S. C. Ch. Rep. 354. Story's Com. on the Conflict of Laws, ch. 9, pp. 391–393, 402–411. Leake *v.* Gilchrist, 2 Dev. N. C. Rep. 73.

(*b*) 1 Const. Rep. S. C. 292.

(*c*) The general rule in England and in this country is, that letters testamentary, or of administration, granted abroad, give no authority to sue or be sued in another jurisdiction, though they may be sufficient ground for new probate authority.[2] Tourton *v.* Flower, 3 P. Wms. 369. Lee *v.* Bank of England, 8 Vesey, 44. Dixon *v.* Ramsay, 3 Cranch's Rep. 319. Doe *v.* McFarland, 9 Idem. 151. Pond *v.* Makepeace, 2 Metcalf's Rep. 114. Sabin *v.* Gilman, 1 N. H. Rep. 193. Goodwin *v.* Jones, 3 Mass. Rep. 514. Riley *v.* Riley, 3 Day's Rep. 74. Morrell *v.* Dickey, 1 Johns. Ch. Rep. 153. Dangerfield *v.* Thurston, 20 Martin's La. Rep. 232. Kerr *v.* Moon, 9 Wheaton, 565. Armstrong *v.* Lear, 12 Idem. 169. Story's Com. on the Conflict of Laws, § 513. Vaughan *v.* Northup, 15 Peters's U. S. Rep. 1. In N. Carolina, it is now held, that probate of a will in another state and duly authenticated, supersedes the necessity of a new probate in that state. Lancaster *v.* McBryde, 5 Iredell, 421.

1 The subject of domicil is much discussed by Mr. Justice Paige, in Crawford *v.* Wilson, 4 Barb. S. C. Rep. 504, and the general conclusions of the author's note, *supra*, affirmed. See, also, Shelton *v.* Tiffin, 6 How. U. S. 163. A man may obtain a new domicil in a country where he is only a lodger, and not a housekeeper, and without repudiating his nationality. Whicker *v.* Hume, 5 E. L. & Eq. 52. See, also, Bartlett *v.* Mayor, &c. 5 Sandf. 44.

2 In the case of The Boston, Bl. & How. 309, Mr. Justice Betts holds that the common-law disability of foreign administrators is essentially technical and formal, and does not apply to proceedings *in rem* in admiralty.

*432 cussion took place on this part of the *subject, in *Harvey* v. *Richards.* (a) It was held, upon a masterly con-

The administration on a foreigner's estate must be taken out where he died, though the assets there are distributable according to the law of the country of his domicil. Aspinwall v. The Queen's Proctor, 2 Curteis, 241. In Carmichael v. Ray, 1 Richardson's S. C. Rep. 116, administration was granted in S. Carolina on the estate of an intestate domiciled there; but it was held, after an able and learned discussion, that a suit could not lie in that state in trover for chattels held by the intestate in N. Carolina, as the title of the administrator did not extend to personal property in a foreign state. The case of *executor* is different. His title is good *jure gentium,* and operative when confirmed by the authority of the jurisdiction in which it is to operate.[1] But the *administrator's* title under grant from the authorities of the intestate's domicil does not *de jure* extend or attach to the property in another jurisdiction. A new title or a recognition of the authority must be derived from the foreign government, and then it is merely ancillary to the original power as to the collection and distribution of effects, and is made subservient to domestic claims, and the *residium* is transmitted to the foreign country after the final account is settled in the domestic forum. On this difficult subject of conflicting claims under probate powers from different states, it was held, after a full and learned discussion in Connecticut, in the case of Holcomb v. Phelps, 16 Conn. Rep. 127, that where administration was granted in New York on the estate of A., who was domiciled in New York, and the assets were removed to Connecticut by the administrator, and a new administration was granted there to another person, that the first administration was not answerable there by suit for the assets, and that the authority from New York was his protection. See *infra,* p. 434, n. *a,* S. P. In McNamara v. Dwyer, 7 Paige, 239, the chancellor was of opinion that the creditors and next of kin were not confined in their remedies against an executor or administrator to the courts of the country in which the letters testamentary or of administration were granted. It was adjudged that the Court of Chancery had jurisdiction to compel a foreign executor or administrator to account for the trust funds which he received abroad and brought with him into the state, and without taking out letters of administration in New York on the estate of the deceased. So it has been adjudged in the Court of Appeals in Virginia, after an elaborate discussion, that if an executor takes out letters testamentary in England, and removes to Virginia, and *brings the assets with him,* he may be sued there for an account of his administration, and for debts and legacies. Tunstall v. Pollard, 11 Leigh's Rep. 1, 36. But the assets will be applied and distributed according to the laws of the state or country from whom he derived his authority to administer. It is held in other cases, that a foreign administrator may receive payment anywhere, and give acquittance. Doolittle v. Lewis, 7 Johns. Ch. Rep. 45. Stevens v. Gaylord, 11 Mass. Rep. 256. Trecothick v. Austin, 4 Mason's Rep. 16. Atkins v. Smith, 2 Atk. Rep. 63. Nisbet v. Stewart, 2

(a) 1 Mason's Rep. 403.

[1] No letters testamentary in another state are required to enable an executor to sue on contracts made in such state, with him as executor. Lawrence v Lawrence, 3 Barb. Ch. R. 71. See Smith v. Webb, 1 Barb. S. C. Rep. 230. In Kilpatrick v. Bush, 23 Miss. 199, it was held that an administrator, carrying assets into a foreign state, loses his title to them, and cannot sue in his own name to recover them.

sideration of the case, that whether a court of equity would proceed to decree an account and distribution according to

Dev. & Battle's Rep. 24. Mr. Justice Story, in his Conflict of Laws, is of opinion that upon principles of international law, a payment to an original administrator as against a foreign administrator subsequently appointed in the domicil of the debtor would not be good, and that the latter administrator would be entitled to recover the debt, inasmuch as the prior and original administrator had no right to demand it. But in Vaughn *v.* Barret, 5 Vermont Rep. 333, a contrary doctrine is declared; and it was adjudged, upon full discussion, that an administrator appointed in another state, had no authority to settle and discharge a debt due from a citizen of Vermont, to his intestate, and that such discharge would be no bar to an action for the debt by the administrator appointed in Vermont. Under the local law of Pennsylvania, letters of administration granted in another state are a sufficient authority to maintain an action in that state.[1] M'Cullough *v.* Young, 1 Binney's Rep. 63. This is the case in Ohio. Statutes of Ohio, 1831, p. 241. 8 Ohio Rep. 228. And in Tennessee, by the statute of 1809, and the provision is commended in Smith *v.* Mabry, 7 Yerger, 26, as just and liberal. But foreign executors and administrators cannot be sued in Tennessee, as such, in virtue of their foreign letters testamentary or of administration. Allsup *v.* Allsup, 10 Yerger, 283. And to entitle the executor or administrator to sue in Tennessee, on the fact of the foreign probate or letters, he must produce a duly authenticated copy of the same. Statute Laws of Tennessee, 1836, p. 78. In the Revised Statutes of Pennsylvania, relating to orphans' courts, as reported in January, 1831, the law of Pennsylvania was recommended to be made to agree, in this particular, with the law of most of the other states. In Massachusetts and Ohio, no will is effectual to pass either real or personal estate, unless duly proved and allowed in the Probate Court; and the probate of a will devising real estate is conclusive as to the due execution of the will, equally as it is of a will of personal estate. Mass. Revised Statutes, 1836, part 2, tit. 3, ch. 62, sec. 20. Swazey *v.* Blackman, 8 Ohio Rep. 1. So the probate is equally conclusive on trials at law in Maine, Connecticut, and Virginia; (4 Greenleaf, 225. 5 Idem. 494. 1 Day, 170. 1 Leigh, 293;) whereas, in Pennsylvania, the probate of a will is conclusive as to chattels, and only *primâ facie* evidence of title under it as to lands. In England, the probate is evidence of the will as to chattels, but none at all as to lands, for the ordinary has no jurisdiction over wills as to lands. The confirmation of foreign letters testamentary, of administration and of guardianship, is made very simple and easy in Alabama and Indiana by their statute codes. It is by filing with the clerk of the court where suit is brought the same authorities or authenticated copies thereof. The guardian is to give new security, as well as to file a copy of the appointment, in order to have the privilege of a resident guardian. So, in Virginia, a will duly authenticated and proved in another state, or in a foreign country, will be admitted to probate, if the proof abroad be such, that if made in Virginia, it would have been admitted to proof, as a will of chattels or of lands, as the case may be. *Ex parte* Povall, 3 Leigh's Rep. 816. In Massachusetts and Maine, a will proved and allowed in any other state, or in a foreign country,

[1] So in Kentucky, Loval *v.* Johnson, 9 B. Mon. 556. An administrator, who also takes out letters of administration in a foreign state, is accountable at the domicil for the foreign assets. Stokely's Estate, 19 Penn. 476.

*433 the *lex loci rei sitæ*, or direct the assets to be *distributed by the foreign tribunal of the domicil of the party, would depend upon circumstances. The *situs rei*, as well as the presence of the parties, conferred a competent jurisdiction to decree distribution, according to the rule of the *lex domicilii;* and such a jurisdiction was sustained by principles of public law, and was consistent with international policy. The court was not bound, at all events, to have the assets remitted to the foreign administrator, and to send the parties entitled to the estate abroad, at great expense and delay, to seek their rights in a foreign tribunal. Though the property was to be distributed according to the *lex domicilii*, national comity did not require that the distribution should be made abroad. Whether the court here ought to decree distribution, or remit the property abroad, was matter of judicial discretion, and there was no universal or uniform rule on the subject.[1]

The manner and extent of the execution of the rule were well discussed and considered in the Supreme Court of Massachusetts. (*a*) A person was domiciled at Calcutta, and died there insolvent, and his will was proved, and acted upon there. Administration was taken out in Massachusetts, on the probate of the will in the East Indies; and assets came to the hands of the administrator at Boston sufficient to pay a claim due citizens of the United States, and a judgment debt due a British subject in England; but all the assets were wanted to be applied, in the course of administration, by the executor at Calcutta. It was held, that the administrator here was only an-

according to the laws of such state or country, may be filed and recorded, on producing an authenticated copy to the judge of probate of any county in which there is any estate, real or personal, on which the will may operate; and the judge is to hear the case on the probate of the will on giving the prescribed notice of the time and place. If allowed, it is to be filed and recorded, and to have the same force and effect as if proved in the usual way; and letters testamentary or of administration, with the will annexed, are to be granted. Mass. Revised Statutes of 1836, part 2, tit. 4, ch. 3. Act of Maine, 1821. See, also, State *v.* Judge of Probates, 17 La. Rep. 486, as to a similar rule and practice in Louisiana.

(*a*) Dawes *v.* Head, 3 Pick. Rep. 128.

[1] Cassily *v.* Meyer, 4 Md. 1.

cillary to the executor in India; and the assets ought to be remitted, unless he was compelled by law to appropriate them here to pay debts. It was not decided whether he was compelled to pay here; but if it were the case, it would only be the American creditors; and the British creditor was not entitled to come here and disturb the legal course of settlement of the estate in his own country. If there were no legal claimants with us in *the character of creditors, legatees, or *434 next of kin, the administrator would be bound to remit the assets to the foreign executor, to be by him administered according to the law of the testator's domicil;[1] and if any part of the assets were to be retained, it would form an exception to the general rule, growing out of the duty of every government to protect its own citizens in the recovery of their debts. The intimation has been strong, that such an auxiliary administrator, in the case of a solvent estate, was bound to apply the assets found here to pay debts due here; and that it would be a useless and unreasonable courtesy to send the assets abroad, and the resident claimant after them. But if the estate was insolvent, the question became more difficult. The assets ought not to be sequestered for the exclusive benefit of our own citizens. In all civilized countries, foreigners, in such a case, are entitled to prove their debts, and share in the distribution. The court concluded that the proper course in such a case would be to retain the funds, cause them to be distributed *pro rata*, according to our own laws, among our own citizens, *having regard to all the assets, and the whole aggregate amount of debt here and abroad*, and then to remit the surplus abroad to the principal administrator. Such a course was admitted to be attended with delay and difficulty in the adjustment; but it was thought to be less objectionable than either to send our citizens abroad upon a forlorn hope, to seek for fragments of an

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[1] Where a person died leaving personal property in several sovereignties, it was held that all the foreign administrations were subsidiary to that of the decedent's domicil, and that any property in the foreign jurisdiction at the time of death of the decedent, coming into the jurisdiction of his domicil, immediately vested in the administrator there. Collins v. Bankhead, 1 Strobh. R. 25. As to the subsidiary character of such administrations, see also Suarez v. Mayor, &c. of New York, 2 Sand. Ch. R. 173; State v. Campbell, 10 Mo. R. 724.

insolvent's estate, or to pay them the whole of their debts, without regard to the claims of foreign creditors. (a)

(a) In the case *Ex parte* Ryan (Newfoundland Rep. 113), it was held that in the case of the insolvency of two branches of the same firm, one in England and the other in Newfoundland, the property in each country was exclusively divisible among the creditors who trusted the branch where property was situated. The Supreme Court of Louisiana, in Gravillon *v.* Richard, 13 La. Rep. 293, followed the Massachusetts doctrine, and declared that it was competent for the courts of probate in Louisiana to order the remission of funds belonging to a foreigner domiciled in France, but dying at New Orleans, to the representatives in France authorized to receive them, and that policy and justice required such a transmission, inasmuch as the creditors were in France and none in Louisiana. In Davis *v* Estey, 8 Pick. Rep. 475, it was held, that where the original administration was in another state, and that in Massachusetts only ancillary, and the estate was insolvent, the creditor in Massachusetts was only entitled to a *pro rata* dividend, though the assets in Massachusetts were sufficient to meet his demand. In the case of these different administrations, each is deemed so far independent of the others, that property received under one cannot be sued for under another, though it may at any time be within the jurisdiction of the latter. Currie *v.* Bircham, 1 Dowl. & Ryl. Rep. 35. Holcomb *v.* Phelps, *supra*, p. 431. n. c. Story's Confl. of Laws, § 518. Nor can a judgment against one furnish a right of action against the other; for in contemplation of law, there is no privity between them.[1] Brodie *v.* Bickley, 2 Rawle's Rep. 431. Story on the Conflict of Laws, § 522. In Mothland *v.* Wireman, 3 Penn. Rep. 185, the subject was well discussed. It was held that the liability of the administrator to account, and his title to the assets, was commensurate only with the jurisdiction of the authority that appointed him, and the trust was in exclusion of foreign interference, and was regulated by the law of the *loci rei sitæ*. This principle was indispensable to the protection of the resident or domestic creditors, who were not to be sent abroad to assert their claims in foreign courts, so long as there were assets within the control of the domestic administration. The foreign courts might impair the priorities allowed by the domestic law, or bar claims by shorter statutes of limitation. The intestate's effects were to be collected and administered under the authority of the local jurisdiction in which they were at his death, and with the permission to foreign creditors to participate in proportion to their debts, respect being had to the aggregate of the estate and debts, whether foreign or domestic. If there be no domestic claimants, or they be satisfied, then the local auxiliary administrator is to remit the assets, when collected, to the primary administrator at the place of the intestate's domicil, and to whom they rightfully belonged, for administration. This is not the case as to executors, whose title, flowing from the will, extends to the assets wherever found. The opinions of the Ch. J. in this case, and in the case of Miller's Estate, 3 Rawle, 312, are drawn with much precision and force; and the general American rule from these Pennsylvania cases, and from decisions in Massachusetts and South Carolina, seems to be, (and Mr. Justice Story, in his Commentaries on the Conflict of Laws, § 513, comes te the same

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[1] But a judgment in favor of the principal administrator is a bar to an action for the same cause against an ancillary administrator in another state. Goodall *v.* Marshall, 14 N. H. 161. See Hill *v.* Tucker, 13 How. U. S. 458.

A difficult question on the subject of the distribution of the property of intestates arose in the K. B. in England, in 1767,

conclusion, and see also *supra*, p. 420,) that the new administration is made subservient to the rights of creditors, legatees, and distributees, *resident within the country*; and that the residuum was transmissible to the foreign country *only* when the final account had been settled in the proper domestic tribunal, upon the equitable principles adopted in its laws. Some of the authorities above referred to, speak of the domestic legatees and distributees as being entitled, after creditors, to have their claims satisfied out of the assets arising within the authority of the ancillary administrator; but other cases, as Richards *v.* Dutch, 8 Mass. Rep. 506, Dawes *v.* Boylston, 9 Idem. 337, and Stevens *v.* Gaylord, 11 Idem. 256, held that they are to resort to the primary administration abroad, where the residuary assets are to be transmitted. The case of the Heirs of Porter *v.* Heydock, 6 Vermont Rep. 374, followed the principles declared in the cases of Dawes *v.* Head, and Harvey *v.* Richards, and decided that it appertained to the courts in Vermont, when the ancillary administration was granted there, to settle and adjust the accounts of the administrator touching assets *received in Vermont*; and that it was *discretionary* in them to order distribution in Vermont, or remit the effects to the place of the *principal* administration for that purpose.[1] It rested on courtesy and expediency alone, and it is the usual course to remit them; but it will not be adopted when the rights of those entitled to the estate would be endangered by it. So in Slatter *v.* Carroll, 2 Sandford's Ch. Rep. 573, a foreign resident owned lands in New York, and conveyed them to a trustee there to sell and distribute the proceeds, and remit the balance for distribution at the domicil. It was held that the court would direct the fund to be remitted, or retain and distribute it in New York, according to the circumstances of the case, in reference to the convenience of creditors and of the accounting parties. In the case of Fay *v.* Haven, 3 Metcalf, 109, being the latest case in Massachusetts, it was held that the assets received by a foreign executor or administrator in the foreign state where the testator resided, were to be administered in such state; and that, under the ancillary administration in Massachusetts, he was not held to pay debts due to creditors in that state out of assets received abroad, though he had paid all the creditors elsewhere, and had the requisite balance in hand received from the assets in the state where the principal administration was granted. The creditors must resort to the tribunals of the foreign state. See the just criticisms of Mr. Justice Story on some of the American cases on this point, in his treatise on the Conflict of Laws, § 514 b. In the case of the Earl of Winchelsea *v.* Garetty, 2 Keen, 293, A. was domiciled in England and died intestate, leaving real estate in Scotland, and the bond-debts were paid by the heir out of the real estate, and it was held that the heir was entitled to relief out of the personal estate in England, as being by the law of the domicil the primary fund for the payment of debts. This vexed subject of the distribution of assets being in different states, was discussed in Goodall *v.* Marshall, in 11 N. H. Rep. 88, by Mr. Ch. J. Parker, with his usual ability; and the result of the decision of the court was, that the laws of the place under which an ancillary or auxiliary administration was taken, governs the distribution of the assets in the payment of *debts there*, but that the distribution of the estate among the *heirs and legatees* is to be made according to the law of the domicil

[1] Lawrence *v.* Kitteridge, 21 Conn. 577.

in the case of *The King* v. *Hay*. (a) A father and his *435 *only daughter perished at sea, in the same vessel and

of the testator or intestate at his death.[1] And if a person domiciled in another government dies, leaving personal property in New Hampshire, and an ancillary administration is taken out there, and the estate be insolvent, *all the creditors* of the deceased are entitled to prove their claims, and have the *real* as well as personal estate duly applied in satisfaction thereof, and they are entitled to pursue their claims in every government where administration is taken, and to avail themselves of all the estate of the debtor until fully paid.[2]

The question of the payment of debts and distribution of the assets of testators and intestates, being in different jurisdictions, by trustees acting under the authority of different probate powers, primary and ancillary, has been frequently examined and discussed in our American courts with great learning and ability; and while the general principles are acknowledged in all of them, the difference seems to consist in the local application of some of them on minor points. The spirit of justice pervades them all, though it may be obtained *diverso intuitu*, and with more or less inconvenience. The most important cases may be perused with much profit and pleasure. Such are the cases referred to, *supra*, pp [431–434,] and more especially those of Harvey *v.* Richards, Dawes *v.* Head, Goodall *v.* Marshall, Heirs of Porter *v.* Heydock, Holcomb *v.* Phelps, Mothland *v.* Wiseman, Carmichael *v.* Ray, and Gravillon *v.* Richard. Mr. More, the learned editor of Lord Stair's Institutions, vol i. note *a*, 8, states that great confusion would prevail unless the law of the domicil be held to be the rule of the distribution, both in succession and in bankruptcy. The Supreme Court of the United States, in Aspden *v.* Nixon, 4 How. U. S. 467, has very much narrowed the doctrine and application of comity in the case of concurrent administrators in different governments, over the assets of the same testator or intestate. A. was domiciled in England and died there, leaving assets both in England and America, and letters testamentary were taken out in both countries; and the claim under each power was restricted to the limits of the country to which the letters extended, and it was considered that the Pennsylvania executor could not rightfully transmit his assets to be distributed by the foreign jurisdiction, for the suits were to be regarded as suits between different parties, and that the property in controversy was different, and the local laws different, and that the exercise of comity among different states was little more than a barren theory. This decision, however, it is to be observed, met the dissent of the Ch. Justice and of Mr. McLean, and it cannot be received without much misgiving.

The Massachusetts Revised Statutes of 1835, part 2, tit. 4, ch. 70, secs. 21-26, have finally settled this question in that state. They direct that if administration be taken out on the estate of a person who was of another state, or a foreigner, the estate, after payment of debts, should be disposed of according to his will, if validly made according to the law of Massachusetts. If no will, the real estate descends according to the law of that state, and his personal estate is to be distributed according to the law of

(a) 1 Blacks. Rep. 640.

[1] Ordronaux *v.* Helie, 3 Sandf. Ch. R. 512.

[2] Loomis *v.* Farnum, 14 N. H. 119. See Laws of N. H. c. 1110, (1851.)

in one catastrophe; and a question suggested by the case was, who took under the statute of distributions. If the father died first, the personal estate would have vested in the daughter, and, by her death, in her next of kin, who, on the part of the mother, was a different person from the next of kin on the part of the father. The right to succeed depended upon the fact which person died first, and that fact could not possibly be known, as the vessel perished at the same time. It was said to be the rule of the civil law, to found its presumptions on the relative strength, arising from the difference of age and sex of two persons; but these presumptions were shifting and unstable. The court did not decide the question. The arguments on each side were equally ingenious and inconclusive. Lord Mansfield recommended a compromise, as he said there was no legal principle on which he could decide it. The same question arose again in the Prerogative Court, in 1793, in *Wright* v. *Sarmuda*. (a) The husband, wife, and children all perished together in a vessel which foundered at sea; and Sir William Wynne, after a long and learned discussion, held it to be the

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his domicil, after the payment of all debts for which he was liable in that state. The residue may be thus distributed by the Probate Court in which the estate is settled, or it may be transmitted to the executor or administrator, if any, in the place of the deceased's domicil, to be there disposed of as the court, under the circumstances of the case, shall think best. If the deceased died insolvent, his estate in Massachusetts is to be disposed of, as far as practicable, equally among his creditors there and elsewhere. His estate is not to be transmitted to the foreign executor or administrator until the domestic creditors have received their just proportion of all the estate, wherever found, applicable to the payment of common creditors; and the domestic creditors are to receive their just proportion before any other creditor shall be paid out of the assets. After the domestic creditors have so received their just propoition, other creditors, who prove their debts, may then receive their proportion; but no one is to receive more than would be due to him if the whole was to be divided ratably among all the creditors.[1] The balance, if any, to be transmitted as aforesaid.

In Kentucky, the law of the domicil of the intestate is not regarded as to the succession to movable property, *so far* as his creditors in that state are concerned. The administration for the benefit of creditors is regulated by the *lex loci rei sitæ*. Warren *v.* Hall, 6 Dana, 452.

(a) 2 Phillimore, 266, n. Afterwards, in Colvin *v.* Procurator-General, 1 Hagg. Eccl. Rep. 92, Sir John Nicholl held the presumption of law in such a case to be, that the husband survived.

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1 Perkins *v.* Stone, 18 Conn. R. 270. Lawrence *v.* Elmendorf, 5 Barb. S. C. Rep. 73.

most rational presumption that all died together, and that none could transmit rights to another. So, again, in *Taylor* v. *Diplock*, in 1815, (*a*) in a like case, Sir John Nicholl assumed that the parties (who were husband and wife) perished at the same moment; and he could not decide on any survivorship in the case, and consequently granted administration to the representatives of the husband. (*b*) The English law has hitherto waived the question, and, perhaps prudently abandoned as delusive all those ingenious and refined distinctions which have been raised on this vexed subject by the civilians. The latter draw their conclusions from a tremulous presumption *436 resting on the dubious point which * of the parties, at the time, under the difference of age or sex, or of vigor and maturity of body, and quickness and presence of mind, was the most competent to baffle and retard the approaches of death. (*c*)

(*a*) 2 Phillimore, 261.

(*b*) So, also, in the case of Murray, in the English prerogative court, 1 Curteis, 596, the husband, wife, and child perished together by shipwreck, and administration was granted on the husband's effects, as of a widower. And in Satterthwaite *v.* Powell, Ibid. 705, where husband and wife were drowned at the same time, the property passed to the next of kin of the party in whom it was vested, and neither party could claim as survivor. The wife's effects passed to her next of kin, to whom administration was granted. See, also, the case of Coye *v.* Leach, 8 Metcalf, 371.

(*c*) This curious question was much discussed in the civil law, and the presumption as to which was the longest liver, vibrated between parent and child, according to circumstances. (Dig. lib. 34, tit. 5, ch. 10, secs. 1 and 4, and 23, 24, de Rebus Dubiis.) It was also very ingeniously and elaborately handled in Causes Célèbres, tom. iii. pp. 412–432, and a number of cases cited. The decisions had not been steady or consistent. M. Talon, the eloquent avocat-général, took a distinguished lead in the discussions. The ancient French jurisprudence had nothing fixed on the subject, and continued floating and uncertain, with a very shifting presumption in favor of one or another person, according to age and sex, and manner of the death, until the law was reduced to certainty by the Code Napoleon. (Toullier, Droit Civil Français, tom. iv. No. 76.) By the Code Napoleon, Nos. 720, 721, 722, and by the Civil Code of Louisiana, Nos. 930–933, which has adopted the same provision, when two of the next of kin perish together, without it being possible to be known which died first, the presumption of survivorship is determined by circumstances. If the parties were both under fifteen years of age, the eldest shall be presumed to have survived. If above sixty, the youngest shall be presumed to have survived. If they were between the age of fifteen and sixty, and of different sexes, the male shall be presumed to have been the survivor, provided the ages were within a year of each other. If of the same sex, then the youngest of the two is presumed to have survived.

The cases on this difficult subject in the jurisprudence of the civil law of the conti-

nental nations of Europe and of England, are collected and stated in Burge's Com. on Colonial and Foreign Laws, vol. iv. pp. 11–29. The case of Pell *v.* Ball, on the same subject, occurred in the Court of Chancery in South Carolina, and was decided in January, 1840. (1 Cheve's Eq. Rep. 99.) The husband and wife both perished, with many others, in the dreadful destruction of the steamer Pulaski by explosion of a boiler in the night of June 14th, 1838, on her passage from Charleston to New York. The wife (Mrs. Ball) was seen alive on the wreck for a short time after the explosion, but the husband was not seen after the explosion. Chancellor Johnston decided upon that fact in favor of the survivorship of the wife. There was a ground of probability founded upon positive proof of that fact, superior to anything founded on arbitrary presumptions, and the decision was no doubt logical and correct.[1]

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[1] In the case of Moehring *v.* Mitchell, 1 Barbour, 264, where a mother and daughter went to sea in the steamship President, which never was heard of after leaving port, the chancellor held that there could be no presumption that the daughter survived the mother, but both must be considered to have perished at the same moment.

Upon this subject, see Dig. lib. 34, tit. 5, chap. 10, arts. 22, 23, De Rebus Dubiis; Toullier, Droit Civil Français, tom. iv. No. 76. Causes Célèbres, tom. iii. p. 412, *et seq.* The 720th article of the Code Civil is as follows: "Si plusieurs personnes respectivement appelées à la succession l'une de l'autre périssent dans un même évènement sans qu'on puisse reconnaître laquelle est décédée la premiere, la presomption de survie est déterminée par les circonstances du fait, et, à leur défaut, par la force de l'âge ou du sexe." Upon this a learned commentator, M. Rogron, remarks as follows: —

Périssent dans un même évènement. — Il devient alors indispensable de fixer laquelle de ces personnes a survécu aux autres, et par consequent leur a succédé. Si on ne peut pas le faire pas des preuves certaines, on sera forcé de s'arréter a des presomptions plus ou moins fortes; car il faut bien nécessairement que les successions soient données à l'une de ces personnes.

Par les circonstances du fait. — Par exemple, dans l'incendie d'une maison qui a commencé par le premier étage, ceux qui l'habitaient ont péri probablement avant ceux qui habitaient les étages supérieurs; dans un naufrage, ceux qui savaient nager ont survécu probablement à ceux qui ne le savaient pas.

A leur defaut. — Ce n'est que dans les cas où les circonstances manquent entièrement, que l'on a recours aux présomptions fondées sur l'âge et sur la force, parcequ' elles ont toujours quelque chose de très incertain.

The foregoing extracts are taken from the reporter's note to Sillick *v.* Booth, 1 Younge & Collyer, Cas. in Ch. 126.

LECTURE XXXVIII.

OF TITLE TO PERSONAL PROPERTY BY GIFT.

Title to personal property arising from transfer by act of the party, may be acquired by gift and by contract.

There has been much discussion among the writers on the civil law, whether a gift was not properly a contract, inasmuch as it is not perfect without delivery and acceptance, which imply a convention between the parties. In the opinion of Toullier, (a) every gift is a contract, for it is founded on agreement; while, on the other hand, Puffendorf had excluded it from the class of contracts, out of deference to the Roman lawyers, who restrained the definition of a contract to engagements resulting from negotiation. Barbeyrac, in his notes to Puffendorf, (b) insists that, upon principles of natural law, a gift *inter vivos*, and which ordinarily is expressed by the simple term gift, is a true contract; for the donor irrevocably divests himself of a right to a thing, and transfers it gratuitously to another, who accepts it; and which acceptance he rationally contends to be necessary to the validity of the transfer. The English law does not consider a gift, strictly speaking, in the light of a contract, because it is voluntary, and without consideration; whereas a *438 contract is defined *to be an agreement upon sufficient consideration to do or not to do a particular thing. (c) And yet every gift which is made perfect by delivery, and every grant, are executed contracts; for they are founded on the mutual consent of the parties, in reference to a right or interest passing between them.

There are two kinds of gifts: 1. Gifts simply so called, or

(a) Droit Civil Français, tom. v. Des Donations Entre Vifs, secs. 4, 5, and n. 1.
(b) Droit Des Gens, liv. v. ch. 3, sec. 10, n. 5.
(c) 2 Blacks. Comm. 442.

gifts *inter vivos*, as they were distinguished in the civil law; 2. Gifts *causâ mortis*, or those made in apprehension of death. The rules by which they are governed are different and quite distinct, and they were taken from the Roman law.

1. Gifts *inter vivos* have no reference to the future, and go into immediate and absolute effect. Delivery is essential, both at law and in equity, to the validity of a parol gift of a chattel or chose in action; and it is the same whether it be a gift *inter vivos* or *causâ mortis*. (a) [1] Without actual delivery, the title does not pass. A mere intention, or naked promise to give, without some act to pass the property, is not a gift. There exists the *locus pœnitentiæ*, so long as the gift is incomplete and left imperfect in the mode of making it; and a court of equity will not interfere and give effect to a gift left inchoate and imperfect. (b) The necessity of delivery has been maintained in every period of the English law. *Donatio perficitur possessione accipientis*, was one of its ancient maxims. (c) The subject of the gift must be certain, and there must be the mutual consent and concurrent will of both parties. It is, nevertheless, hinted

(a) Irons v. Smallpiece, 2 Barnew. & Ald. 551. Bunn v. Markham, 7 Taunt. Rep. 227. Bryson v. Brownrigg, 9 Vesey, 1. Antrobus v. Smith, 12 Idem, 39. Hooper v. Goodwin, 1 Swanst. Rep. 485. Sims v. Sims, 2 Alab. Rep. N. S. 117. Noble v. Smith, 2 Johnson, 52. Adams v. Hayes, 2 Iredell's N. C. Rep. 366. But though the two cases first mentioned do not advert to any distinction between gifts *inter vivos* and gifts *causâ mortis*, there are cases which do make it, and consider a gift *inter vivos*, by parol, accompanied by *acceptance*, good to pass the property, without actual delivery of the chattel. Com. Dig. tit. Biens, D. 2. 2 Manning & Granger, 691, note c.

(b) Antrobus v. Smith, 12 Vesey, 39. Pennington v. Gittings, 2 Gill & Johns. 208.

(c) Jenk. Cent. 109, case 9. Bracton, de acquirendo rerum dominio, lib. 2, 15, 16. The delivery must be, if not actual, yet, under the circumstances, constructive or symbolical. Carradine v. Collins, 7 Smedes & Marshall, R 428. In South Carolina, it is declared by statute, in 1830, that no parol gift of any chattel shall be valid against subsequent creditors, purchasers, or mortgagees, except where the donee is separate and apart from the donor, and actual possession delivered at the time, and continued in the donee and his representatives.

1 Carpenter v. Dodge, 20 Vermont R. 595. Withers v. Weaver, 10 Barr's R. 391. Allen v. Polereczky, 31 Me. 338. Dole v. Lincoln, 3 Id. 422. Huntington v. Gilmore, 14 Barb. 243. People v. Johnson, 14 Ill. 342. Hunter v. Hunter, 19 Barb. 631. Brown v. Brown, 23 Barb. 565. Hitch v. Davis, 3 Md. Ch. 266. Woodruff v. Cook, 25 Barb. (N. Y.) 505. But it is not necessary for the delivery to be simultaneous with the words of conveyance. Gillespie v. Burleson, 28 Ala. 551.

or assumed, in ancient and modern cases, (*a*) that a gift of a chattel, by deed or writing, might do without delivery; *439 for an assignment in writing would be tantamount * to delivery. But in *Cotteen* v. *Missing*, (*b*) a letter to executors, expressing a consent that a specific sum of money be given to a donee, was not a sufficient act in writing; and it was held not to be a gift of so much money in their hands, because the consent was not executed and carried into effect, and a further act was wanting in that case to pass the money.[1] The vice-chancellor held, that money paid into the hands of B, for the benefit of a third person, was countermandable, so long as it remained in the hands of B. (*c*) A parol promise to pay money as a gift is not binding, and the party may revoke his promise; (*d*) and a parol gift of a note from a father to a son was held not to be recoverable from the executors of the father. (*e*)

Delivery, in this, as in every other case, must be according to the nature of a thing.[2] It must be an actual delivery, so far as the subject is capable of delivery. It must be *secundum subjectam materiam*, and be the true and effectual way of obtaining the command and dominion of the subject. If the thing be not capable of actual delivery, there must be some act equivalent to it. The donor must part not only with the possession, but with the dominion of the property. (*f*) If the thing given be a chose in action, the law requires an assignment, or some equivalent instrument, and the transfer must be actually executed. Therefore, where a donor expressed by letter his intention of relinquish-

(*a*) Flower's case, Noy's Rep. 67. Irons *v.* Smallpiece, 2 Barnew. & Ald. 551. Caines *v.* Marley, 2 Yerger's Tenn. Rep. 582.

(*b*) 1 Maddock's Ch. Rep. 176.

(*c*) 1 Dyer, 49 a, S. P.

(*d*) Pearson *v.* Pearson, 7 Johns. Rep. 26.

(*e*) Fink *v.* Cox, 18 Johns. Rep. 145. Pitts *v.* Mangum, 2 Bailey's S. C. Rep. 588. S. P.

(*f*) Hawkins *v.* Blewitt, 2 Esp. Rep. 663. Noble *v.* Smith, 2 Johns. Rep. 52.

[1] Chadoin *v.* Carter, 12 B. Mon. 383. Roland *v.* Schrack, 29 Penn. State R. 125.

[2] It may be constructive. Pope *v.* Randolph, 13 Ala. R. 214. Carradine *v.* Collins, 7 S. & M. Rep. 428. Blakey *v.* Blakey, 9 Ala. R. 391. Anderson *v.* Baker, 1 Kelly's R. 595. Hillebrant *v.* Brewer, 6 Tex. 45.

ing his share of an estate, and directed the preparation of a release of the personal estate, and he died before it was executed, it was held that his intention, not being perfected, did not amount to a gift. (a) [1]

* When the gift is perfect, by delivery and acceptance, *440 it is then irrevocable, unless it be prejudicial to creditors, or the donor was under a legal incapacity, or was circumvented by fraud.[2] A pure and perfect gift *inter vivos* was also held by the Roman law to be in its nature irrevocable; and yet in that law it was nevertheless revocable for special reason, such as extreme ingratitude in the donee, or the unexpected birth of a child to the donor, or when sufficient property was not left with the donor to satisfy prior legal demands. (b) The English law does not indulge in these refinements, though it controls gifts when made to the prejudice of existing creditors.

By the statutes of 50 Ed. III. ch. 6, and 3 Hen. VII. ch. 4, all fraudulent gifts of goods and chattels in trust for the donor, and to defraud creditors, were declared void; and by the statute of 13 Eliz. ch. 5, gifts of goods and chattels, as well as of lands, by writing or otherwise, made with intent to delay, hinder, and defraud creditors, were rendered void, as against the person to whom such fraud would be prejudicial. But the

(a) Hooper v. Goodwin, 1 Swanst. Rep. 485. Picot v. Sanderson, 1 Devereaux's N. C. Rep. 309, S. P. By the Civil Code of Louisiana, edited by Upton & Jennings, art. 1523, a donation *inter vivos*, of immovables and *choses in action*, must be verified before a notary and two witnesses, unless it be manual gifts, accompanied with actual delivery.

(b) Code, lib. 8. tit. 56, De Revocandis Donationibus, 1, 10. Ibid. 1, 8. Code, lib. 3, tit. 29, De Inofficiosis Donationibus. Puff. Droit des Gens, par Barbeyrac, tom. ii. 53, n. So, by the Civil Code of Louisiana, art. 1484, 1485, the donation would be void if the donor divested himself of all his property, and did not reserve enough for his own subsistence; and he cannot deprive his descendants of a certain portion. Lagrange v. Barré, 11 Rob. La. R. 302.[3]

1 So a direction by a creditor to deliver notes to his debtor, not complied with, is no release to the debtor, and the notes remain as assets of the estate. Campbell's Estate, 7 Barr's Rep. 100. Penfield v. Thayer, 2 E. D. Smith, (N. Y.) 305.

2 Gilchrist v. Stevenson, 9 Barb. 9. Marston v. Marston, 1 Fost. 491. Sanborn v. Goodhue, 8 Id. 48. Van Deusen v. Rowley, 4 Seld. 358.

3 As to what kind of donation is not prohibited by the Code, see Bourgeat v. Dumoulin, 12 La. An. 204.

statute excepted from its operation estates or interests in lands or chattels conveyed or assured *bonâ fide* and upon good consideration, without notice of any fraud or collusion.[1] The statute of 27 Eliz. ch. 4, was made against fraudulent conveyances of lands to defeat subsequent *bonâ fide* purchasers, and it applies in favor of subsequent purchasers for a valuable consideration, even in cases of fair voluntary conveyances, provided they were purchasers without notice of the voluntary conveyance. (*a*) These statutes have been reënacted in New York, and with increased checks; (*b*) and doubtless the principle in them, though they may not have been formally or substantially reënacted, prevails throughout the United States. (*c*) All the

(*a*) *Vide infra*, vol. iv. p. 463.

(*b*) N. Y. Revised Statutes, vol. ii. p. 135, sec. 1. Ibid. vol. ii. p. 137, secs. 1, 3. The provision applies equally to every species of transfer, and to things in action, and to every charge upon lands, goods, or things in action; and not only in favor of creditors and purchasers, but in favor of the heirs, successors, personal representatives and assignees who represent them. It is even made a misdemeanor to be a party, or privy to any conveyance or assignment of any interest in goods or things in action, as well as in lands, with intent to defraud prior or subsequent purchasers, or to delay, hinder, or defraud creditors or other persons. Ibid. vol. ii. p. 690, sec. 3. In Louisiana, it is held that the right of a creditor to attack a sale as fraudulent, made by his debtor to a third person, depends on his showing he was a creditor *before the date of the act.* Lopez *v.* Bergel, 12 La. Rep. 197. This rule, I should think, was rather too strict for all cases.

The statute in Connecticut *against fraudulent conveyances* is distinguished for its simplicity, precision, and brevity. It declares that all fraudulent conveyances of lands or chattels, and all bonds, suits, judgments, executions, and contracts made with intent to avoid any debt or duty, are utterly void, as against the persons whose debt or duty is endeavored to be avoided. Revised Statutes of Connecticut, 1821, p. 247. The Ohio statute of 1810, and the statute of Illinois of 1827, and of North Carolina, by the Revised Statutes of 1837, p. 287, make all such conveyances equally void as against creditors and purchasers. The statutes of Kentucky of 13th December, 1820, and of February 1st, 1839, render all mortgages and deeds of trust, real or personal property, unless recorded, void against creditors and purchasers.

(*c*) See *infra*, vol. iv. p. 462. In Cadogan *v.* Kennett, Cowp. 434, Lord Mansfield observed that the principles and rules of the common law were as strong against

[1] In Mebane *v.* Mebane, the doctrine was declared, that property cannot be given to a man, or to another for him, in such manner as to permit him to take the benefit of it, and at the same time resist the claims of his creditors upon it. 4 Ired. Eq. R. 131. But it has been held, that one may make a voluntary conveyance of his property, in trust for his support, valid against subsequent creditors. Buchanan *v.* Clark, 2 Wms. (28 Vt.) 799.

doctrines of the courts of law and equity, concerning voluntary settlements of real estates, and the presumptions of fraud arising from them, * are applicable to chattels; and *441 a gift of them is equally fraudulent and void against existing creditors. (a) Voluntary settlements, whether of lands or chattels, even upon the wife and children, are void in these cases, and the claims of justice precede those of affection. (b) [1] The English cases were extensively reviewed and considered, in the case of *Reade* v. *Livingston;* (c) and the doctrine of that case was, that a voluntary settlement by a person indebted at the time was fraudulent and void, as to existing creditors. The conclusion in that case was, that if the party be indebted at the time of the voluntary settlement, it is presumed to be fraudulent in respect to such antecedent debts, and that the presump-

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fraud in every shape, as the statutes of 13 and 27 Eliz.; and those statutes are considered as only declaratory of the principles of the common law. Marshall, Ch. J., in Hamilton *v.* Russel, 1 Cranch, 316, to the same point. Lord Coke considered the statute of 13 Eliz. as *declaratory* of the common law. Co. Litt. 76 a, 290 b. It professes to be so. In North Carolina, by Act of 1806, all gifts of slaves are void, unless in writing, signed by the donor, and attested by one subscribing witness, and proved or acknowledged, and registered within one year.

(a) Bayard *v.* Hoffman, 4 Johns. Ch. Rep 450. An immoral and corrupt motive is not essential to render the act fraudulent as to creditors. It is constructively so, if it necessarily leads to the injury of the creditor. Montgomery *v.* Tilley, 1 B. Monroe, 157. Huth *v.* Bank of U. S. in Ch., Louisville, Kentucky, August, 1843. 4 B. Monroe, 423.

(b) This sentiment is strongly inculcated and sententiously expressed by Cicero. (De Off. 1, 14.) *Videndum est igitur, ut ea liberalitate utamur, quæ prosit amicis, noceat nemini. Nihil est enim liberale, quod non idem justum.* But *settlements of personal estates* are held in England not to be within 27 Eliz. ch. 4; and a voluntary settlement of them by persons *not indebted at the time,* is good against a subsequent purchaser for a valuable consideration. 1 Sim. & Stu. 315. And in Bohn *v.* Headley, 7 Harr. & Johns. 257, it was held that a gift of chattels by a father, not indebted at the time, to his child, by deed, *with a provision that the donor was to retain possession and use for life,* was valid under 13 Eliz., and also at common law, and good against a subsequent purchaser. A gift of a particular chattel, though the giver be at the time indebted more than he is worth, has been held to be only presumptive evidence of fraud, and not necessarily void. Toulmin *v.* Buchanan, 1 Stewart's Ala. Rep. 67.

(c) 3 Johns. Ch. Rep. 481.

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[1] A deed of gift, expressed to be for natural love and affection towards a bastard child is good, though there is no delivery of the thing given at the time of the execution. Gordon *v.* Wilson, 4 Jones, Law, (N. C.) 64. M'Ewen *v.* Troost, 1 Sneed, (Tenn.) 186.

tion did not depend upon the amount of the debts, nor the extent of the property in settlement, nor the circumstances of the party. There is no such line of distinction set up or traced in any of the cases. The attempt would be embarrassing, if not dangerous to the rights of creditors, and prove an inlet to fraud. The principle had not only been previously established in the state of New Jersy, (a) but it has since been recognized by the Supreme Court of New York, (b) and by the Supreme Court of the United States; and it prevails equally in several of the other states. (c)[1] A voluntary conveyance, if *442 *made with fraudulent views, would seem to be void

(a) Den v. De Hart, 1 Halsted's Rep. 450.[2]

(b) Jackson v. Seward, 5 Cowen's Rep 67. The doctrine of the case of Jackson v. Seward, as settled in the Court of Errors, in 8 Cowen's Rep. 406, is not pressed to the severe extent of holding a voluntary conveyance absolutely void, though there be a small indebtedness at the time. It is only so under certain circumstances. The question is one of fraud, in fact, for a jury. See, also, to the same point, Jackson v. Peck, 4 Wendell's Rep. 300. Hopkirk v. Randolph, 2 Brockenbrough, 132. Van Wyck v. Seward, 6 Paige, 62. The rule in Vermont and Pennsylvania, is to the same effect; and indebtedness, at the time of the voluntary settlement, is only presumptive evidence of fraud, and the conclusion will depend upon the amount of the debt, and the estate of the settler and other circumstances. Brackett v. Waite, 4 Vermont Rep. 389. Chambers v. Spencer, 5 Watts, 404. Posten v. Posten, 4 Wharton, 27. In Van Wyck v. Seward, Chancellor Walworth held, that if a parent makes an advancement to his child, and honestly and fairly retains in his hands sufficient property to pay all his existing debts, the child will not be bound to refund, even though the parent does not pay his debts existing at the time of the advancement.[3] A voluntary conveyance is not *per se* fraudulent, even as against creditors to whom the grantor was indebted at the date thereof. Bank of United States v. Housman, 6 Paige's Rep. 526.

(c) Sexton v. Wheaton, 8 Wheaton, 229. Hinde v. Longworth, 11 Id. 199. Thomson v. Dougherty, 12 Serg. & Rawle, 448. Parker v. Procter, 9 Mass. Rep. 390. Bennett v. Bedford Bank, 11 Id. 421. Meserve v. Dyer, 4 Greenleaf's Rep. 52. Hudnal v. Teasdall, 1 M'Cord's Rep 227. O'Daniel v. Crawford, 4 Dev. N. C. Rep. 197. Hanson v. Buckner, 4 Dana's K. Rep. 254. Mills v. Morris, 1 Hoffman's Ch. Rep. 419. In Hudnal v. Wilder, (4 M'Cord's Rep. 294,) it was held, that a voluntary deed in favor of a wife or children, was valid against subsequent purchasers, with notice; but it was void as to existing creditors, if the donor was at the same

[1] Hawkins v. Moffitt, 10 B. Mon. 81. Trimble v. Ratcliff, 9 Id. 511. Gannard v. Eslava, 20 Ala. 732. Clark v. Depew, 25 Penn. 509. Williams v. Banks, 11 Md. 198. Hayes v. Jones, 2 P. & H. (Va.) 583. Craig v. Gamble, 5 Florida, 430.

[2] Doughty v. King, 2 Stockt. (N. J.) 396.

[3] Thacker v. Saunders, Bush. Eq. 145. See French v. French, 39 E. L. & Eq. 85.

even as to subsequent creditors; but not to be so, if there was no fraud in fact.(a)[1]

time *largely* indebted.[2] To the same purpose it was decided in the Court of Appeals in South Carolina, in 1830, in Howard *v.* Williams, that a voluntary gift to a child was not necessarily void as to existing creditors, *but it would depend upon circumstances;* and that a voluntary gift to a child, if made *bonâ fide*, would be good against subsequent creditors, even without notice of it; and that the possession by the donor, if the donee be a child residing with the parent, was not to be deemed a badge of fraud. Carolina Law Journal, No. 2, p. 231. 1 Bailey's Rep. 575, S. C.[3] A very inconsiderable amount of debt existing at the time would not affect the gift as to existing creditors. Ibid. 585, note. M'Elwee *v.* Sutton, 2 Id. 128. Such a gift is good even against subsequent creditors, with notice, though the donor retains possession. Madden *v.* Day, 1 Bailey's Rep. 587. Cordery *v.* Zealy, 2 Id. 205. The English courts seem now inclined to be as indulgent as any of the courts in this country, for, from the language of the judges of the K. B, in the case of Shears *v.* Rogers, 3 B. & Adolph. 362, we are led to infer that the party must be indebted at the time to the extent of insolvency, to render his conveyance fraudulent within the statute of 13 Eliz. ch. 5.[4] In Massachusetts, he need only to be *deeply* indebted, and not to the extent of insolvency. Parkman *v.* Welch, 19 Pick. Rep. 231. The N. Y. Revised Statutes, (vol. ii. p. 137, sec. 4,) have relaxed the strictness of the doctrine in the text as to voluntary gifts and conveyances, by declaring that no conveyance or charge (and the provision applies equally to lands and chattels) should be adjudged fraudulent as against creditors or purchasers, *solely on the ground that it was not founded on a valuable consideration.* In Louisiana, a deed cannot be set aside as fraudulent by a creditor, who becomes such *after* the date of the alienation, unless it be proved to have been made with an intention to defraud future creditors. Hesser *v.* Black, 17 Mart. La. Rep. 96. In Parkman *v.* Welch, 19 Pick. R. 231, it was held that a conveyance under the 13th Eliz. c. 9, made upon a secret trust and with fraudulent intent, may be avoided by *subsequent* as well as by previous creditors.

(a) Reade *v.* Livingston, 3 Johns. Ch. Rep. 501, 502. Bennett *v.* Bedford Bank, 11 Mass. Rep. 421. Damon *v.* Bryant, 2 Pick. Rep. 411. Howe *v.* Ward, 4 Greenleaf's Rep. 195. Sexton *v.* Wheaton, 8 Wheaton, 229. Hinde *v.* Longworth, 11 Id. 199. Benton *v.* Jones, 8 Conn. Rep. 186. Validity is never given in England to a settlement where the party was largely indebted at the time, and subsequent creditors

[1] Vertner *v.* Humphreys, 14 S. & M. 130. Atkinson *v.* Phillips, 1 Md. Ch. 507. Heap *v.* Tonge, 7 E. L. & Eq. 180. Lewis *v.* Caperton, 8 Gratt. 148. Thomas *v.* Degraffenreid, 17 Ala. 602.

[2] See Wilson *v.* Howser, 12 Penn. 109. Wilson *v.* Buchanan, 7 Gratt. 334. Crumbaugh *v.* Kugler, 2 Ohio St. 373. In Welles *v.* Cole, 6 Gratt. 645, it was held, that, a deed made by a father in failing circumstances, to secure a voluntary bond to his daughter, given when he was solvent, was good against creditors.

[3] Iyes *v.* Owens, 28 Ala. 641.

[4] Smith *v.* Yell, 3 Eng. (Ark.) R. 470. It was held in Burkey *v.* Self, 4 Sneed, (Tenn.) 121, that a voluntary conveyance of lands is valid and not fraudulent as to creditors, notwithstanding the grantor was indebted at the time, if he retained property sufficient to pay all demands.

It has been said by the elementary writers, (a) that the statute of 13 Eliz. does not extend to voluntary settlements of property

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have applied for relief. If the deed be set aside as fraudulent against creditors, subsequent creditors are let in. Richardson v. Smallwood, Jacob's Rep. 553. Mr. Justice Story, in his Commentaries on Equity Jurisprudence, p. 351, draws the conclusion as to the opinion of the master of the rolls in the case last cited, that indebtedness at the time was a circumstance presumptive of a fraudulent intent. This learned commentator has examined the authorities on the question (Com. pp. 343–360) very critically, and he comes to the conclusion that the doctrine in the case of Reade v. Livingston is *strictissimi juris;* and he evidently settles down upon the conclusion under the statute of 13 Eliz., that mere indebtedness at the time would not *per se* establish that a voluntary conveyance was void, even as to existing creditors, unless the other circumstances of the case *justly created a presumption of fraud, actual or constructive, from the condition, state, and rank of the parties, and the direct tendency of the conveyance to impair the rights of creditors.* I have no doubt that this is the tendency of the decisions both in England and America, and that the conclusions of fraud are to be left as matters of fact to a common jury. The doctrine in Reade v. Livingston, and of those English chancellors on whom it rested, is, as I greatly fear, too stern for the present times. If the creditor's claim, at the time of the voluntary conveyance, rested in unliquidated damages for a tort, which had not been then ascertained and made certain by a judgment, yet he is entitled to the benefit of his character as a creditor, as against the conveyance. Fox v. Hills, 1 Conn. Rep. 295. Jackson v. Myers, 18 Johns. Rep. 425. In Van Wyck v. Seward, in the Court of Errors of New York, in 1837, (18 Wendell, 392, 405,) the free, sound, and elevated reflections of Mr. Justice Bronson, on the doctrine in Reade v. Livingston, and in Jackson v. Seward, 5 Cowen, 67, which followed it, are delivered with elegance and strength. He thinks that the presumption of a fraudulent intent may be and ought to be, in cases of that kind, an inference of law; and he does not construe the case in 8 Cowen, 406, as contradicting that principle, but concludes that the court had not advanced a single step towards denying the doctrine of legal fraud, as laid down in Reade v. Livingston.

In noting the vacillating and contradictory decisions on the point of the validity of voluntary gifts and conveyances of property by persons indebted at the time, it is painful to perceive, in so many instances, the tendency to a lax doctrine on the subject. The relaxation goes to destroy conservative principles, and to commit sound, wholesome, and stern rules of law to the popular disposal and unstable judgment of jurors. The very able decision of the Supreme Court of North Carolina, in December, 1833, in O'Daniel v. Crawford, 4 Dev. N. C. Rep. 197, stands out firmly opposed to this enervating infirmity. It has established by argument and authority, resting on the soundest foundations, the rule that no voluntary conveyance of property even to a child, will be upheld to defeat any creditor existing at the time, however small the amount of the demand. It was well observed that there is not an English case in chancery to sustain the gift in such a case; and this, I think, was fully shown in the review of the cases in Reade v. Livingston, mentioned in the text.

(a) Atherley on Marriage Settlements, 220. Roberts on Fraudulent Conveyances, 421, 422. Mr. Justice Story, in his Com. on Equity Jurisprudence, 361, says that the English doctrine has at length settled down in favor of the proposition, that in order

which a creditor could not reach by legal process in case no settlement had been made, such as choses in action, money in the funds, &c.; and, therefore, that a voluntary *settlement of that species of property must be good *443 against creditors, even if made by an insolvent debtor. The difficulty of reaching that species of personal property was discussed and considered in the case of *Bayard* v. *Hoffman.* (*a*) The cases were found to be contradictory, and the question unsettled; but there appeared to be much good authority and much strong reason for the opinion that personal property, not tangible by execution at law, could be reached by the assistance of a court of equity. Without such assistance there would be great temptations to fraudulent alienations; and a debtor under the shelter of it might convert all his property into stock, and settle it upon his family, in defiance of his creditors and to the utter subversion of justice. In *Spader* v. *Davis*, (*b*) the Court of Chancery assisted a creditor at law to reach personal property which the debtor had previously conveyed away in trust. That case was affirmed upon appeal; (*c*) and the language of the Court of Errors was, that the Court of Equity would assist a judgment creditor at law in discovering and reaching personal property which had been placed in other hands; and that it made no difference whether that property consisted of *choses in action, or money, or stock.* This disposition of the courts of equity to lend assistance in such cases, was afterwards checked by the argument and opinion in *Donovan* v. *Finn*, (*d*) where the chancellor held that the doctrine of equitable assistance to a judgment-creditor at law, to enable him to reach choses in action of his debtor, was to be restricted to

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to make a voluntary conveyance void as to creditors, either existing or subsequent, it is indispensable that it should transfer property which would be liable to be taken in execution for the payment of debts.

(*a*) 4 Johns. Ch. Rep. 450.

(*b*) 5 Id. 280. This decision in Spader *v.* Davis had important influences on the jurisprudence of New York, and may be considered as the origin and foundation in this country of the *creditor's bill,* to supply the inefficiency of the execution at law, which has made such a conspicuous figure in the subsequent business and practice in chancery.

(*c*) 20 Johns. Rep. 554.

(*d*) 1 Hopkins's Rep. 59.

special cases of fraud or trust; and that without some such specific ingredient, the case was not of equitable jurisdiction. (*a*)

(*a*) The English equity jurisdiction would seem not to be carried beyond the doctrine in the case of Donovan *v.* Finn; (Otley *v.* Lines, 7 Price's Exch. Rep. 274;) but the N. Y. Revised Statutes, vol. ii. p. 173, sec. 38, have fortunately carried to the full extent the principle declared in Spader *v.* Davis, and given jurisdiction to the Court of Chancery to satisfy debts at law *out of debts due to the defendant, or things in action, or property held in trust for him,* after a *fieri facias* at law has been returned *nulla bona,* and the remedy at law *bonâ fide* exhausted. In Tappan *v.* Evans, 11 N. H. Rep 311, the power of the Court of Chancery to reach choses in action, in aid and satisfaction of a judgment at law after the remedy at law has been exhausted, is discussed and established in the clearest manner; and the assistant vice-chancellor, in Storm *v.* Waddell, 2 Sandf. Ch. R. 494, showed also, very satisfactorily, that, long before the case of Spader *v.* Davis, it was settled law that an unsatisfied execution creditor had a right to resort to chancery, to compel payment of his judgment debt out of equitable interests and things in action of the judgment debtor. A creditor's bill will lie in chancery to collect a public tax assessed out of the equitable interests and choses in action of a defendant, on the collector's return of no visible property on which to levy. Supervisors of Albany Co. *v.* Durant, 9 Paige's Rep 182. So, in Ohio, Kentucky, Michigan, Georgia, Pennsylvania, Tennessee, Mississippi, and probably in other states, a judgment creditor is authorized by statute to seize and sell on execution, or apply for the aid of chancery powers, to reach choses in action, stock, property, or money in the hands of third persons, or voluntary assignees, when the debtor has not property sufficient to satisfy the judgment, which can be reached by execution, and the remedy at law has been exhausted. Under that assistance, equitable interests and choses in action, and interest in joint-stock companies, may be made subject to the payment of judgments at law. Statutes of Ohio, 1831. Act of Tennessee, 1833. Act of Kentucky, February, 1828. Act of Georgia, 1822 Purdon's Dig. 368, 371, 372. Statutes of Connecticut, 1838, p. 65. Hubbard, Ib. 28. Wright *v.* Petrie, 1 Smedes & M. Miss. Ch. R. 282, 295. C. C. U S. for Michigan, October, 1841, where the court sustained on demurrer a creditor's bill in chancery against choses in action, &c. Freeman *v.* Michigan State Bank, Walker's Mich. Ch R. 62. In New Hampshire bank-notes may be attached on mesne process, and sold on execution. Spencer *v.* Blaisdell, 1 N H. 198. Money may be levied on *fieri facias.* 1 Bailey's S. C. Rep 39. 12 Johns. Rep. 220. So, in New York, bank bills and other evidences of debt, issued by any moneyed corporation, or by the government of the United States, and circulated as money; and in Connecticut all corporate stock may be levied upon and sold under execution at law without recourse to chancery. N. Y. Revised Statutes, vol. ii. p. 366. Revised Statutes of Connecticut, 1821. The New York provision in chancery extends to property and things in action held in trust for the debtor, with the exception of such trusts *as have been created by, and of funds so held in trust proceeding from some other person, than the defendant himself.* Ibid. p. 174, secs. 38, 39. *Vide infra,* vol. iv. p. 430. In Kentucky, by statutes of 1821 and 1828, equities of redemption were made subject to sale on execution. In Maryland, equitable estates are liable to sale under a *fi. fa.* in the same manner that legal estates are. McMechen *v.* Marman, 8 Gill & Johnson, 58. But in North Carolina choses in action cannot be reached by a *fi. fa.* at law, nor by a court

* II. Gifts, *causâ mortis*, have been a subject of very *444 frequent and extensive discussion in the English courts of equity. Such gifts are conditional, like legacies; and it is essential to them that the donor make them in his last illness, or in contemplation and expectation of death;[1] and with reference to their effect after his death, they are good, notwithstanding a previous will; and if he recovers, the gift becomes void. (*a*) The apprehension of death may arise from infirmity or old age, or from external and anticipated danger. (*b*)

The English law on the subject of this species of gift is derived wholly from the civil law. Justinian was justly apprehensive of fraud in these gifts, and jealous of the abuse of them, and he required them to be executed in the presence of five witnesses. We have not adopted such precautions; though

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of equity. Pool *v.* Glover, 2 Iredell, 129. Doak *v.* Bank of the State, 6 Idem, 337. Nor in New Jersey can trust estates be sold on execution. The statute of 29 Charles II. ch. 3, on that point, has not been adopted in New Jersey No equitable interest can be levied on and sold on execution at law. Disborough *v.* Outcalt, Saxton's N. J. Ch. Rep. 298. In England, an equitable interest is not salable under a *fi. fa.* Scott *v.* Scholey, 8 East, 467; nor does a court of equity consider a judgment or execution at law as binding a mere equitable interest. See Bogart *v.* Perry, 1 Johns. Ch. Rep. 56. Hendricks *v.* Robinson, 2 Id. 312. Disborough *v.* Outcalt, *ub. sup.* Mercer *v.* Beale, 4 Leigh's Rep. 207. President Tucker was inclined to the doctrine, in Bayard *v.* Hoffman, 4 Johns. Ch. Rep. 450, that where a creditor was in pursuit of his demand, and the debtor transfers his choses in action, stocks, &c., to trustees for his benefit, the creditor would be entitled to be assisted in equity. In Georgia, an equitable interest or a distributive share is not subject to a sale on execution. Colvard *v.* Coxe, Dudley's R. 99.

(*a*) Swinb. 18. Drury *v.* Smith, 1 P. Wms. 404. Blount *v.* Burrow, 1 Vesey, Jr. 546. Sir L. Shadwell, in Edwards *v.* Jones, 7 Simons, 325. S. C. 1 Mylne & Craig, 226. Wells *v.* Tucker, 3 Binney's Rep. 366. In Nicholas *v.* Adams, 2 Wharton, 17, it was held not to be indispensable to a valid *donatio mortis causâ*, that it should be made *in extremis*, like a nuncupative will. The chief justice defined it to be a conditional gift, depending on the contingency of expected death, and that it was defeasible by revocation, or deliverance from the peril. To constitute a *donatio mortis causâ*, the circumstances must be such as to show that the donor intended the gift to take effect if he should die shortly afterwards, but that if he should recover, the thing should be restored to him.[2]

(*b*) Dig. 39, 6, secs 3, 4, 5, 6.

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[1] Barker *v.* Barker, 2 Gratt. R. 344. Grattan *v.* Appleton, 3 Story's R. 755. Merchant *v.* Merchant, 2 Bradford, (N. Y.) 432.

[2] Staniland *v.* Willott, 12 E. L. & Eq. 42. Hebb *v.* Hebb, 5 Gill's R. 507. Chevallier *v.* Wilson, 1 Texas R. 161.

it has been truly declared that such donations amount to a revocation *pro tanto* of written wills; and, not being subject to the forms prescribed for nuncupative wills, they were of a dangerous nature. By the civil law, they were reduced to the similitude of legacies, and made liable to debts, and to pass for nothing, and to be returned if the donor recovered or revoked the gift, or if the donee died first. (*a*) It was a disputed point with the Roman civilians, whether donations *causâ mortis* resembled a proper gift or a legacy. The final and correct opinion was established, that a gift *inter vivos* was irrevocable; but that a gift *causâ mortis* was conditional and revocable,[1] and of *445 a *testamentary character, and made in apprehension of death. (*b*) The first case in the English law on the subject of gifts *causâ mortis*, was that of *Jones* v. *Selby*, in 1710, (*c*) in which the lord chancellor ruled, that a *donatio causâ mortis* was substantially a will, with a like revocable character during the life of the donor. Afterwards, in *Drury* v. *Smith*, (*d*) a person, in his last sickness, gave a one hundred pound bill to a third person, to be delivered to the donee if he died; and this was held to be a good gift, and Lord Hardwicke subsequently (*e*) approved of that decision.[2] In *Lawson* v. *Lawson*, (*f*) and in

(*a*) Inst. 2, 7, 1. Code, 8, 57, 4.

(*b*) Dig. 39, 6, 2, and 27. Inst 2, 7, 1. *Vide* Dig. lib. 39, tit. 5, *De Donationibus*, and tit. 6, *De mortis causa Donationibus*, for the Roman law at large on the subject. By the Lex Cincia, A U. C. 550, a donation above 200 *solidi* was not valid, unless accompanied with delivery.

(*c*) Prec. in Ch. 300. In Hambrooke *v.* Simmons, 4 Russell's Rep. 25, it was left as a doubtful point whether a *donatio mortis causâ* be avoided by the making of a subsequent will.

(*d*) 1 P. Wms. 404. (*e*) 3 Atk. Rep. 214.

(*f*) 1 P. Wms. 440.

[1] Parker *v.* Marston, 27 Maine R 196. Lee *v.* Luther, 3 W. & M. 519. Jones *v.* Brown, 34 N. H. 439. Bloomer *v.* Bloomer, 2 Bradford, (N. Y.) 339.

[2] Moore *v.* Darton, 7 E L. & Eq. 134. Michener *v.* Dale, 23 Penn. 59. Dole *v.* Lincoln, 31 Me. 422. The question has lately arisen whether there is any limit to the *amount* of property which may be conveyed by a *donatio causâ mortis*. In the case of Headley *v.* Kirby, 18 Penn. 326, it was held, that a gift, in prospect of death, of *all* the donor's property, was not valid. More lately, however, in Meach *v.* Meach, 24 Vt. 591, where the donor, on his death-bed, executed a deed of all his personal property to his wife, it was upheld, as a *donatio causâ mortis;* and Mr. C. J. Redfield, in a learned note to the decision, says, that he is unable to find any principle of limitation to the extent of this class of gifts.

Miller v. *Miller*, (a) a delivery to the wife as donee was held good; but in the last case it was held, that a note of hand not payable to bearer, and being a mere *chose in action*, to be sued in the name of the executor, did not pass by delivery, or take effect as a gift *causâ mortis*. (b) The delivery of bank notes, which circulated as cash, was held at the same time to be a valid donation; and the same point has been since established. (c)

But the case of *Ward* v. *Turner* (d) was that in which the whole doctrine was, for the first time, fully and profoundly examined in the English court of chancery; and Lord Hardwicke gave to the subject one of his most elaborate and learned investigations. He held, that actual delivery was indispensable to the validity of a gift *causâ mortis*, and that a delivery to the donee of receipts for South Sea annuities *was not sufficient to pass the property, though it was strong evidence of the intent. The delivery of the receipt was not the delivery of the thing. He examined very accurately the leading texts of the civil law, and the commentators on the point; and concluded, that though the civil law did not require absolute delivery of possession in every kind of donation *causâ mortis*, that law had been received and adopted in England, in respect to those donations, only so far as the donations were accompanied with actual delivery. The English law required delivery throughout, and in every case. In all the chancery cases, delivery of the thing was required, and not a delivery in the name of the thing. In *Jones* v. *Shelby*, a symbol was held good; but that was in substance the same as delivery of the article, and it was the only case in which such a symbol had been admitted. Delivery of a symbol in the name of the article was not sufficient. The delivery of the receipts was merely legatory, and amounted to a nuncupative will, and was a breach of the statute of frauds.

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(a) 3 Idem, 356.

(b) The same point as that in Miller v. Miller was decided the same way, in Bradley v. Hunt, 5 Gill & Johnson 54, in the case of a promissory note payable to the husband's order. It would have been otherwise if the note had been payable to the bearer.

(c) Hill v. Chapman, 2 Bro. Ch Rep. 612.

(d) 2 Ves. 431.

Symbolical delivery is very much disclaimed by Lord Hardwicke in this case, and yet he admits it to be good when it is tantamount to actual delivery; and in *Smith* v. *Smith* (*a*) it was ruled, that the delivery of the key of a room containing furniture was such a delivery of possession of the furniture as to render the gift *causâ mortis* valid. Ch. J. Gibbs said that was a confused case; but the efficacy of delivery, by means of the key, was not a questionable fact.

The doctrine of this species of gift was afterwards discussed with ability and learning, in *Tate* v. *Hilbert.* (*b*) Lord Loughborough pressed the necessity of actual delivery to the efficacy of such gift, except in the case of a transfer by deed or writing. He held, that where a person, in his last sickness, gave the donee his check on his banker for a sum of money, payable to bearer, and he died before it was realized, * 447 it was not good as a *donatio causâ mortis*; for it was to take effect presently, and the authority was revoked by his death. He likewise held, that where the same person, at the same time, gave to another donee his promissory note for a sum of money, that was not good as such a gift, for it was no transfer of property. So, where a person supposing himself to be in his last sickness, caused India bonds, bank notes, and guineas, to be sealed up and marked with the name of the donee, with directions to have them delivered after his death, and still retained possession of them, it was held, (*c*) that there was no delivery; and the act was void as a gift *causâ mortis*; for there must be a continuing right of possession in the donee until the death of the donor, and he may revoke the donation at any time before his death. (*d*) [1]

(*a*) Str. Rep. 955.

(*b*) 2 Ves. Jr. 111. 4 Bro. Ch. Rep. 286.

(*c*) Bunn *v.* Markham, 7 Taunt. Rep. 224.

(*d*) Hawkins *v.* Blewitt, 2 Esp. N. P. Rep. 663, S. P. In the case of the Roman Catholic Church *v.* Miller, 17 Martin's La. Rep. 101, it was held, that a legacy of so much money in a drawer, was only good for the sum found there at the death of the testator.

[1] It is said, in Miller *v.* Jeffress, 4 Gratt. R. 472, that *delivery* is indispensable — delivery of the thing, or of the means of getting possession, or, if it be a chose in action, of the instrument by which it may be reduced to possession. An after-acquired possession, or a previous and continuing possession, though by authority of the donor, is insufficient.

The cases do not seem to be entirely reconcilable on the subject of donations of choses in action. A delivery of a note, as we have seen, was not good, because it was a mere chose in action; and yet, in *Snellgrove* v. *Baily*, (a) the gift of a bond *causâ mortis* was held good, and passed an equitable interest; and Lord Hardwicke afterwards, in the great case of *Ward* v. *Turner*, said he adhered to that decision; and the same kind of gift, as well as the gift of a promissory note *causâ mortis*, has been held in this country to be valid. The distinction made by Lord Hardwicke between bonds and bills of exchange, promissory notes and other choses in action, seems now to be exploded in this country, and they are all considered proper subjects of a valid donation *causâ mortis* as well as *inter vivos*. (b) [1]

(a) 3 Atk. Rep. 214.

(b) Wells v. Tucker, 3 Binney's Rep. 366. Borneman v. Sidlinger, 15 Maine Rep. 429. Wright v. Wright, 1 Cowen's Rep. 598. Constant v. Schuyler, 1 Paige's Rep. 318. Parker v. Emerson, Sup. Court, (N. Y.) 1846. 4 Law Reporter for June, 1846. Brunson v. Brunson, Meig's Tenn. Rep. 630. Parish v. Stone, 14 Pick. 207. This last case overrules the one from Cowen, so far as it applies to the donor's own promissory note payable to the donee, and which cannot be the subject of a *donatio causâ mortis*. It has been a debatable question whether a bond and mortgage could pass by delivery as a *donatio causâ mortis*. In Duffield v. Elwes, 1 Sim. & Stu 239, it was held that a mortgage could not be so given, and that the bond did not also pass. The reason assigned was, that it was not a gift completed, inasmuch as the mortgagor had a right to resist the payment of the bond without the reconveyance of the estate; and the donor of the bond was not to be compelled to complete his gift by such conveyance. But this case was afterwards reversed; and the delivery of the mortgage, as

Dole v. Lincoln, 31 Maine R. 422. Huntington v. Gilmore, 14 Barb. R. 243. Gough v. Tindon, 8 E. L. & Eq. 507. *Contra*, Moore v. Darton, 7 E. L. & Eq. 134. But possession does not prove delivery, where claimant had opportunities of wrongful acquisition. Kenney v. Public Administrator, 2 Bradford, (N. Y.) 319.

[1] In New York, after a most complete and elaborate discussion, it has been held, that the executory promise of a donor, *i. e.*, his own draft upon a third party, not accepted, in favor of the donee, and intended as a *donatio causâ mortis*, is not valid as such, and no action can be maintained upon it against the representatives of the donor.

If the instrument executed by the donor would operate as an assignment or transfer of his funds in the hands of a third person, it *might* be good as a *donatio causâ mortis*. Harris v. Clark, 2 Barb. S. C. R. 94. S. C. 3 Comst. R. 93. Wright v. Wright, cited in the note, *supra*, is overruled. See, also, Flint v. Pattee, 33 N. H. 520.

It has been held in Connecticut that the promissory note of a *third person*, though not payable to bearer, nor so indorsed as to transfer the legal title by delivery merely, may be the subject of a *donatio causâ mortis*. Brown v. Brown, 18 Conn. R. 410; and see Craig v. Craig, 3 Barb. Ch. R. 78, 117, 118. See, also, Smith v. Kittridge, 21 Vermont R. 238; Bouts v. Ellis, 21 E. L. & Eq. 337; Sessions v. Mosely, 4 Cush. 87; Waring v. Edmonds, 11 Md. 424.

*448 *By the admirable equity of the civil law, donations *causâ mortis* were not allowed to defeat the just claims of creditors; and they were void as against them even without a fraudulent intent. (*a*) It is equally the language of the modern civilians and of the English law, that donations cannot be sustained to the prejudice of existing creditors. (*b*)

creating a trust by operation of law, was good as a *donatio causâ mortis*. 1 Bligh's Rep. N. S. 497. This principle was also admitted in Hurst *v*. Beach, 5 Madd. Ch. Rep. 351, and a delivery of a bond and mortgage, as a donation *mortis causâ*, held valid So also in Duffield *v*. Hicks, 1 Dow's N. S. 1, bond and mortgage securities were held to be capable of a good delivery as a *donatio causâ mortis*. They raise a trust by operation of law, and the heir or executor is bound to give effect to the intent of the donor.[1] These decisions are subject to the objection, that they go very much to impair the provision in the statute of frauds, which avoids parol grants and assignments in trust. The requisites of a valid *donatio mortis causâ* are well collected in a learned note to the case of Walter *v*. Hodge, 2 Swanston, 101, where it is stated and proved that it requires delivery of the property or the documentary evidence of it — that it is revocable by the donor — that it is revoked by the death of the donee during his life — that it is subject to the claims of creditors, and that, on the death of the donor, the property vests absolutely in the donee, and no probate is required, and the wife may be that donee.

(*a*) Dig. 39, 6, 17.

(*b*) Voet, Com. ad Pand. 39, 5, sec. 20. Pothier, Traité des Donations entre Vifs, sec. 3, art. 1, sec. 2. Toullier, Droit Civil Français, tom. v. p. 733. Smith *v*. Casen, cited in 1 P. Wms. 406, note.

[1] Brinckerhoff *v*. Lawrence, 2 Sandf. Ch. R. 400.

LECTURE XXXIX.

OF CONTRACTS

In entering upon so extensive and so complicated a field of inquiry as that concerning contracts, we must necessarily confine our attention to a general outline of the subject; and endeavor to collect and arrange, in simple and perspicuous order, those great fundamental principles which govern the doctrine of contracts, and pervade them under all their modifications and variety. (a)

I. *Of the parties thereto.*

An executory contract is an agreement of two or more persons, upon sufficient consideration, to do, or not to do, a particular thing. (b) * The agreement is either under seal *450

(a) The latest and best Practical Treatise in the English law on the Law of Contracts not under Seal, is the one under that title by Mr. Chitty; and the Philadelphia edition of 1834 is much improved by notes and references to American cases, by Francis I. Troubat, Esq., of the Pennsylvania bar. A Treatise on the Law of Contracts, and Rights and Liabilities of Contracts, by G. G. Addison, of the Inner Temple, in two volumes, has since appeared, and is full and very comprehensive.[1]

(b) 2 Blacks. Com. 442. Plowd Rep. 17, a. Com. Dig. tit. Agreement, A 1. The definition of a contract in the English law is distinguished for neatness and precision. The definition in the Code Napoleon, No. 1101, is more diffuse. "A contract," says that code, "is an agreement by which one or more persons bind themselves to one or more others, to give, to do, or not to do some thing." This definition is essentially the same with that in Pothier, Traité des Oblig. No. 3. A contract, says Ch. J. Marshall, 4 Wheaton, 197, is an agreement in which a party undertakes to do, or not to do, a particular thing. An able writer on contracts, in the American Jurist (vol. xx.) for October, 1838, prefers this definition, which drops the word "consideration," to that of Blackstone. But as an agreement, valid in law, necessarily requires *parties*, a *sufficient consideration* and an *object*, all these essential members of the definition ought to be stated, or the definition is imperfect. A sufficient consideration is in the purview of the English law essential to the legal obligation of a contract; and the

[1] Since the author's death, Prof. Parsons, of Harvard University, has given to the world the ablest and most comprehensive treatise on the Law of Contracts which has yet appeared.

or not under seal. If under seal, it is denominated a specialty, and if not under seal, an agreement by parol; and the latter includes equally verbal and written contracts not under seal. (a) The agreement conveys an interest either in *possession* or in *action*. If, for instance, one person sells and delivers goods to another for a price paid, the agreement is *executed*, and becomes complete and absolute; but if the vendor agrees to sell and deliver at a future time, and for a stipulated price, and the other party agrees to accept and pay, the contract is *executory*, and rests in action merely. There are also *express* and *implied* contracts. The former exists when the parties contract in express words, or by writing; and the latter are those contracts which the law raises or presumes, by reason of some value or service rendered, and because common justice requires it.

Every contract, valid in law, is made between *parties* having sufficient understanding, and age, and freedom of will, and of the exercise of it, for the given case.[1] We have already considered how far infants and married women are competent to contract. The contracts of lunatics are generally void from the period at which the inquisition finds the lunacy to have com-

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only difference between simple contracts and specialties is, that in the latter the consideration is presumed, and so strongly that the obligor is estopped, by the solemnity of the instrument, from averring a want of consideration. See *infra*, p. 464, note. In the Partidas, part 5, tit. 11, law 1, a promise is defined to be, "a verbal agreement, mutually entered into between men, with an intention to obligate themselves, the one to the other, to give or to do a certain thing agreed upon."[2] See the translation of the Partidas on Contracts and Sales, by Messrs. Moreau & Carlton, New Orleans, 1820 The Partidas is the principal code of the Spanish laws, compiled in Spain, under the reign of Alphonso the Wise, in the middle of the thirteenth century; and it is declared by the translators to excel every other body of law in simplicity of style and clearness of expression. It is essentially an abridgment of the civil law; and it appears to be a code of legal principles, which is at once plain, simple, concise, just, and unostentatious to an eminent degree.

(a) Rann *v.* Hughes, 7 Term Rep. 350, note. Ballard *v.* Walker, 3 Johns. Cas. 60.

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[1] A less degree of intellect will suffice to make a will than to make a contract, yet something more is required than mere passive memory. Converse *v.* Converse, 21 Vermont R. 168. See Warring *v.* Warring, 12 Jurist R. 1848, p. 947, for an interesting discussion of the natnre and degrees of insanity. Lord Brougham thinks that it is erroneous to suppose that a mind established to be partially insane, can be really sound on any subject.

[2] No action will lie on a covenant by C. to pay a sum of money to A., B., and C., or the survivors or survivor of them, on their joint account. Faulkner *v.* Lowe, 2 Wels., H., & Gor. R. 595.

menced. (a) But the inquisition is not conclusive evidence of the fact; and the party affected by the allegation of lunacy may gainsay it by proof, without first traversing the inquisition. (b)[1] In the case of *Baxter* v. *The Earl of Portsmouth*, the K. B. went quite far towards annihilating the plea of lunacy in the case of fair *dealing; for they held that the inquisition *451 of lunacy was not admitted to form any defence, on the ground that the goods furnished by the tradesman were suitable to the condition of the defendant, and that he had no reason to suppose that the defendant was a lunatic. (c) So, in *Niell* v. *Morley*, (d) the master of the rolls held, that a court of equity would not interfere to set aside a contract overreached by an inquisition of lunacy, if it was fair, and made without notice of the derangement. (e)[2]

The general rule is, that sanity is to be presumed until the contrary be proved; and, therefore, by the common law, a deed made by a person *non compos* is voidable only, and not void; and when an act is sought to be avoided, on the ground of mental imbecility, the proof of the fact lies upon the person who alleges it.[3] On the other hand, if a general mental derangement be once established or conceded, the presumption is shifted to the other side, and sanity is then to be shown. (f) The

(a) Attorney-General v. Parkhurst, 1 Ch. Cas. 112.

(b) Sergeson v. Sealey, 2 Atk. Rep. 412. Faulder v. Silk, 3 Campb. N. P. Rep. 126. Baxter v. Earl of Portsmouth, 5 Barnew. & Cress. 170. S. C. 7 Dow. & Ryland, 614. 2 Carr. & Payne, 178. Den v. Clark, 5 Halsted's Rep. 217.

(c) See, also, to S. P., Brown v. Jodrell, 3 Carr. & Payne, 30.

(d) 9 Ves. 478.

(e) The English Act of August 4, 1845, contains judicious and humane provisions, relative to the care and treatment of lunatics.

(f) Swinb. part 2, sec. 3, ¶ 4, 7. Attorney-General v. Parnther, 3 Bro. 441.

[1] See Keys v. Norris, 6 Rich. Eq. 388.

[2] A fair and *bonâ fide* executed contract, made with a lunatic apparently of sound mind, and not known to be otherwise, and of which he has taken the benefit, if the parties cannot be placed *in statu quo*, cannot be set aside by him or his representatives. Molton v. Camroux, 2 Exch. 487. S. C. 4 Exch. 17. And see Price v. Berrington, 7 Eng. L. & Eq. 254; Beavan v. McDonnell, 24 Eng. L. & Eq. 484. The wife of a lunatic may pledge his credit for necessaries. Read v. Legard, 4 Eng. L. & Eq. 523. A lunatic might be arrested, at common law, in a civil suit. Bush v. Pettibone, 4 Comst. R. 300. Person v. Warren, 14 Barb. R. 488. After inquest and the appointment of a committee, all contracts by the lunatic are absolutely void. Fitzhugh v. Wilcox, 12 Barb. R. 235. Wadsworth v. Sherman, 14 Id. 169.

[3] Ingraham v. Baldwin, 5 Seld. (N. Y.) 45.

party himself may set up as a defence, and in avoidance of the contract, that he was *non compos mentis* when it was alleged to have been made. The principle advanced by Littleton and Coke, (a) that a man shall not be heard to stultify himself has been properly exploded, as being manifestly absurd and against natural justice. (b)

The rule formerly was, that intoxication was no excuse, and created no privilege or plea in avoidance of a contract; (c) but it is now settled, according to the dictate of good sense and common justice, that a contract made by a person so destitute of reason as not to know the consequences of his contract, though his incompetency be produced by intoxication, *452 *is void. (d) This question was fully and ably considered in *Barrett* v. *Buxton*; (e) and it was decided that an obligation, executed by a man when deprived of the exer-

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Lord Erskine, in White *v.* Wilson, 13 Ves. 88. Jackson *v.* Van Dusen, 5 Johns. Rep. 144. Ballew *v.* Clarke, 2 Iredell's N. C. Rep. 23. Allis *v.* Billings, 6 Metcalf, 415.

(a) Littleton, sec. 405. Beverley's case, 4 Co. 123. Co. Litt. 247 a.

(b) F. N. B. 202, D. Yates *v.* Boen, Str. Rep. 1104. Lord Holt, in Cole *v.* Robins, Buller's N. P. 172. Webster *v.* Woodford, 3 Day's Rep. 90. Grant *v.* Thompson, 4 Conn. Rep. 203. Mitchell *v.* Kingman, 5 Pick Rep. 431. Rice *v.* Peet, 15 Johns. Rep. 503. Ballew *v.* Clarke, 2 Iredell's N. C. Rep. 23. In Baxter *v.* Earl of Portsmouth, *supra*, p. 450, n. b., Littledale, J., said that a *specialty* might be avoided by plea of lunacy, if at the time it was executed, the defendant was *non compos mentis*; but that the rule did not apply to the case of necessaries supplied to a person insane on some particular subject and sound on others, though found by inquisition to have been of unsound mind when the contract was made. And in Brown *v.* Jodrell, 3 Carr. & Payne, 30; S. C. 1 Moody & Malkin, 105, Lord Tenterden would not allow a defendant to stultify himself in an action of assumpsit for work and labor, unless he could show imposition in consequence of mental imbecility. The point, whether unsound mind could be a defence in the case of an unexecuted contract, was expressly waived in the case of Baxter *v.* Earl of Portsmouth. The rule allowing defendant to stultify himself by plea, seems now to be confined to specialties.

(c) Co. Litt. 247 a. Johnson *v.* Medlicott, cited in 3 P. Wms. 130.

(d) Lord Holt, in Cole *v.* Robins, Buller's N. P. 172. Lord Ellenborough, in Pitt *v.* Smith, 3 Camph. Rep. 33. 1 Starkie's N. P Rep. 126. Sir William Grant, in Cooke *v.* Clayworth, 18 Ves. 12. Wade & Massy *v.* Colvert, 2 Mill's Const. Rep. 26. Ring *v.* Huntington, 1 Id. 162. Foot *v.* Tewksbury, 2 Vermont Rep 97. Prentice *v.* Achorn, 2 Paige's Rep. 30. Burroughs *v.* Richman, 1 Green's N. J. Rep. 233. Harbison *v.* Lemon, 3 Blackf. Ind. Rep. 51. Hotchkiss *v.* Fortson, 7 Yerger, 67. Gore *v.* Gibson, 13 Meeson & Welsby, 623.

(e) 2 Aiken's Vermont Rep. 167. Hutchinson *v.* Tindall, 2 Green's N. J. Ch. Rep. 357, S. P.

cise of his understanding by intoxication, was voidable by himself, though the intoxication was voluntary, and not procured through the circumvention of the other party. (*a*)[1]

Imbecility of mind is not sufficient to set aside a contract when there is not an essential privation of the reasoning faculties, or an *incapacity of understanding, and acting with discretion in the ordinary affairs of life.* This incapacity is now the test of that unsoundness of mind which will avoid a deed at law. The law cannot undertake to measure the validity of contracts by the greater or less strength of the understanding; and if the party be *compos mentis*, the mere weakness of his mental powers does not incapacitate him. (*b*) Weakness of understanding may, however, be a material circumstance in establishing an inference of unfair practice or imposition; and it will naturally awaken the attention of a court of justice to every unfavorable appearance in the case. (*c*) Nor is a person born deaf and dumb to be deemed absolutely *non compos mentis*, though by some of the ancient authorities he was deemed incompetent to contract. (*d*) The proposition would seem to be a reasonable one, that every such person was **primâ facie* incompetent, inasmuch as the want of hearing and speech must exceedingly cramp the powers, and limit the range of the human mind. But it is well known, by numerous and affecting *453

(*a*) Drunkenness rendered a contract void by the civil law. Pothier, Traité des Oblig. 49. Heinecc. Elem. Juris. Nat. 1, 13. The rule in equity is, that the court will not interfere to assist a person on the ground merely of intoxication; but if any unfair advantage has been taken of the person's intoxication, it will render all proper aid. Cooke *v.* Clayworth, 18 Ves. 12. Hutchinson *v.* Tindall, 2 Green's N. J. Rep. 357. Crane *v.* Conklin, Saxton's N. J. Ch. Rep. 346. Dealing with persons *non compos* is evidence of fraud; but if the evidence of good faith is full and the contract beneficial to the infirm person, the court of chancery will not interfere. Jones *v.* Perkins, 5 B. Monroe, 227.

(*b*) Osmond *v.* Fitzroy, 3 P. Wms. 129. Lord Hardwicke, in Bennett *v.* Vade, 2 Atk. Rep. 324. Ball *v.* Mannin, 1 Dow's N. S. Rep. 380.

(*c*) Blachford *v.* Christian, 1 Knapp's Rep. 73.

(*d*) Brower *v.* Fisher, 4 Johns. Ch Rep. 441. Bracton de Exceptionibus, lib. 5, ch. 20. Fleta, lib. 6, ch. 40. Bro. tit. Escheat, pl. 4. The civil law also held such afflicted persons to be fit subjects for a curator or guardian. Inst. 1, 23, 24. Ibid. 2. 12, 3. Vinnius and Ferriere, h. t.

[1] In Gore *v.* Gibson, cited *supra*, a distinction is taken between an express and implied contract. In the latter, as for money had and received, necessaries furnished, &c., drunkenness may be no defence.

examples, that persons deprived of the faculty of speech and the sense of hearing, possess sharp and strong intellects, susceptible of extensive acquirements in morals and science. (a)

If the contract be entered into by means of violence offered to the will, or under the influence of undue constraint, the party may avoid it by the plea of duress; and it is requisite to the validity of every agreement, that it be the result of a free and *bonâ fide* exercise of the will. (b) If a person be under an arrest for improper purposes, without a just cause, or where there is an arrest for a just cause, but without lawful authority, he may be considered as under duress. The general rule is, that either the imprisonment or the duress must be tortious and without lawful authority, or by an abuse of the lawful authority to arrest, to constitute duress by imprisonments. (c) Nor will a contract be valid if obtained by misrepresentation or concealment, or if it be founded in mistake as to the subject-matter of the contract. But the distinctions under this head will be considered at large in a subsequent part of the lecture.

(a) Mr. Justice Story, in his Commentaries on Equity Jurisprudence, pp. 227–245, has fully discussed the question, and examined the authorities both in the English and the civil law, which bear on it, respecting the relief afforded in equity against contracts and other acts of persons wholly or partially *non compos mentis*.

(b) By the Scotch law, force and fear annul engagements, when they are such as to shake a mind of ordinary firmness. Bell's Principles of the Law of Scotland, p. 5. Fear of unlawful imprisonment will constitute a case of duress *per minas*, and avoid a contract. Co. Litt. 253 b. 2 Inst. 483. Foshay *v* Ferguson, 5 Hill's N. Y Rep. 154.

(c) Nicholls *v*. Nicholls, 1 Atk. 409. Thompson *v*. Lockwood, 15 Johns. Rep. 259. Watkins *v*. Baird, 6 Mass. Rep. 511. Stouffer *v*. Latshaw, 2 Watt's Penn. Rep. 165. Richardson *v* Duncan, 3 N. H. Rep. 508. This last case states, that even an arrest for a just cause and under lawful authority, may amount to duress; if done for unlawful purposes. 5 Hill's N. Y. Rep. 157, S. P.[1] There is a material distinction between duress of the person and duress of goods, and the latter will not render an agreement void. Skeate *v*. Beale, 11 Adolph. & Ellis, 983. Powell, J., in 11 Mod. 203. But though a man may not avoid his bond procured by an illegal distress of his goods, Mr. Justice Bronson had no doubt that a contract procured by threats and the fear of battery, *or the destruction of property*, might be avoided on the ground of duress. Foshay *v*. Furguson, *sup*.[2]

[1] See Breck *v*. Blanchard, 2 Fost. 303.

[2] Payments made in case of duress of personal property, may be recovered back. Fleetwood *v*. City of New York, 2 Sandf. S. C. R. 475. Harmony *v*. Bingham, 1 Duer, R. 229. See also Oates *v*. Hudson, 5 Eng. L. & Eq. 469. Mayor of Baltimore *v*. Lefferman, 4 Gill, R. 425. As to what constitutes duress, see Strong *v*. Grannis, 26 Barb. (N. Y.) 122; Burr *v*. Burton, 18 Ark. 214.

II. *The lex loci as to contracts.*

Questions have frequently arisen on the effect to be given to foreign laws, when brought into view in discussions concerning personal rights and contracts. The inquiry is, how are contracts made abroad to be construed, and in what manner and to what extent are they to be enforced and discharged, when the law of the country in which they were made, and the law of the country in which performance is sought, are in collision? The subject forms a secondary branch of the *law of nations; and the rules by which such questions *454 are governed are founded on the principles of general jurisprudence, and are incorporated into the code of national law in all civilized countries. It is sometimes called private international law, and it exists not strictly *ex jure gentium*, but rests on the *comitas gentium*. But if one independent state allows commercial intercourse and contracts between its citizens and those of another, the rights of the parties and the relation between them would seem to have a higher claim than that of mere comity,—a claim of justice, though perhaps of imperfect obligation under the laws of independent states within their own territories. The principal events which produce a conflict in respect to personal rights and the distribution of property between the laws of the country where the judicial discussions arise and the laws of the place of the party's domicil, are marriage, death, bankruptcy, and the application of remedies. We have already adverted to the subject, (though necessarily in the brief manner which the nature of the present undertaking required,) in respect to the effect of foreign suits and judgments; (*a*) and in respect to marriage, (*b*) divorce, (*c*) infancy, (*d*) assignments in bankruptcy, (*e*) the discharge of insolvent debtors, (*f*) and the distribution of intestates' estates. (*g*) A further view of the doctrine will be useful, and

(*a*) *Supra*, p. 118.

(*b*) *Supra*, pp. 91, 183, 184.

(*c*) *Supra*, pp. 106–118.

(*d*) *Supra*, p. 233.

(*e*) *Supra*, pp. 404–408.

(*f*) *Supra*, pp. 392, 393.

(*g*) *Supra*, pp. 67, 428–434. Those universal personal qualities which the laws of all civilized nations consider as essentially affecting the capacity to contract, as majority and minority, marriage, or celibacy, sanity or lunacy, &c., are regulated by the *lex domicilii*, and travel with parties wherever they go, as see *post*, p. 456.

cannot fail to be interesting to the student, in its application to contracts at large; for questions arising on the extra-territorial operation of statutes, usages, and judicial decisions, are becoming frequent and delicate topics of discussion in our American law.

A contract, valid by the law of the place where it is made, is, generally speaking, valid everywhere *jure gentium*, and by tacit assent. The *lex loci contractus* controls the nature, construction, and validity of the contract; and on this broad foundation the law of contracts, founded on necessity and commercial convenience, is said to have been originally established. (*a*) If the rule were otherwise, the citizens of one country could not safely contract, or carry on commerce, in the territories of another. The necessary intercourse of mankind requires *455 * that the acts of parties, valid where made, should be recognized in other countries, provided they be not contrary to good morals, nor repugnant to the policy and positive institutions of the state. (*b*)

The doctrine of the *lex loci* is replete with subtle distinctions and embarassing questions which have exercised the skill and learning of the earlier and most distinguished civilians of the Italian, French, Dutch, and German schools, in their discussions on highly important topics of international law. (*c*) These

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(*a*) *Ex hoc jure gentium omnes penè contractus, introducti sunt — usu exigente et humanis necessitatibus.* Inst. 1, 2. 2. Pardessus, Droit Commercial, tom. v. p. 1482. Trasher *v.* Everhart, 3 Gill & Johns 234. Pickering *v.* Fisk, 6 Vermont Rep. 102. Story's Com. on the Conflict of Laws, § 242. *Rectores imperiorum id comiter agunt ut jura cujusque populi intra terminos ejus exercita, teneant ubique suam vim, quatenus nikil potestati aut juri alterius imperantis ejusque civium prœjudicetur.* Huber, tit. 3, de Conflictu Legum, sec. 2.

(*b*) This principle of public law, says Toullier, (Droit Civil, tom. x. sec. 80, n.) is well explained and enforced by M. Bayard, in the Nouvelle Collection de Jurisprudence, tom. ix. 759, and which he undertook in conjunction with M. Camus.

(*c*) Among a host of jurists who have displayed their research and acuteness on these subjects, the most preëminent are, Dumoulin, d'Argentre, Burgundus, Rodenburgh, P. & J. Voet, Boullenois, Bouhier, and Huberus; and their respective doctrines, pretensions, and merits, were critically and ably examined by Mr. Livermore, of New Orleans, in his Dissertation on Personal and Real Statutes, published in 1829 — a work which is very creditable to his learning and vigorous spirit of inquiry. A curious fact is mentioned by Mr. Robertson, in his Treatise on the Law of Personal Succession. He says, that of the ninety-one continental writers on the subject of the Conflict of Laws, quoted or referred to by the American jurists, Livermore

topics were almost unknown in the English courts, prior to the time of Lord Hardwicke and Lord Mansfield; and the English lawyers seem generally to have been strangers to the discussions on foreign law by the celebrated jurists in continental Europe. When the subject was introduced in Westminster Hall, the only work which attracted attention was the tract in Huber, entitled De Conflictu Legum, and which formed only a brief chapter in his voluminous Prelections on the Roman Law; and yet it appears that the very great diversity of laws and usages in the cities, provinces, and states of Germany, Holland, and France, had produced far more laborious investigations on the subject. (a) In the works of the civilians on * the *456 continent of Europe, the application of the law of domicil or the *lex loci* on the one hand, and the *lex fori* or *rei sitæ* on the other, is made to depend on the distinction between real and personal statutes. According to the understanding of an American lawyer, a statute means an express act of the legislature of the country; but the jurists, educated in the schools of the civil law, apply the term *statute* to any particular municipal law or usage, though resting for its authority on judicial decisions or the practice of nations. A *personal statute* is a law, ordinance, regulation, or custom, the disposition of which affects the person, and clothes him with a capacity or incapacity, which he does not change with every change of abode: but which, upon principles of justice and policy, he is assumed to carry with him wherever he goes. A *real statute* affects things

and Story, a large proportion of them was not to be found in the public law libraries in London, but all of them, except six, were to be met with in that admirable repertory of books of law, the library of the faculty of advocates in Edinburgh. Mr. Livermore, while a practising lawyer in New Orleans, had collected from continental Europe most of those rare works as part of his valuable law library, and which library he bequeathed by will to Harvard University, in Massachusetts.

(a) The foreign treatises of most interest on the doctrine of the *lex loci*, in addition to that of Huber, are understood to be Rodenburgh's Tractatus de Jure quod oritur ex Statutorum Diversitate, P. Voet's De Statutis eorumque Concursu, Hertius's De Collissione Legum, and G. G. Titius's De Conflictu Legum. Mr. Henry published at London, 1823, a Treatise on Foreign Law, and particularly *on the difference between personal and real statutes, and its effects on foreign judgments and contracts, marriages and wills.* In that treatise he shows himself to be a master of many of the foreign works on this subject; and he bestows particular commendation on the treatise of Rodenburgh.

as used in contradistinction to persons; and their operation is necessarily confined within territorial limits, or *ad locum rei sitæ.* (a) According to this distinction, laws regulating the marriage and nuptial contracts, divorce, the period of infancy, and the disposition of personal property, are personal statutes; while laws regulating the descent, transmission, and disposition of real property, and the nature, extent, and limitation of *457 civil remedies, are real statutes. But the * difficulty with the civilians has been to draw a clear, precise, and practical line of distinction, and one worthy of insertion in the code of international jurisprudence, between the real and personal statutes; and many of their discussions are involved in perplexity and confusion. Merlin arrives at the most definite and intelligible result. In his view of the subject, the laws which regulate the condition, capacity, or incapacity of persons, are personal statutes; and those which regulate the quality, transmission, and disposition of property, are real statutes. The test by which they may be distinguished consists in the circumstance, that if the principal, direct, and immediate object of the law be to regulate the condition of the person, the statute is personal, whatever may be the remote consequences of that condition upon property. But if the principal, direct, and immediate object of the law be to regulate the quality, nature, and disposition of property, the statute is real, whatever may be its ulterior effects in respect to the person. (b)

The doctrine in question may be considered, 1. In its application to the obligation and construction of contracts; 2. In its application to the remedy.

(a) Mr. Henry and Mr. Livermore have become so completely initiated in the learning of the Roman civil law, as to use the terms *real and personal statutes* as familiarly as an English lawyer would the words real and personal property. I beg leave, however, to protest against the introduction into our American jurisprudence of such a perversion of the word statute, so long as we can find other and more appropriate terms to distinguish foreign from domestic law, or the law of the domicil from the law of the territory.

(b) Répertoire de Jurisprudence, tit. Autorisation Maritale, sec. 10. The writers on the civil law frequently speak of the *status* of the person, by which they mean only his civil condition, quality, or capacity. *Status est qualitas, cujus ratione homines diverso jure utuntur.* So, again, *Persona est homo, cum statu quodam consideratus.* Heinecc. Elem. Jur. C. lib. 1, tit. 3, sec. 75, 76.

(1.) There is no doubt of the truth of the general proposition, that the laws of a country have no binding force beyond its territorial limits; and their authority is admitted in other states, not *ex proprio vigore*, but *ex comitate;* or, in the language of Huberus, *quatenus sine præjudicio indulgentium fieri potest.* Every independent community will judge for itself how far the *comitas inter communitates* is to be permitted to interfere with its domestic interests and policy. The general and most beneficial rule of international law, contributing to the safety and convenience of mankind, is *Statuta suis clauduntur territoriis nec ultra territorium disperluntur.* There are, however, certain general rules in respect to the admission of the *lex loci contractus*, which have been illustrated by jurists, and recognized in judicial decisions, and to which we may confidently appeal, as being of commanding influence in the consideration of the subject. Thus it may be laid down as the settled doctrine of public law, that personal * contracts are to have the same validity, interpretation, and obligatory force in every other country which they have in the country where they were made. (*a*) The admission of this principle *458

(*a*) Bank of the United States *v.* Donnally, 8 Peters's U. S. Rep. 361. Watson *v.* Orr, 3 Dev. N. C. Rep. 161. See also, *infra*, note *b*. If, therefore, under a foreign marriage contract, the husband would be entitled to property accrued to the wife during coverture, the English courts will enforce it, without raising an equity for a settlement in favor of the wife. Anstruther *v.* Adair, 2 Mylne & Keen, 513. Dues *v.* Smith, Jacob's Rep. 544, S. P. Matrimonial rights as between husband and wife, are determined by the law of their domicil. Garnier *v.* Poydras, 13 La. Rep. 177. And as a general rule, personal property follows the law of the domicil of the owner, and the real property, the law of the *locus rei sitæ*. *Vide supra*, p. 429. But every state may impress upon all property within its territory any character which it may deem expedient. Story's Conflict of Laws, sec. 447. Thus, in Louisiana, slaves were declared to be immovable property, or real estate, in contemplation of the law. La. Dig. 1808, b. 2, c. 2, art. 19. Local stocks, such as bank, insurance, turnpike, and canal stock, and other incorporeal property, owing its existence or regulated by local laws, must be transferred according to local laws or regulations. But debts due from corporations are not of a local character, and may be assigned or transferred according to the law of the place where the assignment is made. A debt has no *situs* or locality. Erskine's Inst. b. 3, tit. 9, sec. 4. Story's Conflict of Laws, secs. 362, 383, 399. Atwood *v.* Protection Ins. Co. 14 Conn. Rep. 555. The general principle is, that personal property has no locality or *situs*, but follows the person of the owner, and his alienation of it is governed by the law of his domicil, or where it was made, and this rule is generally recognized by the comity of nations. Vanbuskirk *v.* Hartford F. Ins. Co. 14 Conn. Rep. 583.

is requisite to the safe intercourse of the commercial world, and to the due preservation of public and private confidence; and it is of very general reception among nations. Parties are presumed to contract in reference to the laws of the country in which the contract is made, and where it is to be paid, unless otherwise expressed; the maxim is, that *locus contractus regit actum*, unless the intention of the parties to the contrary be clearly shown. (*a*) The rule stated in Huber relative to contracts made in one country and put in suit in the courts of another, is the true rule, and one which the courts follow, viz: the interpretation of the contract is to be governed by the law of the country where the contract was made; [1] but the mode of suing and the time of suing, must be governed by the law of the country where the action is brought. (*b*) It is, however, a necessary exception to the universality of the rule, that no people are bound or ought to enforce, or hold valid in their courts of justice, any contract which is injurious to their public rights, or offends their morals, or contravenes their policy,[2] or violates a public law. (*c*) [3] It is a consequence of the admission

(*a*) Allshouse *v.* Ramsay, 6 Wharton, 331. Burge's Col. & For. Laws, vol. ii. 851, vol. iii. 758. In the matter of Roberts's Will, 8 Paige's R. 446, 525. Sessions *v.* Little, 9 N. H. Rep. 271. Dunscomb *v.* Bunker, 2 Metcalf's Rep. 8. Thomas *v.* Beckman, 1 B. Monroe's Ken. Rep. 32. Story's Conflict of Laws, § 76. Story on Bills, pp. 184-188. Arrington *v.* Gee, 5 Iredell's N. C. Rep. 590. If no place be designated in a note as a place of payment, the law of the place where it is made determines its construction, obligation, and place of payment, and if the law of that place gives three days of grace, the maker is entitled to that grace, if he resides elsewhere, before demand can be made and the indorser fixed. Story's Conflict of Laws, § 347. Bryant *v.* Edson, 8 Vermont Rep. 325. Bank of Orange County *v.* Colby, 12 N. H. Rep. 520.

(*b*) Hub. de Conflictu Legum, sec. 7. De la Vega *v.* Vianna, 1 B. & Adolph. 284. Trimby *v.* Vignier, 1 Bing. N. C. 151. Dunscomb *v.* Bunker, 2 Metcalf's Rep. 8.

(*c*) Hub. Prælec. Jur. Civ. tom. ii. b. 1, tit. 3, De Conflictu Legum. Voet, ad

1 The courts of Kentucky have declared, that in an action on a note brought in that state, they will not enforce the set-off laws of the state where the note was made. Bank of Galliopolis *v.* Trimble, 6 B. Mon. 599.

2 In Virginia, slaves may be emancipated by will; but this is prohibited by statute in Mississippi. The courts of the latter state held that the will of a person whose domicil was in Virginia, providing for the emancipation of his slaves in Mississippi, was inoperative for that purpose. Mahorner *v.* Hooe, 9 S. & M. 247. Dalton *v.* Murphy, 30 Mississippi, (1 George,) 59.

3 A contract made in one state, with the full knowledge of the parties that the prop-

of the *lex loci* that contracts void by the law of the land where they are made, are void in every other country. (*a*) [1] So, also, the personal incompetency of individuals to contract, as in the case of infancy, and the general capacity of parties to contract, depend, as a general rule, upon the law of the place of the contract. (*b*) The incompetency of a married woman to contract is considered by the civilians to depend upon the law of the

Pand. lib. 5, tit. 1, sec. 51 Emerig. des Ass. ch. 4, sec. 8, vol. i. p. 122. Kame's Principles of Equity, b. 3, ch. 8, sec. 4. Van Reimsdyk *v.* Kane, 1 Gall. Rep. 371. Harvey *v.* Richards, 1 Mason's Rep. 381. Le Roy *v.* Crowninshield, 2 Idem, 151. Greenwood *v.* Curtis, 6 Mass. Rep. 358. Brown *v.* Richardsons, 13 Martin's La. Rep. 202. Blanchard *v.* Russell, 13 Mass. Rep. 1. Prentiss *v.* Savage, Ibid. 26. Lodge *v.* Phelps, 1 Johns Cas. 139. Saul *v.* His Creditors, 17 Martin's La. Rep. 569. Story's Com. on the Conflict of Laws, § 244, *et seq.* In this work of Mr. Justice Story, the exceptions in the text are stated and discussed, and the authorities in support of them collected. In New Jersey it was held, in Varnum *v.* Camp, 1 Green's Rep 326. that an assignment of personal property by an insolvent debtor, made at New York, in trust to pay creditors, and giving preferences, though good in New York, was void as to personal property in New Jersey, because their statute law prohibited preferences in that case. The *lex rei sitæ*, even as to personal property, prevailed by force of the statute over the *lex loci*. The exercise of comity in admitting or restraining the application of the *lex loci*, must unavoidably rest in sound judicial discretion, dictated by the circumstances of the case. Parker, Ch. J., in Blanchard *v.* Russell, 13 Mass. Rep. 6. Story's Conflict of Laws, § 28. Shaw, Ch. J., in Commonwealth *v.* Aves, 18 Pick. 193–225.

(*a*) Boullenois, tom. i. tit. 2, c. 3, p. 491. Alves *v.* Hodgson, 7 Term Rep. 241. Desesbats *v.* Berquier, 1 Binney's Rep. 336. Houghton *v.* Page, 2 N. H. Rep. 42. Story's Com. on the Conflict of Laws, § 242. Story on Bills, pp. 184–188.

(*b*) Male *v.* Roberts, 3 Esp. N P. Rep. 163. *Ex parte* Lewis, 1 Vesey, 298. Henry on Foreign Law, 96. Saul *v.* His Creditors, 17 Martin's La. Rep. 596–598. Story on the Conflict of Laws, p. 97. Pickering *v.* Fisk, 6 Vermont Rep. 102. In the case of Polydore *v.* Prince, Ware's Rep. 402, it was held, after a full consideration of the law, both at home and abroad, and of the principles of general jurisprudence which belong to the question, that civil incapacities and disqualifications by which a person is affected by the law of his domicil, are regarded in other countries as to acts done or rights acquired in the place of his domicil, but not as to acts done or rights ac-

erty, which is its subject-matter, is to be used in another state, in violation of the positive law of the latter state, but in no immoral manner, will be enforced in the latter state, unless it be shown that the parties knew that such use was forbidden. Merchants' Bank *v.* Spalding, 5 Selden, (N. Y.) 53.

[1] And they will be held void in any other country, although they would have been held valid, if made in such other country. McAllister *v.* Smith, 17 Ill. 328. Perhaps there may be an exception to this rule in the case of contracts growing out of the violation of the revenue laws of foreign countries. Sharp *v.* Taylor, 2 Phillip, (22 English Ch.) R. 801.

place of the marriage. (*a*) Upon the doctrine of the *459 *lex loci*, nuptial contracts, * valid by the law of the place where made, will be recognized. and enforced by the courts of other countries, in proper cases; (*b*) and as personal qualities and civil relations of a universal nature, such as infancy and coverture, are fixed by the law of the domicil, it becomes the interest of all nations mutually to respect and sustain that law. (*c*)

quired within another jurisdiction, where no such disqualifications are acknowledged. On this doctrine it was held that the libellant, who was a slave by the law of his domicil, might sue in his own name in Maine, where slavery was not allowed, for a personal tort committed in an American vessel, on the high seas, and within the cognizance of the District Court.

(*a*) Henry on Foreign Law, 37, n., cites the opinion of Grotius, in a case submitted to him to that effect.

(*b*) Feaubert *v.* Turst, Prec. in Ch. 207. 1 Bro. P. C. 38, S. C. Freemoult *v.* Dedire, 1 P. Wms. 429. Decouche *v.* Savetier, 3 Johns. Ch. Rep. 190. Crosby *v.* Berger, 3 Edwards's N. Y. Ch. Rep 538. Hub de Conflictu Legum, lib. 1, tit. 3, sec. 9. Story's Com. on the Conflict of Laws, §§ 113, 225. Anstruther *v.* Adair, 2 Myl. & K. 513. Scrimshire *v.* Scrimshire, 2 Hagg Cons. Rep. 407 Lord Eldon's opinion, in Lashley *v* Hoy, cited in Robertson on Personal Succession, App pp. 427, 428. But if A. and B., domiciled in Louisiana, elope to the state of Mississippi, and marry, and shortly thereafter return, the conjugal rights under the marriage are held to be according to the law of domicil, as the law of the land would otherwise be fraudulently evaded; and it was not in such a case the intention of the parties to shift their domicil. Le Breton *v.* Nouchet, 3 Martin's La. Rep. 60. See also Hub. de Conflictu Legum, sec. 10. Nor can a contract of marriage, entered into in Louisiana, provide that the rights of the parties shall be according to the provisions of any foreign specified law. Bourcier *v.* Lanusse, 3 Martin's La. Rep 581. If, however, the parties agree, previously to their marriage, upon a place of residence after it, and actually settle there, it becomes the place of their matrimonial domicil, and the marital rights of the husband to the wife's property are determined by the law of that domicil. Kneeland *v.* Ensley, Meigs's Tenn Rep 620. Le Breton *v.* Miles, 8 Paige's Rep. 261[1]

(*c*) Mr. Justice Story, in treating of the capacity of persons, in his Commentaries on the Conflict of Laws, ch. 4, has thoroughly examined the conflicting opinions and infinite distinctions with which the host of civilians of continental Europe have overwhelmed and perplexed the subject; and he has deduced the following rules as best established in the jurisprudence of England and America, viz: (1.) The capacity, state, and condition of persons, according to the law of their domicil, will generally be regarded as to acts done, rights acquired and contracts made in the place of their domicil. (2.) That as to acts done, and rights acquired, and contracts made in other countries, the law of the country where they are done, acquired, or made, will generally

[1] See Lyon *v.* Knott, 26 Miss. 548.

The *lex loci* operates not only in respect to the nature, obligation, and construction of contracts, and the formalities and authentications requisite to the valid execution of them, but also as to their discharge. It is a general rule, that whatever constitutes a good defence, by the law of the place where the contract is made or is to be performed, is equally good in every other place where the question may be litigated. Upon this principle, the discharge of a debtor under the bankrupt or insolvent laws of the country where the contract was made, and in cases free from partiality and injustice, is a good discharge in every other country, and pleadable in bar. The same law which creates the charge, is to be regarded when it operates in discharge of the contract. (*a*) [1]

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govern, in respect to the capacity, state, and condition of persons. And, therefore, in regard to questions concerning infancy, competency to marry, incapacities incident to coverture, guardianship, and other personal qualities and disabilities, the law of the domicil of birth, or other fixed domicil, is not generally to govern, but the *lex loci contractus aut actus.* (3.) Personal disqualifications, arising from customary or positive law, and of a penal nature, are territorial, and not generally regarded in other countries, where the like disqualifications do not exist. Story's Com §§ 101, 102, 104. On this subject of the capacity of persons to contract, the continental jurists generally adopt the law of the domicil, and the English common law the *lex loci contractus.* Burge, in his Com. on Colonial and Foreign Laws, vol. i. pp. 244–260, cites largely from the continental civilians, to show that the wife's rights, capacities, and disabilities, under the contract of marriage, are determined by the law of the husband's domicil, when the marriage took place. This is the law in this country, if the parties had not in view, at the time, another place of residence. If the husband and wife have different domicils at the time of the marriage, the law of the husband's domicil governs the marital rights; and if neither party have any determinate domicil at the time, the *lex loci contractus* governs. Kneeland *v.* Ensley, Meigs, 620. *Primâ facie,* at least, the husband's domicil is that of the wife. Whitcomb *v.* Whitcomb, 2 Curteis, 351.

(*a*) Ballantine *v.* Goulding, 1 Cooke's B. L. 347, 1st edit. Potter *v.* Brown, 5 East's Rep. 124. Van Raugh *v.* Van Arsdale, 3 Caines's Rep. 154. Smith *v.* Smith, 2 Johns. Rep. 235. Hicks *v.* Brown, 12 Johns. Rep. 142. Blanchard *v.* Rus-

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[1] And, on the other hand, a discharge of a contract by the law of a place where the contract was not made, or to be performed, will not be a discharge in any other country. Very *v.* McHenry, 29 Maine R. 206.

It is held, in Leroux *v.* Brown, 14 E. L. & Eq. 247, that the 4th sec. of statute of frauds does not make the agreements void, but only prevents their being enforced by action; and, *therefore,* (the court concludes,) a parol agreement, not to be performed in a year, though made in France and valid there, cannot be enforced in England.

Is this argument satisfactory?

But if a contract be made under one government, and is to be performed under another, and the parties had in view the laws of such other country in reference to the execution of the contract, the general rule is, that the contract, in respect to its construction and force, is to be governed by the law of the country or state in which it is to be executed, and the foreign law is in such cases adopted, and effect given to it. (a) [1] This exception to the application of the *lex loci* is more embarrassed than any other branch of the subject, by distinctions and jarring decisions; and the notice of a few of them may be instructive, and serve to give some precision to the doctrine. Thus, the

sell, 13 Mass. Rep. 1. Bradford *v.* Farrand, Ibid. 18. Prentiss *v.* Savage, Ibid. 20. Van Reimsdyk *v.* Kane, 1 Gall. Rep 371. Le Roy *v* Crowninshield, 2 Mason's Rep. 151. Green *v.* Sarmiento, Peters's Cir. C. Rep. 74. Harrison *v.* Edwards, 12 Vermont Rep. 648. Story on the Conflict of Laws, §§ 334, 351 a. See, also, *supra*, p. 393. All the foreign jurists agree that every contract must conform to the formalities and solemnities required by the *lex loci*, in respect to their valid execution; and the like doctrine is recognized in Alves *v.* Hodgson, 7 Term Rep. 241; Clegg *v.* Levy, 3 Campb. Rep. 166; Vidal *v.* Thompson, 11 Martin's La. Rep. 23; Depau *v.* Humphreys, 20 Idem, 1, 22; but a contrary rule was declared in Wynne *v.* Jackson, 2 Russell's Rep. 351, and James *v.* Catherwood, 3 Dowl. & Ry. 190. Mr. Justice Story adds the weight of his opinion to the rule first mentioned. Com. on the Conflict of Laws, 215-219.

(a) Hub. de Conflictu Legum. sec. 10. Voet, ad Pand. 4, 1, 29. Lord Mansfield, in Robinson *v.* Bland, 2 Burr. Rep. 1077 Dig. 42, 5. Ibid 44, 7, 21. Story's Com. on the Conflict of Laws, 233, 234. Baldwin, J., in Strother *v.* Lucas, 12 Peters, 436, 437. Andrews *v.* Pond, 13 Peters, 65. Bell *v.* Bruen, 1 Howard's U. S. Rep. 182. Le Breton *v.* Miles, N. Y. Court of Chancery, 8 Paige, 261. The principle was applied in this last case to an antenuptial contract, made in reference to another country, as the future domicil of the parties; and it was laid down as a rule of law, that when parties marry in reference to the laws of another country as their intended domicil, the law of the intended domicil governs the construction of their marriage contract, as to the rights of personal property. See, also, Prentiss *v.* Savage, 13 Mass. Rep 23; Thompson *v.* Ketcham, 8 Johnson, 189; Cox & Dick *v.* United States, 6 Peters, 172; Fanning *v.* Consequa, 17 Johnson, 511. If A. in America orders goods from England, and the English merchant executes the order, the contract is governed by the law of England, for the contract is there consummated. Casaregis's Dis. 179. Whiston *v.* Stodder, 8 Martin's La. Rep. 93.

[1] See Dacosta *v.* Davis, 4 Zabr. 319; Emerson *v.* Patridge, 1 Wms. 8; Davis *v.* Clemson, 6 McL. 622; Lennig *v.* Ralston, 23 Penn. 137. If a contract is to be performed partly in one country and partly in another, each portion is to be interpreted according to the laws of the country where it is to be performed. Pomeroy *v.* Ainsworth, 22 Barbour, (N. Y.) 118

days of grace allowed upon bills of exchange, are to be computed *according to the usage of the place in which *460 they are to be paid, and not of the place in which they were drawn, for that is presumed to have been the intention of the parties; (a) whereas, by the general understanding and course of decisions and practice, the drawer or indorser, upon the return of a foreign bill under protest, pays the damages allowed by the law of the place where the bill was drawn or indorsed. (b) If interest be not stipulated in the contract, and the money be payable at a given time, in a different territory, and there be default in payment, the law of the place of payment regulates the allowance of interest, for the default arises there. (c) [1] The drawer may, consequently, be liable to one rate of damages, and the indorser to another, if he indorses at a different place; for every indorsement is a new contract. (d)

(a) Vidal v. Thompson, 11 Martin's La. Rep. 23. Bank of Washington v. Triplett, 1 Peters's U. S. Rep. 25.

(b) Hendricks v. Franklin, 4 Johns. Rep. 119. Graves v. Dash, 12 Idem, 17. Slocum v. Pomeroy, 6 Cranch's Rep. 221. Hazlehurst v. Kean, 4 Yeates's Rep. 19. Pothier's Oblig. n. 171.

(c) Cooper v. The Earl of Waldegrave, 2 Beavan, 282.

(d) Champant v. Lord Ranelagh, Prec. in Ch. 128. Fanning v. Consequa, 17 Johns. Rep. 511. Henry on Foreign Law, 53. Story on the Conflict of Laws, pp. 261, 262. It may be laid down as a general rule, that negotiable paper of every kind is construed and governed, as to the obligation of the drawer or maker, by the law of the country where it was drawn or made; and as to that of the acceptor, by the law of the country where he accepts; and as to that of the indorsers, by the law of the country in which the paper was indorsed. Potter v. Brown, 5 East's Rep. 124. De la Chaumette v. Bank of E. 9 B & Cress. 208. 2 Bell's Com. 692, 693. Slocum v. Pomeroy, 6 Cranch's Rep. 221. Ory v. Winter, 16 Martin's La. Rep. 277. Blanchard v. Russell, 13 Mass. Rep. 1. Pardessus, Cours de Droit, tom. v. secs 1497–1499. Notice of the dishonor of a foreign bill and protest is to be given according to the law of the place where the acceptance is dishonored, though the other parties resided in England; for the bill, being made payable in France, was a foreign bill, and, as between the drawer and payee, is to be taken as made there. Rothschild v. Currie, 1 Adolph. & Ellis, N. S. 43. Sherrill v. Hopkins, 1 Cowen's Rep. 103. Story's Com. 237, 284–289, 298. Boyce v. Edwards, 4 Peters's U. S. Rep. 111. Aymar v. Sheldon, 12 Wendell's Rep. 439. Gaston, J., in Hatcher v. McMorine, 4 Dev. N. C. Rep. 124. If the drawee accepts a bill in New York, when it was drawn in another state by the drawer, who resides in that other state, the contract of acceptance,

[1] A promissory note, payable generally, must bear the rate of interest of the place where it is made. Hawley v. Sloo, 12 La. An. 815.

If, however, the rate of interest be specified in the contract, and it be according to the law of the place where the contract was made, though the rate be higher than is lawful by the law of the place where payment was to be made, the specified rate of interest at the place of the contract has been allowed by the courts of justice in that place, for that is a part of the substance of the contract. (a) The general doctrine is, that the law of the place where the contract is made is to determine the rate of interest when the contract specifically gives interest; and this will be the case, though the loan be secured by a mortgage on land in another state, unless there be circumstances to show that the parties had in view the laws of the latter place in respect to interest. (b) When that is *461 the case, the rate of interest of *the place of payment is to govern. (c) According to the case of *Thompson* v.

as to presentment, &c., is governed by the law of New York. Worcester Bank *v.* Wells, 8 Metcalf, 107.[1]

(a) Depau *v.* Humphreys, 20 Martin's La. Rep. 1. The decision in this case is accompanied with a full discussion of the authorities in the English and American law, and of the opinions of the European continental civilians. The law of this case has been critically examined by Mr. Justice Story, (Com on the Conflict of Laws, 248, 254,) and he does not think that the foreign jurists bear out the case. See below, note *a*, the result of the authorities there referred to.

(b) De Wolf *v.* Johnson, 10 Wheaton, 367. Story's Com. on the Conflict of Laws, pp. 239, 242, 244. The place or country in which a bill of exchange is accepted is considered the *locus contractus*, as regards the acceptor. P. Voet, de Stat. secs. 9, 1, 2, 14. De la Chaumette *v* Bank of England, 9 B. & Cress. 208. S. C. 2 B. & Adolph. 385.

(c) De Wolf *v.* Johnson, 10 Wheaton, 367. Scofield *v.* Day, 20 Johns. Rep. 102. Quince *v.* Callender, 1 Desaus. S. C. Rep. 160. The authorities are numerous to show the general rule to be, that interest is to be paid according to the law of the place where the contract is made, unless the payment was to be made elsewhere, and then it is to be according to the law of the place where the contract was to be per-

[1] The principle of this rule has been applied to a case where a bill was drawn in New York on London, and was paid by the acceptor. The contract between the acceptor and drawer was to be interpreted by the laws in force in London. Lizardi *v.* Cohen, 3 Gill, 430.

As an indorsement is not binding until the bill is transferred, the place of effectual transfer is the place of contract. Cook *v.* Litchfield, 5 Sandf. S. C. R. 330. Affirmed by the Court of Appeals, 5 Selden, 280. Young *v.* Harris, 14 B. Mon. 556.

A bill of exchange, payable in New York, is governed, as to its mode of transfer, by the laws of New York. Everett *v.* Vendryes, 25 Barbour, (N. Y.) 383.

Powles, (*a*) it is now the received doctrine at Westminster Hall, that the rate of interest on loans is to governed by the law of the place where the money is to be used or paid, or to which the loan has reference; and that a contract made in London to pay in America, at a rate of interest exceeding the

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formed. Fanning *v.* Consequa, 17 Johns. Rep. 511. Boyce *v.* Edwards, 4 Peters's U. S. Rep. 111. Scofield *v.* Day, 20 Johns. Rep. 102. Robinson *v.* Bland, 2 Burr. Rep. 1078. Quince *v.* Callender, 1 Desaus. S. C. Rep. 160. Story's Com. on the Conflict of Laws, 241, 243, 246. Cooper *v.* The Earl of Waldegrave, 2 Beavan, 282. Archer *v.* Dunn, 2 Watts & Serg. 328, 364. Thomas *v.* Beekman, 1 B. Monroe's Rep. 34. In Pecks *v.* Mayo, 14 Vermont Rep. 33, a promissory note was made in Canada and indorsed in Vermont, in both of which countries the rate of interest is six per cent., and was payable at New York at a day certain, where the rate of interest is seven per cent. It was held, after a thorough discussion of the authorities, that both the maker and indorsers wer liable to pay the New York interest. The rules were declared to be, (1.) If a contract be entered into in one place, to be performed in another, the parties may stipulate for the rate of interest of either country. (2.) If the contract stipulate generally for interest, without fixing the rate, it shall be the rate of interest at the place of payment. (3.) If no interest be stipulated, and payment be not made at the day, interest, by way of damages, is according to the law of the place of payment. In Chapman *v.* Robertson, 6 Paige's Rep. 627, the debtor borrowed money in England upon a bond and mortgage, executed in New York, on lands in New York, at the New York rate of interest, and it was held that the mortgage was a valid security for the bond, and that the usury law of England was no defence. Chancellor Walworth fully concurred in the decision of Depau *v.* Humphreys, in Louisiana, and held, that if the contract was made in New York, upon a mortgage here, it was not a violation of the English usury law, though the money was made payable to a creditor in England. The contract was made in New York, in reference to the laws of New York, and must be governed by them. New York was the domicil of the debtor. The mortgage gave locality to the contract, within the intent and meaning of the parties, and it must be governed by the *lex loci rei sitæ.* Had it been a mere personal contract, without any mortgage, the conclusion might possibly have been otherwise, though I think the conclusion in the case is, that the English law of usury would not have been a defence; for in the Louisiana case there was no mortgage. The principle now established in Louisiana and New York is, that the place where the contract was made determines its validity as to interest, though made payable in another state or country, where the rate of interest is lower. This principle has much to recommend it for reasonableness, convenience, and certainty, except in cases where the whole arrangement was evidently and fraudulently intended as a mere cover for usury.[1]

(*a*) 2 Simons's Rep. 194. See also Harvey *v.* Archbold, Ryan & Mood. 184; Hosford *v.* Nichols, 1 Paige's Rep. 220; Pecks *v.* Mayo, 14 Vermont Rep. 33, S. P.

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[1] Fisher *v.* Otis, 3 Chandler, 83. When the usury laws of the state, where the contract is made, only impose a penalty, not avoiding the contract, they will not be applied if the suit is brought in another state. Watrias *v.* Pierce, 32 N. H. 560. See *infra*, p. [462.] And see McFadin *v* Burns, 5 Gray, (Mass.) 599.

lawful interest in England, was not a usurious contract, for the stipulated interest was parcel of the contract. This is also the law in this country, (*a*) and it appears to be a liberal relaxation of the rigor of the former rule. But if the bond, or other security, be taken in England, no higher rate of interest than English interest can be allowed, though the debt be secured by a mortgage executed abroad, upon real property abroad, and the bond and mortgage specify the foreign rate of interest. The courts considered that if the rule was otherwise it would contravene the policy of the law, and sap the foundations of the statute of usury. (*b*) But on this subject of conflicting laws it may be generally observed that there is a stubborn principle of jurisprudence that will often intervene and act with controlling efficacy. This principle is, that when the *lex loci contractus* and the *lex fori*, as to conflicting rights acquired in each, come in direct collision, the comity of nations must yield to the positive law of the land. *In tali conflictu magis est ut jus nostrum quam jus alienum servemus.* (*c*)

*462 *(2.) Remedies upon contracts and their incidents are regulated and pursued according to the law of the place where the action is instituted, and the *lex loci* has no application.[1] *Actor sequitur forum rei.* The *lex loci* acts upon the

(*a*) Andrews *v.* Pond, 13 Peters, 65 See *supra*, n. c. The general principle is, that as to contracts merely personal, their construction is governed by the law of the place where they were made; the *consequences of their breach*, by that of the country where they are enforced. Cooper *v.* The Earl of Waldegrave, 2 Beavan, 282.

(*b*) The rule turns upon the question of fact, where was payment of the money under the contract to be made? Stapleton *v.* Conway, 1 Vesey, 428. 3 Atk. Rep. 727, S C. Connor *v.* Earl Bellamont, 2 Atk. Rep. 382. Dewar *v* Span, 3 Term Rep. 425. De Wolf *v.* Johnson, 10 Wheaton, 383. The statute of 14 Geo. III. allowed securities on lands abroad to reserve foreign interest, though executed in England: but that statute was taken strictly, and held not to extend to personal contracts.

(*c*) Huberus, 1, 3, 11. Lord Ellenborough, in Potter *v.* Brown, 5 East's Rep. 131. Saul *v.* His Creditors, 17 Martin's La. Rep. 569. If a contract to be performed in a foreign country, be invalid or void by the law of the country where it was made, then the rule of international law cannot prevail, that the law of the place where the contract is to be performed, is to govern. Story, J., in 3 Story's Rep. 484.

[1] This rule has been discussed with ability and learning, in a late case in Connecticut. Wood *v.* Watkinson, 17 Conn. R 500.

If an action be brought in any state upon a contract not under seal, but which, in the

right; the *lex fori* on the remedy.[1] This is the rule in all civilized countries; and it has become part of the *jus gentium*. (*a*) The comity of nations is sufficiently satisfied in allowing to foreigners the use of the same remedies and to the same extent that are afforded to the citizens of the state. Though the person of the debtor should therefore be exempted from redress by the *lex loci*, yet personal arrest will be permitted, if it be the practice according to the *lex fori*. If a party be discharged from imprisonment only, he remains liable to arrest for the same debt in another state; for imprisonment relates only to the remedy, which forms no part of the contract. (*b*) *In his quæ*

(*a*) Story on the Conflict of Laws, p. 811, and sec. 556. Bank of United States *v.* Donally, 8 Peters's U. S. Rep. 361. Thrasher *v.* Everhart, 3 Gill & Johns. 234. The authorities, both foreign and domestic, for this clearly established doctrine, are collected in Story's Com. on the Conflict of Laws, pp 468–473. The doctrines in the text are ably stated and illustrated in the case of Pickering *v.* Fisk, 6 Vermont Rep. 102, where it was truly observed by Mr. Justice Phelps, in giving the opinion of the court, that what appropriately belongs to the contract, and what to the remedy, is not always a question of easy solution.

(*b*) Lodge *v.* Phelps, 1 Johns. Cas. 139. Smith *v.* Spinolla, 2 Johns. Rep. 198. White *v.* Canfield, 7 Idem, 117. Sicard *v.* Whale, 11 Idem, 194. Whittemore *v.* Adams, 2 Cowen's Rep. 626. Hinkley *v.* Marean, 3 Mason's Rep. 88. Titus *v.* Hobart, 5 Idem, 378. Woodbridge *v.* Wright, 3 Conn Rep. 523. Atwater *v.* Townsend, 4 Idem, 47. Wood *v* Malin, 5 Halsted's Rep. 208. Morris *v* Eves, 11 Martin's La. Rep. 730. Webster *v.* Massey, 2 Wash. Cir. Rep. 157. British Linen Co. *v.* Drummond, 10 Barnw. & Cress. 903. De la Vega *v.* Vianna, 1 B. & Adolph. 284. Story on the Conflict of Laws, pp. 478, 479, 480. Trimby *v.* Vignier, 1 Bing. N. C. Rep. 151.

state where made, has the force and effect of a sealed instrument, the maxim, *actor sequitur forum rei* applies, and the form of the action must be appropriate to an usealed instrument. Le Roy *v.* Beard, 8 How. U. S. 451.

[1] This rule was applied in a recent case in the New York Superior Court, under the following circumstances. A firm in Missouri drew two bills of exchange upon a firm in New York, one dated in St. Louis, the other in Ohio. The firm in New York accepted and paid the bills, not having any funds of the drawers in their hands. One of the members of the firm in Missouri, was sued upon the bills in a tribunal of that state, without joining his partners, and judgment recovered against him. By the law of Missouri, a judgment recovered against one of several joint debtors does not prevent a subsequent action against the other debtors. The action was brought in the Superior Court against all the members of the firm in Missouri. The court held that the law of New York, and not the law of Missouri applied; that the separate judgment was a merger of the demand, and the defendants, other than the one against whom judgment was recovered, were discharged. 6 Duer, (N. Y.) 34.

respiciunt litis decisionem, servanda est consuetudo loci contractûs. At in his quæ respiciunt litis ordinationem, attenditur consuetudo loci ubi causa agitur. (*a*) Upon the principle that the time of limitation of actions is governed by the *lex fori*, a plea of the statute of limitations of the state where the contract is made, is no bar to a suit brought in a foreign court to enforce the contract; though a plea of the statute of the state where the suit is brought is a valid bar, even though brought upon a foreign judgment, provided the time of the residence of the party brings him within the time prescribed by the statute. (*b*)[1] The period *sufficient to constitute a bar to the litigation of stale demands, is a question of municipal policy and regulation, and one which belongs to the discretion of every government, consulting its own interest and convenience. Though the foreign statute of limitations may have closed upon the demand before the removal of the party to the new jurisdiction, yet it will be unavailing.[2] The statute of limitations of the state in whose courts a suit is prosecuted, must prevail in all actions. (*c*) To guard, however, against the in-

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(*a*) Ranchin sur Guipape, Quæst. 162, cited in Emerig. Des. Ass. ch 4, sec. 8, who sanctions the distinction, and collects the opinions of the foreign jurists under this branch of the law with his usual variety and immensity of erudition. Mr. Laussat, in a note to his edition of Fonblanque's Treatise of Equity, Phil. 1831, pp. 658–671, has also digested and classified the leading English and American authorities on the subject of the *lex loci*, with accuracy and ability. As to the extent in which the modes of proof and the law of evidence of the *lex loci* or of the *lex fori* are carried, the foreign jurists hold different doctrines, and questions under this head are deemed by Mr. Justice Story to be unsettled and embarrassing. Some maintain that the *lex fori*, and others that the *lex loci contractus*, must regulate the authenticity and admission of the instrument and modes of proof. Story's Com. on the Conflict of Laws, pp. 523–527.

(*b*) M'Elmoyle *v.* Cohen, 13 Peters, 312.

(*c*) Estes *v.* Kyle, Meig's Tenn. Rep. 34. If the time of prescription in the country where the parties reside, goes not only to bar the remedy, but to render the con-

[1] This subject has again come before the Supreme Court of the United States, and the doctrine of the case cited in the text, (13 Pet. 312,) was affirmed in a learned and elaborate opinion. Townsend *v.* Jamison, 9 How. U. S. 407. See also Nichols *ads.* Rogers, 2 Paine, C. C. 437.

[2] In some of the states it is provided by statute that actions shall not be brought on demands which have been barred by the statutes of limitations of the states where they arose. See Ohio R. S. (1854,) 629. Code of Iowa, (1851,) § 1665. Indiana Civ. Code, (1852,) § 216.

convenience of sustaining and enforcing stale demands, not yet barred by a residence under the change of domicil, a presumption of payment will be indulged, and may attach to and destroy the right of recovery. (*a*)

In respect to remedies, there are, properly speaking, three places of jurisdiction: (1.) The place of domicil of the defendant, commonly called the *forum domicilii;* (2.) The place where the thing in controversy is situate, commonly called the *forum rei sitæ;* (3.) The place where the contract is made, or the act done, commonly called the *forum rei gestæ*, or *forum contractus.* Not only real but mixed actions,[1] such as trespasses upon real property, are properly referable to the *forum rei sitæ.* (*b*) But the court of chancery, having authority to act *in personam*, will act indirectly, and under qualifications, upon real estate situated

tract absolutely void, the better opinion is, that the debt itself will also be held to be extinguished by the *lex fori* as well as by the *lex loci contractus.* Story on the Conflict of Laws, 487. Huber *v.* Steiner, 2 Bing. N. C. 211.

(*a*) Hub. de Conflictu Legum, sec. 7. Voet ad Pand. 44, 3. Lord Kames's Equity, b. 3, ch. 8, sec. 4. Dupleix *v.* De Roven, 2 Vern. Rep. 540. Nash *v.* Tupper, 1 Caines's Rep 402. Ruggles *v.* Keeler, 3 Johns. Rep. 263. Pearsall *v.* Dwight, 2 Mass. Rep. 84. Hall *v.* Little, 14 Idem, 203. Williams *v.* Jones, 13 East's Rep. 439. The British Linen Company *v.* Drummond, 10 B. & Cressw. 903. Decouche *v.* Savetier, 3 Johns. Ch. Rep. 218. Medbury *v.* Hopkins, 3 Conn. Rep. 476. Graves *v.* Graves, 2 Bibb's Rep. 207. Le Roy *v.* Crowninshield, 3 Mason's Rep. 151. Union Cotton Manufactory *v.* Lobdell, 19 Martin's La. Rep. 108. Ersk. Institutes, vol. ii. p. 581, sec. 48. Pothier, in his Traité de la Prescription, n. 251, and other foreign jurists, think that the *lex loci*, and not the *lex fori*, ought to govern in this case; but the contrary conclusion is too well settled to be now questioned. Story's Com. on the Conflict of Laws, pp. 482–487. In Harrison *v.* Stacy, 6 Robinson's Rep. 15, a resident of Mississippi sued in Louisiana on a note barred by the limitation laws of Mississippi, and it was held that the claim barred there by the laws of Mississippi was barred in Louisiana also.

(*b*) Skinner *v.* East India Company, cited in Cowp. Rep. 168. Doulson *v.* Matthews, 4 Term Rep. 503. Livingston *v.* Jefferson, 4 Hall's L. J. 78. Story on the Conflict of Laws, 448, 449, 466, 467. An injury to real property is local as to jurisdiction. Watts *v.* Kinney, 6 Hill, N. Y. Rep. 82. Trespass on real property situated in one state cannot be sued for in another state.

[1] It has been lately decided in New Hampshire, that the courts of that state have jurisdiction of an action for damages brought against the selectmen of a town in Vermont, who had assessed an illegal tax upon the plaintiff's property in that town, in consequence of which he had been imprisoned. The form of the remedy in such cases was declared to be regulated by the laws of the state where the action is brought. Henry *v.* Sargeant, 13 N. H. Rep. 321. See Martin *v.* Hill, 12 Barb. R. 631.

in a foreign country, by reason of this authority over the person, and it will compel him to give effect to its decrees, by a conveyance, release, or otherwise, respecting such property. (*a*)

(*a*) Lord Hardwicke, in Foster *v.* Vassall, 3 Atk. Rep. 589. 1 Eq. Cas. Abr. 133, C. Earl of Athol *v.* Earl of Derby, 1 Ch. Ca. 221. Archer *v.* Preston, 1 Eq. Ca. Abr. 133. S. C. cited in Arglasse *v.* Muschamp, 1 Vern. Rep. 75, 77, 135. Earl of Kildare *v.* Eustace, Ibid. 419 Penn *v.* Lord Baltimore, 1 Vesey, 444. Lord Cranstown *v.* Johnston, 3 Vesey, 182, 183. White *v.* Hall, 12 Vesey, 323. Lord Portarlington *v.* Soulby, 3 Mylne & Keen, 104. Bunbury *v.* Bunbury, in Chancery, 1839, 2 Beav. 173. Massie *v.* Watts, 6 Cranch, 148, 160. Briggs *v.* French, 1 Sumner's Rep. 504. Church of Macon *v.* Wiley, 2 Hill's S. C. Ch. Rep 586. The court will sustain a jurisdiction in equity in cases of *fraud, trust,* and *contract,* when the person is duly within their process and jurisdiction, although lands not within the jurisdiction of the court might be affected by the decree. Story on the Conflict of Laws, pp. 454–457. Idem, on Equity Jurisprudence, vol. ii. 48, 49, 185. The Court of Chancery in New York, in Ward *v.* Arredondo, 1 Hopkins's Rep. 213, Mead *v.* Merritt, 2 Paige's Rep. 402; Mitchell *v.* Bunch, 2 Idem, 606; Shattuck *v.* Cassidy, 3 Edwards's N. Y. Ch Rep. 152, and Sutphen *v.* Fowler, 9 Paige's Rep. 280; and of Virginia, in Farley *v.* Shippen, Wythe's Rep. 135, and Humphrey *v.* M'Clenachen, 1 Munf. Rep. 501, have declared and enforced the same doctrine. If the court had acquired jurisdiction of the person by his being within the state, they will compel him, by attachment, to do his duty under his contract or trust, and enforce the decree *in rem,* by his executing a conveyance, or otherwise, as justice may require, in respect to lands abroad. White *v.* White, 7 Gill & Johnson, 208. Vaughan *v.* Barclay, 6 Wharton, 392. Watkins *v* Holman, 16 Peters's Rep. 25. If the court has jurisdiction in case of a proceeding *in rem* over the property, it exercises it, though the owner be a non-resident, or a foreign corporation, or sovereign. Clarke *v.* N. J. Steam Navig. Co. 1 Story's Rep. 531. To give jurisdiction, either the defendant or the property attached must be within the state when process is served. A corporation has no legal existence out of the state creating it, and the service of summons on any member of it out of that state is null. Middlebrooks *v.* Springfield F. Ins. Co. 14 Conn. Rep. 301. Chancery may likewise, in the exercise of its jurisdiction *in personam,* and when the ends of justice require it, enjoin a party from proceeding in a suit in any court in any other country. See *supra.* p. 124. But this exercise of power has been declared, as we have already seen, (see vol. i. p. 409, 411,) not to extend to the federal courts in respect to the state courts, nor to the state courts in respect to the federal courts. This is founded on the nature of our federal government, and on indispensable principles of policy.

Mr. Justice Story, in his Commentaries on the Conflict of Laws, (and the 2d edition of which, in 1841, was corrected and greatly enlarged,) has reviewed and discussed the extensive and complicated subject of the *lex loci* in all its relations and incidents, with his usual exhausting research and sound critical sagacity. He has brought to bear upon the subject, and to enlighten it, an immense fund of foreign learning, and there is no treatise extant on the subject of the conflict of laws so accurate, full, and complete. There was no one head of the law that stood so greatly in need of such an effort. The doctrines under that head are more interesting than any other, with the exception, always, of the constitutional doctrines of the government of the United

III. *Of the consideration.*

It is essential to the validity of a contract that it be founded on a sufficient consideration. It was an early principle of the common law, that a mere voluntary act of courtesy would not uphold an assumpsit, but a courtesy showed by a previous request would support it. (*a*) There must be something given in exchange, something that is mutual, or something which is the inducement to the contract, and it must be a thing which is lawful and competent in value to sustain the assumption. A contract without a consideration is a *nudum pactum*, and not binding in law, though it may be in point of conscience; and this maxim of the common law was taken from the civil law, in which the doctrine of consideration is treated with an air of scholastic subtlety. (*b*) * Whether the agreement *464

States; and they are more constant in their application, considering that the Union is composed of twenty-six state jurisdictions, dictating and administering independently their own municipal laws. It was impossible, in this brief section, to do more than state the leading principles of the doctrine, and the authorities which sustain them; and this I have endeavored to do with the lights afforded me by a thorough examination of the treatise alluded to and of all the authorities, foreign and domestic, applicable to the subject, and within my power to examine.

(*a*) Lampleigh *v.* Brathwait, Hob. 105 b. But it is understood to be now settled that, in a case of simple contract, if one person makes a promise to another for the benefit of a third party, the third party may maintain an action upon it, though the consideration does not move from him. Dutton *v.* Pool, 2 Lev. 210. S. C. 1 Vent. 318. 3 Bos. & Pul. 149, notes to Piggett *v.* Thompson. Schemerhorn *v.* Vanderheyden, 1 Johnson's R. 140. Starkey *v.* Mill. Sty. 296. Cumberland *v.* Codrington, 3 Johns. Ch. R. 254. Parker, Ch. J. in 17 Mass. R. 405. 3 Pick. 91. Hosmer, Ch. J., in 7 Conn. R. 347. Barker *v.* Bucklin, 2 Denio's R. 45. Walworth, Chancellor, 2 Denio, 417.[1]

(*b*) Dig. lib. 2, tit. 14, ch. 7, sec. 4. Id. 19, 5, 5. Though a sale without a price was not binding as such by the Roman law, yet it might, under certain circumstances, operate as a donation, if accompanied with delivery. Voet, Com. ad Pand. 18, 1, 1. D'Orgenoy *v.* Droz, 13 La. Rep. 382, 389. Sir William Blackstone, in his Commentaries, vol. ii. p. 444, has borrowed and explained the distinctions in the Pandects upon the four species of contracts, of *do ut des, do ut facias, facio ut des,* and *facio ut facias.* This classification of contracts embraces all those engagements which relate to the interchange of commodities, money, or labor, as, 1. Stipulations mutually to give; 2. Stipulation on the one part to give, in consideration of something to be done or forborne on the other part; 3. Stipulation on the one part to do or forbear, in con-

[1] Delaware & H. Canal Co. *v.* The Westchester C. Bank, 4 Denio's R. 97. Beers *v.* Robinson, 9 Barr's R. 229.

be verbal or in writing, it is still a *nude pact*, and will not support an action, if a consideration be wanting.[1] This was finally settled in England, in the House of Lords, in *Rann* v. *Hughes*, (*a*) and the rule has been adopted, and prevails extensively in this country. (*b*) The rule, that a consideration is necessary to the validity of a contract, applies to all contracts and agreements not under seal, with the exception of bills of exchange and negotiable notes, after they have been negotiated and passed into the hands of an innocent indorsee.[2] The immediate parties to a bill or note, equally with parties to other contracts, are affected by the want of consideration; and it is only as to third persons, who come to the possession of the paper in the usual course of trade, without notice of the original defect, that the want of a consideration cannot be alleged. (*c*) The rule, with this attending qualification, is well settled in English and American law, and pervades the numer-

sideration of something to be given on the other part; 4. Stipulations mutually to do or forbear to do. Each of them implies a reciprocity of benefit. A unilateral engagement, gratuitously made, binds the offerer until rejected, or the acceptance be unduly delayed, according to the French, Dutch, and Scotch law. Toullier, Droit Civil Français, t. vi. n. 30. Code de Commerce de Hollande, art. 1, p. 65. Bell on the Contract of Sale, Edin. 1844, p. 34. In England, it is a nude pact, and no contract. See *infra* p. 477.

(*a*) 7 Term Rep. 350, note. 7 Bro. P. C. 550, S. C.

(*b*) Burnet *v.* Bisco, 4 Johns. Rep. 235. Thacher *v.* Dinsmore, 5 Mass. Rep 301, 302. Hosmer *v.* Hollenbeck, 2 Day's Rep 22. Cook *v.* Bradley, 7 Conn. Rep. 57. Brown *v.* Adams, 1 Steward's Ala. Rep. 51. Beberkeys *v.* Holmes, 4 Munf. Rep. 95. Parker *v.* Carter, Ibid. 273.

(*c*) Bay *v.* Coddington, 5 Johns. Ch. Rep. 54.

[1] The English Law Review, vol x. No. 19, May, 1849, p. 56, contains a learned article upon the doctrine of *nudum pactum*, as administered in the civil and common law. The writer adduces very strong arguments against the policy of the rule of the English law; and he shows that Blackstone and other writers who cite the civil law for the maxim were mistaken. The rule as administered in the common law was not known to the civil law of Justinian. A stipulation was *nudum pactum*, and not enforceable in the civil law; not because it wanted a consideration, (in the sense we use that term,) but because it wanted the regular and solemn form of a stipulation which was necessary to give it validity. See, also, Smith's Greek and Roman Antiquities, (Obligationes,) pp. 820, 821. Mouton *v.* Noble, 1 La. Ann. Rep. 192.

[2] A. was indebted to B., and B. to the plaintiff; B. gave the plaintiff an order on A. for a quantity of wood, which, upon presentment to him by plaintiff, he accepted, and promised to deliver the wood, but when it was due, refused. Held, there was no consideration for the promise. Ford *v.* Adams, 2 Barb. S. C. Rep. 349.

ous cases with which the books abound. In contracts under seal, a consideration is necessarily implied in the solemnity of the instrument; and fraud in relation to part of the consideration is held to be no defence at law: though fraud in respect to the execution of the specialty, and going to render it void, is a good defence. (a) * A valuable consideration is one *465 that is either a benefit to the party promising, or some trouble or prejudice to the party to whom the promise is made. (b) [1] Any damage, or suspension, or forbearance of a right, will be sufficient to sustain a promise. (c) [2] A mutual promise amounts to a sufficient consideration, provided the mutual promises be concurrent in point of time; and in that case the one promise is a good consideration for the other. (d) But

(a) Dale v. Roosevelt, 9 Cowen's Rep. 307. The N. Y. Revised Statutes, vol. ii. p. 406, secs. 77, 78, declare that a seal is only presumptive evidence of a sufficient consideration, and liable to be rebutted equally as if the instrument was not sealed, provided such a defence be made by plea or by notice under the general issue. This statute provision was an innovation upon the common-law rule. Case v. Boughton, 11 Wendell's Rep. 106. It is not to be understood that a voluntary bond would be enforced, if it be admitted by the obligee, by pleading or otherwise, that it was executed without any consideration. The principle is, that a bond, from the solemnity of the instrument, *implies a consideration*, and the defendant is estopped by the seal from averring a want of it. Wright v. Moor, 1 Ch. Rep. 157. Turner v. Sir George Binion, Hardress, 200. 2 Blacks. Com. 446. Sedgwick, J., and Parsons, Ch. J., 2 Mass. Rep. 162. In Indiana, by statute, (R. Statutes, 1838, p. 451,) consideration of specialties and other contracts (conveyances of real estate and negotiable paper excepted) may be inquired into under special plea, or, if given in evidence, on a trial at law.

(b) Jones v. Ashburnham, 4 East's Rep. 455. Lent v. Padelford, 10 Mass. Rep. 236. Patteson, J., 2 Adolph. & Ellis, N. S. 859.

(c) Seaman v. Seaman, 12 Wendell's Rep. 381. Morton v. Burn, 2 Neville & Perry, 297.

(d) Where several persons subscribe to raise money for an object in which all feel an interest, the mutual promises of the subscribers form a valid consideration for the promise of each. But the agreement of a single person to make a donation to a public institution, without any undertaking on the part of the donee to do anything, is without consideration and void. Walworth, Chancellor, in Stewart v. Hamilton College, 2 Denio, R. 416, 417.[3] Wilson v. Baptist Society, 10 Barb. R. 308. If an agreement

[1] See *post*, p. 571, note *a*.

[2] An agreement, by a son, not to complain of the distribution of his father's estate, forms no consideration for a promise by the father not to sue a note, signed by his son. Bluett v. Bluett, 24 Eng. L. & Eq. 434.

[3] This decision has been affirmed in the Court of Appeals. S. C. 1 Comst. 581. Barnes

if two concurrent acts are stipulated, as delivery by the one party and payment by the other, no action can be maintained by either, without showing a performance, or what is equivalent to a performance, of his part of the agreement. (*a*) If the consideration be wholly past and executed before the promise be made, it is not sufficient, unless the consideration arose at the instance or *request* of the party promising; and that request must have been expressly made, or be necessarily implied, from the moral obligation under which the party was placed; and the consideration must have been beneficial to the one party, or onerous to the other. (*b*) A subsisting legal obligation to do a

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be optional as to one of the parties, and obligatory as to the other, it does not destroy its mutuality, if there be a sufficient consideration on both sides; as if one party stipulates that he will deliver salt when called on, and the other that he will pay for the salt so delivered. This is mutuality, and one promise is in consideration of the other. Cherry *v.* Smith, 3 Humph. Tenn. R. 19. Lester *v.* Jewett, 12 Barbour, R. 503.[1]

(*a*) If the act or duty be performed by A., and in consideration of which B. promises to pay, be such that it *cannot*, or from its nature *may not* be performed before the time fixed for payment by B., then A. may sue for the money without averring performance. But if the time be fixed for the payment to be made in consideration of the act, and the act be of such a nature that it may be done presently, and before the time of payment, then the act becomes a precedent condition to the payment. Thorpe *v.* Thorpe, 1 Salk. 171. 1 Lord Raym. 665, S. C. Callonel *v.* Briggs, 1 Salk. 112. Pordage *v.* Cole, 1 Saund. 319 d. Trimble *v.* Green, 3 Dana's Ken. Rep. 356, 357. In this last case, the distinctions to be drawn from the authorities are justly and skilfully taken.

(*b*) Jenkins *v.* Tucker, 1 H. Blacks. Rep. 90. Livingston *v.* Rogers, 1 Caines's Rep. 584. Comstock *v.* Smith, 7 Johns. Rep. 87. Hicks *v* Burnham, 10 Johns. Rep 243. Garrett *v.* Stuart, 1 M'Cord's S. C. Rep. 514. Wing *v.* Mill, 1 Barnew. & Ald. 104.

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v. Perine, 15 Barb. R. 249. A consideration may be proved by parol, where none appears in the writing, the case not coming within the statute of frauds. In Kentucky, it would seem that such a promise would be valid; the duty of the trustees to appropriate the money according to the charter being regarded as a sufficient consideration. Collier *v.* B. E. Society, 8 B. Mon. Rep. 68. So it would be valid in Louisiana. Mouton *v.* Noble, 1 La. Ann. R. 192. This latter case gives a perspicuous explanation of the nature of the *consideration* or *causa* required by the civil law. See also Brouwer *v.* Hill, 1 Sandf. Law Rep. 629. An agreement to take stock in a company, signed before its organization, is binding, the future advantages to the subscribers being a sufficient consideration. Plank Road Co. *v.* Griffin, 21 Barb. 454. See further on the consideration for subscriptions, Trustees *v.* Nelson, 24 Vt. 189. Gittings *v.* Mayhew, 6 Md. 113. Barnes *v.* Perine, 9 Barb. 202. S. C. 2 Kern. 18. Johnston *v.* Wabash College, 2 Carter, (Ind.) 555. Curry *v.* Rogers, 1 Fost. 247. Watkins *v.* Eames, 9 Cush. 537.

[1] L'Amoureux *v.* Gould, 3 Seld. 349.

thing, is a sufficient consideration for a promise to do it; but it has been an unsettled point whether a mere moral obligation be, of itself, a sufficient consideration for a promise, except in those cases in which a prior legal obligation or consideration had once existed. The weight of authority is that it is not sufficient. (a) [1] Though the consideration of natural love and

(a) Smith v. Ware, 13 Johnson, 257. Edwards v. Davis, 16 Idem, 281. Mills v. Wyman, 3 Pick. Rep. 207. Cook v. Bradley, 7 Conn. Rep. 57. Dodge v. Adams, 19 Pick. Rep. 429. Eastwood v. Kenyon, 3 Perry & Davison, 276. S. C. 11 Adolph. & Ellis, 438. Ehle v. Judson, 24 Wendell, 97. The question how far a mere moral obligation was sufficient to raise and support an assumpsit, is learnedly and clearly stated and discussed in the note to 3 Bos & Pull. 249, and the note to 16 Johns. Rep. 283, and the conclusion to which the learned editors arrived, seems to have been adopted in the cases referred to. And yet, in one of the cases, (Lee v. Muggeridge, 5 Taunt. Rep. 36,) Gibbs, J., observed, that it could not now be disputed, that wherever there is a moral obligation to pay a debt or perform a duty, a promise to pay that debt or perform that duty, would be supported by the previous moral obligation. There is a strong instance, in Fairchild v. Bell, Brevard's MSS. Rep. cited in 1 Rice's S. C. Dig. p. 60, in support of the *implied* contract to pay for a meritorious service, founded on a moral obligation. The same doctrine is laid down by Baylies, J., in Barlow v. Smith, 4 Vermont Rep. 144, and in Glass v. Beach, 5 Idem, 176; but the promise must be *express*, and not implied. Lord Tenterden, in Littlefield v. Shee, 2 Barn. & Ad. 811, admitted the doctrine, that a moral obligation was a sufficient consideration for an express promise, though he said that it must be received with some limitation. It is difficult to surmount the case stated by Lord Holt, in 1 Lord Raym. 389, that a promise to pay a debt contracted in infancy is valid. In the case of Eastwood v. Kenyon, Lord Denman observed, that the case of Lee v. Muggeridge was decidedly at variance with the doctrine in the note to 3 B. & Puller, 249, and so was the decision in Littlefield v. Shee; and Lord Denman concluded that a past benefit,

[1] It is finally settled in England, that a promise made in consideration of past illicit intercourse, is void for want of consideration. Beaumont v. Reeve, 8 Ad. & El. N. S. 483. This case, as well as several others, approves the rule as laid down in the note to 3 B. & P. 249; see Geer v. Archer, 2 Barb. S. C. Rep. 420, 8 Ad. & El *supra*; and see also Watkins v. Halstead, 2 Sandf. (Law) R. 311, where it was held, that a promise by a wife, after a divorce, to pay for goods furnished during coverture, was void. See also Waters v. Bean, 15 Geo. 358. But, in Hemphill v. McClimans, 24 Penn. 367, it was held, that a promise made by a woman during coverture, to pay for work done for her son, was sufficient consideration for a new promise, to the same effect, made after divorce.

By a statute in Maine no promise will revive a debt discharged by the bankrupt or insolvent laws, unless it be in writing and signed by the party. Acts of Maine, ch. 52, 1848. Rice v. Maxwell, 13 S. & M. R. 289.

The same rule of law has been adopted in New York, as to promises to pay, where the original cause of action has been barred by the statute of limitations. Code of Procedure, sec. 90, ch. 4, tit. 2, part 2. A new promise to pay a debt made after a decree in bankruptcy, held valid. Corliss v. Shepherd, 28 Maine R. 550.

affection be sufficient in a deed, yet such a consideration is not sufficient to support an executory contract and give it *466 validity, either at law or * in equity. (a) A promise to do a thing may be merely gratuitous, and not binding; yet, if the person promising enters upon the execution of the

not conferred at *the request* of the defendant, would not support a subsequent promise to pay, and that this conclusion was justified by the old common law, and that the principle of moral obligation did not make its appearance till the days of Lord Mansfield. The decision in Lee *v.* Muggeridge was laid down in too unqualified terms, and the doctrine in the note to B. & P. may now be considered as the better doctrine in England and America. But there is a distinction between promises which are void or only voidable, and the former are held not a sufficient consideration to support subsequent promise. Cockshott *v.* Bennett, 2 Term, 763. In Hatchell *v.* Odom, 2 Dev. & Battle, 302, it was observed that it was not every moral obligation that was sufficient in law to raise an implied promise or to support an express one; and that such only were available considerations, which would originally have been good but for the intervention of some rule of policy. A promise to pay after the interdict is removed, will be valid, and may be enforced. The case of a promise to pay a debt barred by the statute of limitations, or a promise by a widow or an adult, to refund a loan of money made during coverture or infancy, are given as instances by Judge Gaston, in his clear and able opinion in the last case cited. So, a promise by an insolvent debtor to pay a debt existing before his discharge, creates a valid contract, the previous indebtedness being a sufficient consideration, and the promise is a revival of the old debt. Earnest *v.* Parke, 4 Rawle, 452. Parke, B., in Smith *v.* Winter, 1 Horne & Hurlestone, 389. Rogers *v.* Stevens, 2 Term, 713. Gibbon *v.* Coggon, 2 Campb. 188. Hawkes *v.* Saunders, Cowp. 290. Cook *v.* Bradley, 7 Conn. Rep. 57.[1] The plaintiff may declare on the original promise, and insist on the new promise, by way of replication. Fitzgerald *v.* Alexander, 19 Wendell, 402. If a debtor compromises a debt by paying part, and afterwards promises to pay the balance when able, the promise is binding without any new consideration. Stafford *v.* Bacon, 25 Wendell, 384.

(a) Tate *v.* Hilbert, 2 Vesey, Jr 111. Pennington *v.* Gittings, 2 Gill & Johns. 208. A court of equity will not specifically enforce or execute a voluntary contract, nor lend its assistance to a mere volunteer, who is not within the influence of the consideration of an executory agreement. Jefferys *v.* Jefferys, Cr. & Ph. 141. Holloway *v.* Headington, 8 Sim. 325. Colyear *v.* Countess of M. 2 Keen, 81. Matthews *v.* L—e, 1 Maddock's Ch. Rep. 564. Neves *v.* Scott, U. S. C. C. for Georgia, Law Reporter, (ix. 67,) Boston, June, 1846. But if it be an executed trust, though without consideration, the court will give it effect. Collinson *v.* Pattrick, 2 Keen, 123. Ellison *v.* Ellison, 6 Vesey, 662. Bunn *v.* Winthrop, 1 Johnson's Ch. Rep. 337. Minturn *v.* Seymour, 4 Id. 500. Acker *v.* Phenix, 4 Paige's Rep. 305. Hayes *v.* Kershow, 1 Sandford's Ch. Rep. 261.

[1] See also Brown *v.* Collier, 8 Humph. R. 510. Prewett *v.* Caruthers, 12 S. & M. Rep. 491. Walbridge *v.* Harroon, 18 Vermont R. 448. Franklin *v.* Beatty, 27 Miss. 347. Otis *v.* Gazlin, 31 Me. 567. Patten *v.* Ellingwood, 32 Me. 163.

business, and does it negligently or amiss, so as to produce injury to the other party, an action will lie for this misfeasance.(a) The consideration must not only be valuable; but it must be a lawful consideration, and not repugnant to law, or sound policy, or good morals.[1] *Ex turpi contractu actio non oritur;* and no person, even so far back as the feudal ages, was permitted by law to stipulate for iniquity. (b) The reports in every period of the English jurisprudence, and our American reports equally abound with cases of contracts held illegal on account of the illegality of the consideration; and they contain striking illustrations of the general rule, that contracts are illegal when founded on a consideration, *contra bonos mores*, or against the principles of sound policy, or founded in fraud, or in contravention of the positive provisions of some statute law. (c)[2] If the contract

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(a) Coggs v. Bernard, 2 Lord Raym. 909.

(b) Fitz. Abr. tit. Obligation, pl. 13. See also the same language in the civil law. Dig. 2, 14, 27, 4. Code, 6, 3, 6.

(c) In the American Jurist for January, 1840, (xxii 249,) the law concerning unlawful contracts, which violate either the common or statute law, is discussed with much learning, order, and perspicuity, and the numerous adjudged cases bearing on the subject referred to, and the leading ones sufficiently examined.

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[1] A promise to an officer in consideration of forbearance to prosecute, is void as against public policy. Keir v. Leeman, 9 Ad. & El. N. S. 371. So an agreement to use one's influence with the Common Council of New York, to procure a lease, was held void as against public policy. Wall v. Charlick, New York S. C. N. Y. Leg. Obs'r. July, 1850, p. 230. A contract for the sale of an office is void as against the policy of the law. Eddy v. Capron, 4 R. I. 394. The employment of an agent or attorney to advocate claims before a legislative body, or committee thereof, is legal, and compensation for such services may be recovered. Sedgwick v. Stanton, 4 Kernan, (14 N. Y.) 289. Bryan v. Reynolds, 5 Wisc. 200.

[2] Courts will not sustain an action for the recovery of property which the owner had prepared to use in violation of the law: as for pieces of *German silver*, of the dimension of Mexican dollars, which were seized *in transitu* to a place to be *milled*. Spalding v. Preston, 21 Vt. Rep. 9.

The court declared this to be the first case of the kind to be found on the records of any court.

The law, as settled by the English cases, as to provisions in wills restraining marriage, is admitted by the English judges to be contradictory and unreasonable. "If (says L. J. Knight Bruce) a man give a single woman an annuity *until* she be married, and the legatee marry, the annuity will thereupon cease. But when a man gave an annuity to a single woman, and declared that if she should marry, the annuity should be forfeited, the proviso was void, and she might marry and retain her annuity." This absurd verbal distinction turns on the difference between a limitation and a condition. Heath v. Lewis, 17 E. L. & Eq. 41. Lloyd v. Lloyd, 10 E. L. & Eq. 139.

grows immediately out of, or is connected with an illegal or immoral act, a court of justice will not enforce it. But if it be unconnected with the illegal act, and founded on a new consideration, it may be enforced, although the illegal act was known to the party to whom the promise was made, and he *467 was the contriver of the illegal act. (a) [1] The *courts of

(a) Hodgson v. Temple, 5 Taunt. Rep. 181. Toler v Armstrong, 4 Wash. Cir. Rep. 297. 11 Wheaton, 258, S C. Story's Com. on the Conflict of Laws, §§ 246–259. That a contract of sale, not prohibited by any positive law, nor against good morals, may still be void as being against principles of sound policy, see Jones v. Randall, Cowp. 39. Bryan v. Lewis, Ry. & Moo. 386. In Richardson v. Mellish, 2 Bing. Rep. 229, Ch. J. Best thought that the courts had gone too far in setting aside contracts, on the ground that they were in contravention of the public policy, and that the objection in such cases ought to be founded on some clear and unquestionable principle, and never applied to doubtful questions of policy. These should be left to be settled by legislative discretion. In the Scots law, contracts are deemed inconsistent with public policy and void; 1. When made against the policy of the domestic relations, 2. In restraint of personal liberty, 3. Tending to impede the course of justice, 4. Defeating the revenue laws; 5. Inconsistent with national war policy. Bell's Principles of the Law of Scotland, pp. 16–18. Mr. Justice Story, in his Commentaries on Equity Jurisprudence, vol. i pp. 262–304, has clearly and fully stated the cases in which contracts have been set aside as against public policy. Such, for instance, are (1.) Marriage brokerage contracts, by which a party engages to give another compensation if he will negotiate an advantageous match for him; (2.) A reward promised for using influence and power over another person, to induce him to make a will in his favor; (3.) Secret conveyances and settlements in contemplation of marriage; (4.) Contracts in general restraint of marriage; (5.) Contracts in general restraint of trade; (6.) Agreements founded upon violation of public trust or confidence, or duty, or for the violation of public law.[2] These and other less striking cases are all enforced and illustrated by numerous authorities, in the masterly treatise to which I have referred. The cases are uniform in declaring the principle, that if a note or other contract be made in consideration of an act forbidden by law, it is absolutely void. 14 Mass. Rep. 322. 5 Johns. Rep. 327. 3 Wheaton, 204. 4 Peters's U. S. Rep. 410. 11 East's Rep. 502. 1 Binney's Rep. 110. 2 Gallison's Rep. 560. *Vide* also *ante*, vol. i. p. 468. If the consideration of a bond or covenant be illegal, that illegality will constitute a good defence at law, as well as in equity. Smith v. Aykwell, 3 Atk. 566. Collins v. Blantern, 2 Wilson, 347. Paxton v. Popham, 9 East, 408. Greville v. Atkins, 9 B. & Cress. 462. Fytche v. Bishop of London, 1 East, 487. Vauxhall

[1] Jack v. Nichols, 5 Barb. S. C. Rep. 38.

[2] Contracts cannot be enforced, when the consideration consists of services in obtaining, by secret means, the passage of a law, Marshall v. B. & O. R. R. Co. 16 How. U. S. 314, or a *nolle prosequi* from the executive. Widley v. Collins, 7 Md. 273. Where the defendant agreed to purchase and the plaintiff to sell wrappers, bearing the trade-mark of the latter, the agreement was held void as a fraud upon the public. Bloss v. Bloomer, 23 Barb. 604.

justice will allow the objection, that the consideration of the contract was immoral or illegal to be made even by the guilty

Bridge Company v. Earl of Spencer, 1 Jacob, 64. Westmeath v. Westmeath, 1 Dow & Clarke, 519. First Cong. Church v. Henderson, 4 Rob. La. Rep. 209. Overman v. Clemmons, 2 Dev. & Battle, 185. In this last case all the authorities are reviewed, and the doctrine clearly established. Though the result of many of the decisions is, that the mere knowledge of the illegal purpose for which goods are purchased will not affect the validity of the contract, if there be no participation or interest in the act itself, as selling goods by a foreign merchant, he knowing that they were intended to be smuggled into England. Holman v. Johnson, Cowper, 341. Waymell v. Reed, 5 Term, 599.[1] Hodgson v. Temple, 5 Taunton, 181. Bell on the Contract of Sale, Edin. 1844, pp. 22. Cheney v. Duke, 10 Gill & Johns. Rep. 11. Lord Abinger, in Pellecat v. Angell, 2 Cr. & M. Rep. 311; yet Ch J. Eyre, in Lightfoot v. Tenant, 1 Bos. & Pull. 551, 556, held otherwise, and that the consideration must be meritorious. A sale of arsenic, knowing it to be intended to commit murder, would not support an action. And Mr. Justice Story, (Conflict of Laws, § 253,) considers that this doctrine contains such wholesome morality and enlarged policy as to be almost irresistible to the judgment. This has now become the prevailing law in the English courts. Langton v. Hughes, 1 Maule & Selw. 593. Cannan v. Bryce, 3 Barnw. & Ald. 179. In Steele v. Curle, 4 Dana's K. Rep. 385, Ch. J. Robertson, after an examination of the authorities on this vexed question, and without giving any definite opinion

[1] Where a person from New York made a contract in Vermont for the sale of liquor, to be retailed in the latter state, in violation of its statute laws, it was held, the vendor could maintain no action for the price in the courts of Vermont. The court will give no man a remedy on a contract made in contemplation of a violation of its laws. Territt v. Bartlett, 21 Vt. R. 184. The same rule was applied in Wooten v. Miller, 7 Smedes & M. 380. But where no part of the contract was made in the *state*, an action may be brought thereon though the plaintiff knew the illegal purpose of the purchase. McConihe v. McMann, 1 Wms. 95. Backman v. Wright, Ib. 187. See also Gassett v. Godfrey, 6 Fost. 415. Smith v. Godfrey, 8 Fost. 379. Sortwell v. Hughes, 1 Curt. C. C. 244. Read v. Taft, 3 R. I. 175. In Kreiss v. Seligman, 8 Barb. 439, it was held that even if the contract is wholly within the state, a bare knowledge by the vendor that the vendee intends to put the goods sold to an illegal use will not vitiate the sale. In this case Mr. Justice Selden delivered an able opinion, in which he denies the correctness of the decision in Langton v. Hughes, *supra*. In Tracy v. Talmage, 4 Kernan, (14 N. Y.) 162, the Court of Appeals, (Selden, J., delivering the opinion,) fully affirmed the principle of Kreiss v. Seligman and denied the authority of Langton v. Hughes. The decision was made upon great consideration. It was argued in 1855, and the court ordered a re-argument in 1856. Subsequent to the decision the counsel for the defendant (three of the ablest counsel of the state,) moved for a re-argument, on the ground that the cases cited by Judge Selden in support of the doctrine were exceptional cases. The Court, in an elaborate opinion delivered by Mr. Justice Comstock, refused a re-argument, holding the decision to be law. The doctrine of Kreiss v. Seligman may, therefore, be considered as settled law in the State of New York. See Kennett v. Chambers, 14 How. U. S. 38, which was the case of a contract, before the recognition of Texas by the United States, to assist a Texan officer in the war with Mexico, and therefore the contract was illegal.

party to the contract; for the allowance is not for the sake of the party who raises the objection, but is grounded on general principles of policy. (a) A *particeps criminis* has been held to be entitled, in equity, on his own application, to relief against his own contract, when the contract was illegal, or against the policy of the law, and relief became necessary to prevent injury to others. It was no objection that the plaintiff himself was a party to the illegal transaction. (b) But if a party, who may be entitled to resist a claim on account of its illegality, waives that

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thereon, suggested that the validity of the contract in the given case might depend *upon the degree of turpitude* evinced by the contemplated transgression of the law.

With respect to contracts in restraint of trade, if they totally prohibit the carrying on of a particular business at any place within the state, they are void, for such a general restraint is injurious to the public.[1] But contracts for a limited restraint, as that a man will not exercise his trade, or carry on his business in a particular place, or within certain limits, are valid, provided they were entered into for some good reasons, independent of the pecuniary consideration.[2] Mitchel *v.* Reynolds, 1 P. Wms. 181. Horner *v.* Graves, 7 Bing. 735. Proctor *v.* Sargent, 2 Manning & Granger, 20. Mallan *v.* May, 11 Meeson & Welsby, 653. Chappell *v.* Brockway, 21 Wendell, 157. Ross *v.* Sadgbeer, Ib. 166. The opinion of Ch. J. Parker, in the case of Mitchel *v.* Reynolds, is very elaborate, and contains the principles of law on the subject, with just discrimination and great precision and accuracy. The opinion of Mr. Justice Bronson, in the New York cases, contains, also, well reasoned conclusions of law.

(*a*) Holman *v.* Johnson, Cowp Rep. 343. Mackey *v.* Brownfield, 13 Serg. & Rawle, 241, 242. Griswold *v.* Waddington, 16 Johns. Rep. 486. Langton *v.* Hughes, 1 Maule & Selw. 593. Josephs *v.* Pebrer, 2 Barnw. & Cress. 639. See *infra*, p. 487, n. *d*.

(*b*) Eastabrook *v.* Scott, 8 Vesey, 456. St. John *v.* St. John, 11 Idem, 526, 535. Jackman *v.* Mitchell, 13 Idem, 581.

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[1] Agreements between the proprietors of boats running on the interior lakes of New York, regulating the price of freight and fare, and prohibiting the parties engaging in similar business out of the association, have been declared void, as conspiracies in restraint of trade, and to coerce the public, under the 2 Rev. St. 691, § 8, and at common law. Stanton *v.* Allen, 5 Denio's R. 434. Hooker *v.* Vandewater, 4 Denio's R. 349. In the case of Hilton *v.* Eckersley, 32 E. L. & Eq. 198, it was held by the Q. B. that a bond, entered into by the manufacturers of a certain district, to carry on their business, according to resolutions to be passed by a majority of the obligors, was void as against public policy and in restraint of trade.

[2] Hartley *v.* Cummings, 5 M. G. & S. Rep. 247. Thomas *v.* Miles, 3 Ohio St. 274. Kinsman *v.* Parkhurst, 18 How. U. S. 289. Van Marter *v.* Babcock, 23 Barb. 633. Lawrence *v.* Kidder, 10 Barb. 641. Mott *v.* Mott, 11 Idem, 127. Whitney *v.* Slayton, 40 Maine, 224. Alcock *v.* Giberton, 5 Duer, (N. Y.) 76. Heichew *v.* Hamilton, 3 Iowa, 596. Beard *v.* Dennis, 6 Indiana, 200. Jones *v.* Lees, 38 E. L. & Eq. 318.

privilege, and fulfils the contract, he cannot be permitted to recover the money back; and the rule that *potior est conditio defendentis* will apply. (*a*) [1] If, however, the money be not paid over, but remains, in its transit, in the hands of the intermediate stakeholders, the law will not permit a third person, who is thus incidentally connected with the transaction, to set up the claim of illegality in the contract between the principal parties.[2] An agent cannot shelter himself from paying over the money by such a plea, and the money advanced may be reclaimed. (*b*) When the transaction is of such a nature that the good part of the consideration can be separated from that which is bad, the courts will make the distinction; for "the common law doth divide according to common reason; and having made that void that is *against law, lets the rest stand." (*c*) *468 The general and more liberal principle now is, that where any matter, void even by statute, be mixed up with good matter, which is entirely independent of it, the good part shall stand, and the rest be held void; (*d*) [3] though if the part which is

(*a*) Howson *v.* Hancock, 8 Term Rep. 575. Burt *v.* Place, 6 Cowen's Rep. 431.

(*b*) Cotton *v.* Thurland, 5 Term Rep. 405. Smith *v.* Bicknore, 4 Taunt. Rep. 474. Vischer *v.* Yates, 11 Johns. Rep. 23. M'Allister *v.* Hoffman, 16 Serg. & Rawle, 147. Hastelow *v.* Jackson, 8 Barnew. & Cress. 221.

(*c*) 14 Hen. VIII. ch. 15. Hob. Rep. 14. Piggot's case, 11 Co. 27 b. Greenwood *v.* Bishop of London, 5 Taunt. Rep. 727. Lord Stowell said, that the admiralty courts adopt this rational rule of the common law, in respect to maritime contracts. The Nelson, 1 Hagg. Adm. Rep. 176.

(*d*) Mouys *v* Leake, 8 Term Rep. 411. Kerrison *v.* Cole, 8 East's Rep. 231. Howe *v.* Synge, 15 East's Rep. 440. Doe *v.* Pitcher, 6 Taunt. Rep. 359. Wigg *v.* Shuttleworth, 13 East's Rep. 87.

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1 The rule of law, that parties *in pari delicto* will be denied all relief both in law and equity, was discussed with uncommon ability by Nesbit, J., and approved by the court, in Adams *v.* Barrett, 5 Georgia R. 404. Unless parties to illegal transactions are *in pari delicto*, as well as *participes criminis*, the court will afford relief to the more innocent party, when equity requires it. Schermerhorn *v.* Talman, 4 Kernan, (14 N. Y.) 93. Tracy *v.* Talmage, Ib. 162.

2 But the losing party in a wager may recover from the stakeholder the money he had deposited with him, though the latter, after the determination of the wager, had, by the order of the depositor, paid over the money to the winner. Ruckman *v.* Pitcher, 1 Comst. R. 392. See also Morgan *v.* Groff, 4 Barb. S. C. R. 524. But see Like *v.* Thompson, 9 Barb. 315.

3 In Rand *v.* Mather, 11 Cush. 1, the Supreme Court of Massachusetts, overruling a

good depends upon that which is bad, the whole instrument is void; (*a*)[1] and so I take the rule to be if any part of the consideration be *malum in se*, or the good and the void consideration be so mixed, or the contract so entire, that there can be no apportionment. (*b*)[2]

IV. *Of the contract of sale.*

A sale is a contract for the transfer of property from one person to another, for a valuable consideration; (*c*) and three things are requisite to its validity, viz: the thing sold, which is the object of the contract, the price, and the consent of the contracting parties. (*d*)[3]

(*a*) Best, J., in Biddell *v.* Leeder, 1 B. & Cress. 327.

(*b*) Scott *v.* Gillmore, 3 Taunt. Rep. 226. Lord Kenyon, in Mouys *v.* Leake, 8 Term Rep. 411. Hinde *v.* Chamberlin, 6 N. H. Rep. 225. Frazier *v.* Thompson, 2 Watts & Serg. 235.

(*c*) Sir William Blackstone defines a sale to be "a transmutation of property from one man to another, in consideration of some price or recompense in value." 2 Com. 446. Ross, in his Treatise on the Law of Purchasers and Vendors, adopts the same definition, and I take this occasion to recommend that work of Mr. Ross as a learned and faithful performance. It is republished in this country as part of the 12th volume of the Law Library, edited by Thomas I. Wharton, Esq., a most valuable series of publications to the profession.

(*d*) Pothier, Traité du Contrat de Vente, n. 3. Bell's Prin. L. S. sec. 85, 90-92.

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ormer case, held, that a contract, part of which was void by the statute of frauds, might be apportioned, and the rule that, if part of a contract is void *by statute*, the whole is void, was repudiated. Beard *v.* Dennis, 6 Indiana, 200.

1 Tilson *v.* Hinces, 5 Barr's R. 452. Morris *v.* Way, 16 Ohio R. 469.

2 It has been repeatedly held, that a contract for doing an act, in violation of a statute imposing a *penalty*, though containing no *express* prohibition of the act, but enacted as a security against *fraud* or *immorality*, and not merely for the purpose of revenue, is *void*. The courts will not uphold a transaction which disregards such statute provisions. Cundell *v.* Dawson, 4 M. G. & Scott's R. 376. Ritchie *v.* Smith, 6 Id. 462. Griffith *v.* Wells, 3 Denio's R. 226. Territt *v.* Bartlett, 21 Vt. R. 184. Brackett *v.* Hoyt, 9 Fost. 264. But see Hill *v.* Smith, Morris, R. 70. Lewis *v.* Welch, 14 N. H. R. 294. Ellis *v.* Higgins, 32 Me. 34. Stanley *v.* Nelson, 28 Ala. 514.

A contract in violation of a merely local or municipal law is equally void as if in violation of a statute of universal application. Beman *v.* Tugnot, 5 Sandf. S. C. R. 153. Harris *v.* Runnels, 12 How. U. S. 80.

3 Mr. Justice Wayne has defined a *sale* "to mean at all times a contract between parties, to give and to pass rights of property for money; which the buyer pays, or promises to pay, to the seller, for the thing bought or sold." Williamson *v.* Berry, 8 How. U. S. 544. Noy's Max. ch. 42. Shep. Touch. 244.

(1.) The thing sold must have an actual or potential existence, (*a*) and be specific or identified, and capable of delivery, otherwise it is not strictly a contract of sale, but a *special* or executory agreement. (*b*) If the subject-matter of the sale be in existence, and only constructively in the possession of the seller, as by being in the possession of his agent or carrier abroad, it is nevertheless a sale, though a conditional or imperfect one,

(*a*) It is sufficient that the thing contracted for has a potential existence; and a single hope or expectation of means founded on a right *in esse*, may be the object of sale, as the next cast of a fisherman's net, or fruits or animals not yet in existence, or the good-will of a trade. But a mere possibility or contingency, not coupled with any interest in, or growing out of property, as a grant of the wool of the sheep the grantor may thereafter buy, or the expectancy of an heir apparent, is void as a sale.[1] Dig. 18, 1, 8. Pothier, Cont. de Vente, n. 5, 6. Plowd. Rep. 13 a. Grantham *v.* Hawley, Hob. Rep. 132. Harg. Co. Litt. lib. 1, n. 363, S. C. Robinson *v.* Macdonnell, 5 Maule & Selw. 228. Com. Dig. tit. Grant, D. Carleton *v.* Leighton, 3 Meriv. 667. See *infra*, vol. iii. 64. See also *infra*, p. 504. A covenant to pay out of future profits of an existing office is good. Clapham *v.* Moyle, 1 Lev. Rep. 155 Mr. Bell, in his Principles of the Law of Scotland, p. 30, (a work very comprehensive but admirably condensed,) states that the hope of succession may be the subject of sale; but in the case from Merivale, Lord Eldon held, that such an expectancy could not be the subject of assignment or contract. Reversionary interest and expectancies, founded on settlements and entailments, are the subject of sale, as, see *post*, 475; but a mere hope, where there is no existing right sustaining the expectation, as where the ancestor is seised in fee simple, with a power of alienation and devise, is not the subject of a valid sale. But see *post*, 475, n. c. A bill or note, or inland bill of exchange, is not the subject of sale, unless it be such a security in the hands of the seller that he could sue on it at maturity.[2] Powell *v.* Waters, 8 Cowen, 689. Cram *v.* Hendricks, 7 Wend. 589. Munn *v.* Commis. Company, 15 Johnson, 44. But *foreign exchange* in the hands of the drawer is a subject of traffic and sale — a commodity bought and sold like merchandise. *Bankers' drafts* are also existing things in action, and subject to the like traffic. The drawer sells his foreign bill as money or funds abroad. His credit abroad is to the payee equivalent to cash, and the bill of exchange is the instrument of transfer. The commission charge on the transfer is part of the price of the sale, and not usurious. Holford *v.* Blatchford, 2 Sandford's Ch. Rep. 149.

(*b*) Rondeau *v.* Wyatt, 2 H. Blacks. 63. Mucklow *v.* Mangles, 1 Taunt. Rep. 318, Groves *v.* Buck, 3 Maule & Selw. 178.

[1] A bill of sale of existing property, with a power to the purchaser to seize *future crops*, passes no title to the latter until the vendee actually takes possession. When he does so, however, the property vests in him against an execution creditor. Congreve *v.* Evetts, 26 E. L. & Eq. 493. Hope *v.* Hayley, 34 Ib. 189.

[2] An assignment of a ship, and all oil and cargo which might be caught or brought home in said ship, is a valid assignment in equity, as well of the future cargo to be taken during the voyage, as of the cargo, if any, existing at the time. Langton *v.* Horton, 1 Hare's R. 549.

depending on the future actual delivery. (*a*)[1] But if the article intended to be sold has no existence, there can be no contract of sale. Thus, if A. sells his horse to B., and it turns out that

(*a*) Boyd *v.* Siffkin, 2 Campb. Rep. 326. Withers *v.* Lyss, 4 Idem, 237. In the civil law, ownership in the seller *at the time of the contract* was not essential to its validity. Dig. 15, 1, 1, 57. Heinecc. Elem. Jur. Secund. Ord. Inst. lib. 3, tit. 24, sec. 905. Pothier, Contrat de Vente, n. 7. In Bryan *v* Lewis, Ryan & Moody, 386, Lord Tenterden ruled, that if goods be sold to be delivered at a future day, and the seller has not the goods, nor any contract for them, nor any reasonable expectation of receiving them by consignment, but intends to go into the market and buy them, it was not a valid contract. It was a mere wager on the price of the commodity. This is contrary to the rule at law, as suggested by Lord Chanceller Parker, in Cud *v.* Rutter, 1 P. Wms. 570. The observation of Lord Tenterden, in this case, is said to be a mere *dictum*, and unsupported by any other case. Wells *v.* Porter, 3 Scott, 141. In this last case in the C. B., it was held, that time bargains in foreign funds were not illegal or void at common law; and in Hibblewhite *v.* M'Morine, 5 Meeson & W. 462, the decision of Lord Tenterden, in Bryan *v.* Lewis, was completely overruled. Mr Bell says, that where the distinction exists between sale as a transfer of property and sale as a contract, as in the civil law, Holland, Scotland, &c., a thing which belongs to another may be the subject of sale, and the seller must make good the contract, or answer in damages. But that in England and America, as a sale is a transfer of property, it cannot exist as to property not belonging to the seller at the time. Bell on the Contract of Sale, Edin. 1844, pp. 26, 27. In France, by the Code Civil, No. 1616, on a contract of sale of goods which can be purchased in the market, the seller is bound to fulfil the contract. By the N. Y. Revised Statutes, 3d edit. vol. i. 892, in order to prevent stock-jobbing, it is declared that all contracts, written or verbal, for the sale or transfer of stocks, are void, unless the party contracting to sell be, at the time, in the actual possession of the evidence of the debt or interest, or otherwise entitled in his own right or with due authority to sell the same;[2] and all wagers upon the price of stock are void.[3] The English statute of 7 Geo. II. c. 8, was made to prevent stock-jobbing, and which the statute termed an infamous practice. The discussions in the English courts on this statute have been many and interesting, and the operation of the statute made subject to important distinctions. An agreement to transfer stocks for a valuable consideration to be paid, though the seller was not at the time actually possessed of, or entitled to the stock, in his own right, has been held not to be within the statute, which only applied to fictitious sales of stocks. Mortimer *v.* M'Callan, 6 Meeson & Welsby, 58. S. C. 7 Id. 20. 9 Id. 636.

[1] There is no implied contract that the vendee shall pay the vendor for anything done to the article previous to delivery. Cole *v.* Kerr, 20 Vt. R. 21.

[2] It has been decided, in Massachusetts, that a sale, by a pledger of stocks, of which the pledgee holds the certificates, but which the pledger is authorized to sell, is not within the New York Statute, cited in the note, *supra*. Thompson *v.* Alger, 12 Met. R. 428.

[3] These sections of the Revised Statutes were repealed by chap. 134 of the Laws of 1858, and it was enacted that contracts for the sale of stock shall not be void or voidable because the party contracting to sell is not the owner or possessor of the stock.

the horse was dead at the time, though the fact was unknown to the parties, the contract is necessarily void. So if A., at New York, sells to B. his house and lot in Albany, and the house should happen to have been destroyed by fire at the time, and the parties are *equally ignorant of the *469 fact, the foundation of the contract fails, provided the house, and not the ground on which it stood, was the essential inducement to the purchase. (*a*)[1] The civil law came to the same conclusion on this point. (*b*) But if the house was only destroyed in part, then if it was destroyed to the value of only half or less, the opinion stated in the civil law is, that the sale would remain good, and the seller would be obliged to allow a ratable diminution of the price. Pothier thinks, however, (*c*) that in equity the buyer ought not to be bound to any part or modification of the contract, when the inducement of the contract had thus failed; and this would seem to be the reasoning of Papinian, from another passage in the Pandects, (*d*) and it is certainly the more just and reasonable doctrine. The Code Napoleon (*e*) has settled the French law in favor of the opinion of Pothier, by declaring, that if part of the thing sold be destroyed at the time, it is at the option of the buyer to abandon the sale, or to take the part preserved, on a reasonable abatement of price; and, I presume, the principles contained in the English and American cases tend to the same conclusion, provided the inducement to the purchase be thereby materially affected.

Where the parties had entered into an agreement for the sale and purchase of an interest in a public house, which was stated to have had eight years and a half to come, and it turned out on examination that the vendor had an interest of only six years in the house, Lord Kenyon ruled, (*f*) that the buyer had a right

(*a*) Dig. 18, 1, 57. Pothier, Cont. de Vente, n. 4. Hitchcock *v.* Giddings, 4 Price's Rep. 135. S. C. Daniell's Exch. Rep. 1. Story's Com. on Eq. Jurisprudence, 157. Allen *v.* Hammond, 11 Peters's U. S. Rep. 63.

(*b*) Dig. 18, 1, 57.

(*c*) Traité du Contract de Vente, n. 4.

(*d*) Dig. 18, 1, 58. (*e*) No. 1601.

(*f*) Farrer *v.* Nightingale, 2 Esp. Rep. 639.

[1] Strickland *v.* Turner, 14 E. L. & Eq. 471. Couturier *v.* Hastie, 16 Id. 562. 20 Id. 533. 38 Id. 8.

to consider the contract at an end, and recover back any money which he had paid in part performance of the agreement for the sale. The buyer had a right to say it was not the interest he had agreed to purchase. So, in another case, and upon *470 the same principle, *Lord Eldon held, (a) that if A. purchased a horse of B., which was warranted sound, if it turned out that he was unsound, the buyer might keep the horse, and bring an action on his warranty for the difference of the value; or he might return the horse, and recover back the money paid; though if he elected to pursue that course, he must be prompt in rescinding the contract. (b) There are other cases, however, in which it has been held, (c) that it was no defence at law to a suit on a note or bill, that the consideration partially failed, by reason that the goods sold were of an inferior quality, unless clear fraud in the sale be made out; and the courts refer the aggrieved party to a distinct and independent remedy. But if a title to a part of the chattels sold had totally failed, so as to defeat the object of the purchase, as if A. should sell to B. a pair of horses for carriage use, and the title to one of them should fail, it is evident, from analogous cases, that the whole purchase might be held void even in a court of law. In case of a sale of several lots of real property at auction, the purchaser purchased three lots, and paid the deposit money, but the title to two of the lots failed, and Lord Kenyon ruled, (d) that it was one entire contract; and if the seller failed in making title to any one of the lots, the purchaser might rescind the contract and refuse to take the other lots. The same principle was advanced in the case of *Judson* v. *Wass*, (e) which was the

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(a) Curtis v. Hannay, 3 Esp. Rep. 82.

(b) Buller, J., 1 Term Rep. 136; and in Compton v. Burn, Esp. Dig. 13.

(c) Morgan v. Richardson, 1 Campb. N. P. Rep. 40, n. Fleming v. Simpson, Ibid. Tye v. Gwynne, 2 Idem, 346.

(d) Chambers v. Griffiths, 1 Esp. Rep. 150.

(e) 11 Johns. Rep. 525. There are conflicting cases on this point; but in the English law the better opinion seems to be, that if a purchaser contracts for the entirety of an estate, and a good title can only be made to a part of it, the purchaser will not be compelled to take it. This was the decision in Roffey v. Shallcross, 4 Madd. Ch. Rep. (227,) 122, Phil. ed., and in Dalby v. Pullen, 3 Simons's Rep. 29. In Cassamajor v. Strode, (1 Cooper's Sel. Ca. 510, 8 Conden. Ch. Rep. 516, S. C.) Lord Chancellor Brougham said, that the decision of Lord Kenyon, in Chambers v.

purchase of several lots of land; and the purchaser was held to be entitled to have a perfect title according to contract, without any incumbrance, or he might disaffirm the sale, and recover back his deposit. (*a*)

(2.) On the subject of the claim to a completion of the purchase, or to the payment or return of the consideration-money, * in a case where the title or the essential qualities of part of the subject fail, and there is no charge of fraud, the law does not seem to be clearly and precisely settled; and it is difficult to reconcile the cases, or make the law harmonize on this vexatious question. The rules on this branch of the law of sales are in constant discussion, and of great practical utility, and they ought to be distinctly understood. It would seem to be sound doctrine, that a substantial error between the parties concerning the subject-matter of the contract, either as to the nature of the article, or as to the consideration, or as to the security intended, would destroy the consent requisite to its validity. (*b*) [1] The principles which govern the subject, *471

Griffiths, was not sound doctrine, and was contradicted by the cases of James *v.* Shore, 1 Starkie, 426, and Roots *v.* Dormer, 4 Barnew. & Adol. 77. He further said, that Lord Eldon, in the note to Roffey *v.* Shallcross, carried the rule too far the other way. The principle laid down by Lord Brougham as the medium one was, that the purchaser was not to be let off from his contract for one lot, on the ground that the title to the other was bad, unless it appeared from the circumstances that the two lots were so connected that the purchaser would not have bought, except in the expectation of possessing both lots.

(*a*) If a party has entered into a contract by the fraud of the other party, he may on discovering the fraud, and on the earliest notice, rescind the contract and recover whatever he has advanced, on offering to do whatever be in his power to restore the other party to his former condition. Masson *v.* Bovet, 1 Denio, 69.

(*b*) Thornton *v.* Kempster, 5 Taunt. Rep. 786. Several cases on the same subject, and in support of the doctrine in the text, are referred to in 1 Bell's Com. 242, 295, *in notis*, as having been decided in the Scotch courts. By the Civil Code of Louisiana, art. 2496–2519, a redhibitory action is provided for the avoidance of a sale, on account of some vice or defect in the thing sold, which renders it either absolutely useless, or its use so inconvenient and imperfect that it must be supposed that the buyer would not have purchased it had he known of the vice. Where a fact in the

[1] Sheldon *v.* Capron, 3 R. I. 171. In this case, an auctioneer knocked off lot No. 25 to a bidder who supposed it to be No. 24; and it was held that nothing passed for want of agreement between the parties.

as to defects in the quality or quantity of the thing sold, require a more extended examination; and they are the same in their application to sales of lands and chattels.

In the case of a purchase of land, where the title in part fails, the court of chancery will decree a return of the purchase-money, even after the purchase has been carried completely into execution, by the delivery of the deed and payment of the money, provided there had been a fraudulent misrepresentation as to the title. (a) But if there be no ingredient of fraud, and the purchaser is not evicted, the insufficiency of the title is no ground for relief against a security given for the purchase-money, or for rescinding the purchase, and claiming restitution of the money. The party is remitted to his remedies at *472 law on his covenants to *insure the title. (b) In *Frisbee* v. *Hoffnagle*, (c) the purchaser, in a suit at law upon his note given to the vendor for the purchase-money, was allowed to show in his defence, in avoidance of the note, a total failure of title, notwithstanding he had taken a deed with full covenants, and had not been evicted. But the authority of that case and the doctrine of it were much impaired by the Supreme Court in Maine, in a subsequent case, founded on like circumstances; (d)

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sale of land is equally unknown to both parties, or each has equal information, or the act is doubtful from its own nature, and the parties have acted in good faith, equity will not interpose. McCobb *v.* Richardson, 24 Maine R. 82.

(a) Edwards *v.* M'Leay, Cooper's Eq. Rep. 308. Fenton *v.* Browne, 14 Ves. 144.

(b) Abbott *v.* Allen, 2 Johns. Ch. Rep. 519. Barkhamsted *v.* Case, 5 Conn. Rep. 528. Banks *v.* Walker, before Ass. V. Ch., 2 Sandford's Ch. R. 344. In Brown *v.* Reves, 19 Martin's La. Rep. 235, it was held, that so long as the buyer is in the peaceable and undisturbed possession of the thing sold, he cannot withhold payment, on the plea of a want of title in the vendor. By the civil law, also, a purchaser in possession could not rescind the contract, nor prosecute the vendor, on the ground of no title. Code, lib. 8, tit. 45, 1, 3. Pothier, Traité du Contrat de Vente, art. Prelim.

(c) 11 Johns. Rep. 50.

(d) Lloyd *v.* Jewell, 1 Greenleaf's Rep. 352. See also Wrinkle *v.* Tyler, 15 Martin's La. Rep. 111. In Tallmadge *v.* Wallis, 25 Wendell, 117, the chancellor supposed that the Supreme Court of New York, in Frisbee *v.* Hoffnagle, erred in the application of a correct principle to the case, because it did not appear that there was a total failure of consideration, as there was no eviction. It was conceded by him, that on a total failure of title in a conveyance of land, and when no interest or possession passed, that fact was a good plea in bar of a suit on the bond given for the purchase-money.

and they were afterwards in a degree restored, by the doubts thrown over the last decision by the Supreme Court of Massachusetts, in *Knapp* v. *Lee*. (*a*) The same defence was made to a promissory note in the case of *Greenleaf* v. *Cook*, (*b*) and it was overruled on the ground that the title to the land, for the consideration of which the note was given, had only partially failed; and it was said, that to make it a good defence in any case, the failure of title must be total. This case at Washington is contrary to the defence set up and allowed, and to the principle established, in the case of *Gray* v. *Handkinson*; (*c*) but it seems to be supported by the case of *Day* v. *Nix*, (*d*) where it was decided, by the English court of C. B., that a partial failure of the consideration of a note was no defence, provided the quantum of damages arising upon the failure was not susceptible of definite computation. (*e*) *The cases are in opposition to each other, and they leave the *473

(*a*) 3 Pick. Rep. 452. But the case of Frisbee *v.* Hoffnagle has been virtually overruled in Vibbard *v.* Johnson, 19 Johnson, 77, and is not now regarded as authority. See Whitney *v.* Lewis, 21 Wendell, 132, 134.

(*b*) 2 Wheaton, 13.

(*c*) 1 Bay's Rep. 278.

(*d*) 9 Moore's Rep. 159.

(*e*) It seems to be now settled in the New York decisions, that on a partial failure of a consideration on a sale, the defendant may *recoupe* his damages, on a breach of the plaintiff's contract of warranty. Reab *v.* McAlister, 8 Wendell, 109. Still *v.* Hall, 20 Id. 51. Batterman *v.* Pierce, 3 Hill, 171. The *recoupement* is not as a set-off but allowed to avoid circuity of action, and it is founded on the plainest principles of justice. Goodwin *v.* Morse, 9 Metcalf, 279. Under the N. Y. R. S. vol. ii. 406, sec. 77, the defendant may *recoupe* in an action upon a sealed as well as upon an unsealed instrument. He may avail himself, by way of *recoupement* in case of fraud by misrepresentation on the part of the vendor. Van Epps *v.* Harrison, 5 Hill, N. Y. R. 63. The equitable doctrine of *recoupement* is of recent origin, and is well calculated to save litigation. It is a question whether evidence by way of *recoupement*, can be received under the general issue without notice with the plea. The majority of the court held that it could not in Barber *v.* Rose, 5 Hill's N. Y. Rep. 76. In Sedgwick on the Measure of Damages, ch. 17, the more modern and liberal doctrine of set-off or *recoupement* of damages in reduction of the plaintiff's claim, is considered quite at large, and the numerous cases are ably reviewed and criticized. The doctrine of set-off, or the compensation of one debt for another, came from the courts of equity, who were in possession of the doctrine long before the courts of law interfered, and it was first introduced with the statute of 5 Geo. II. The doctrine was borrowed from the doctrine of compensation of the civil law. Dig. 16, 2, de Compensationibus. The set-off was confined at law to *mutual debts*, but the statutes of bank-

question, how far and to what extent a failure of title will be a good defence, and between the original parties to an action for the consideration-money on a contract of sale, in a state of painful uncertainty. (*a*) I apprehend that in sales of land, the technical rule remits the party back to his covenants in his deed; and if there be no ingredient of fraud in the case, and the party has not had the precaution to secure himself by covenants, he has no remedy for his money, even on a failure of title. This is the strict English rule, both at law and in equity; and it applies equally to chattels, when the vendor sells without any averment of title, and without possession. (*b*) In sales of chattels, the purchaser cannot resist payment in cases free from fraud, while the contract continues open and he has possession. But in this country the rule has received very considerable relaxation. In respect to lands, the same rule has been considered to be the law in New York; (*c*) while, on the other hand, in South Carolina, their courts of equity will allow a party suffering by the failure of title, in a case without warranty, to recover back the purchase-money, in the sale of real as well as of personal estates. (*d*)

In cases where the consideration had totally failed, the English courts have admitted that fact to constitute a good defence between the original parties to a bill of exchange; though a

rupts embraced *mutual credits*, and which, *ex vi termini*, imported unliquidated damages, and this more liberal practice was adopted in chancery. Grove *v.* Dubois, 1 Term, 112. *Ex parte* Deeze, 1 Atk. 228. James *v.* Kynnier, 5 Vesey, 108. Duncan *v.* Lyon, 3 Johnson's Ch. Rep. 351. T. C. & D. Railroad Co. *v.* Rhodes, 8 Alabama R. N. S. 206. In the case of Whitbeck *v.* Skinner, 7 Hill, N. Y. R. 53, the defendant was admitted to set up by way of *recoupement* an adverse claim under the same agreement, to save needless suits.

(*a*) The general rule in the English law is, that the partial failure of performance by one party to a contract, for which there may be a compensation in damages, does not authorize the other party to put an end to it. Franklin *v.* Miller, 4 Adolph. & Ellis, 599.

(*b*) Tanfield, Ch. Baron, in Roswel *v.* Vaughan, Cro. Jac. 196. Medina *v.* Stoughton, 1 Salk. Rep. 210. Bree *v.* Holbech, Doug. Rep. 654. Lord Alvanley, in Johnson *v.* Johnson, 3 Bos. & Pull. 170. Urmston *v.* Pate, cited in Sugden's Law of Vendors, 3d edit. 346, 347, and in 4 Cruise's Dig. 390, (Eng. edit.) and in Cooper's Eq. Rep. 311. 1 Fonb. 366, n.

(*c*) Frost *v.* Raymond, 2 Caines's Rep. 188. Abbot *v.* Allen, 2 Johns. Ch. Rep. 523. Gouverneur *v.* Elmendorf, 5 Johns. Ch. Rep. 84.

(*d*) Tucker *v.* Gordon, 4 Desauss. 53, 58.

partial failure of the consideration is no defence. (a) But with us, a partial as well as total failure of the * consid- *474 eration may be given in evidence by the maker of a note, to defeat or mitigate, as the case may be, a recovery. (b) [1] In Indiana, by statute, 1831, in actions upon specialty or other contract, excepting conveyances of real estate, and paper negotiable by the law merchant, the defendant may allege the want or failure of consideration, in whole or in part. He may allege fraud or breach of warranty; and if he shows that the article was of no value, or had been returned or tendered, he destroys the action. (c) In North Carolina, a total failure of consideration may be given in evidence in a suit on a promissory note, though a partial failure cannot, and the relief is by a distinct suit. (d) In equity, as well as at law, the defendant, for the purpose of preventing circuity of action, may show, by way of defence, in order to lessen or defeat the recovery, a total or partial failure of consideration, as the case may be, when sued for the consideration of a sale, or upon the security given for the purchase-money. (e) In Illinois, by statute, a want of title in the vendor of lands may be set up by the vendee on the note given for the purchase-money, as a failure of the consideration. (f) So, the true value of articles sold may be shown in

(a) Morgan v. Richardson, 1 Camph. N. P. Rep. 40 n. Tye v. Gwynne, 2 Idem, 346. Mann v. Lent, 10 Barnew. & Cress. 877.

(b) Hills v. Bannister, 8 Cowen's Rep. 31. Sill v. Rood, 15 Johnson, 230. Payne v. Cutler, 13 Wendell, 605. Cook v. Mix, 11 Conn. Rep. 432. Revised Statutes of Illinois, edit. 1833, p. 484. See *sup.* pp. 472–3 n.; the cases from 8 and 20 Wendell and 3 Hill. In Johnson v. Titus, 2 Hill's Rep. 606, mere *inadequacy* of consideration, without warranty or fraud, is no defence to a promissory note; but *entire want* of consideration is a defence to any executory contract. But again, in Scudder v Andrews, 2 McLean's C. C. Rep. 464, it was held, upon what was deemed the weight of authority, that a total failure of consideration was a good defence to a promissory note between the original parties, though a partial failure would not be a defence.

(c) Wynn v. Hiday, 2 Blackf. Ind. Rep. 123. In Georgia, by statute of 1836, partial failure of consideration in any contract may be given in evidence.

(d) Washburn v. Picot, 3 Dev. Rep. 390. See *supra*, pp. 472–3, note.

(e) Lewis v. Wilson, 1 Edw. N. Y. Ch. Rep 305.

(f) Mason v. Wait, 4 Scammon, 127. The law allows a total or partial failure of

[1] In Vermont, the maker cannot avail himself of such partial failure, unless he has offered to rescind the contract. Burton v. Schermerhorn, 21 Vt. R. 289.

reduction of the price, even on a note given, as between the original parties, in cases of sales with warranty, or fraudulent representation, though the article has not been returned; and this is allowed to avoid circuity of action. (*a*) In Louisiana, the failure of consideration, either in whole or in part, in a contract of sale, has been held to be a defence as far as it goes; on the principle that matters which diminish, as well as those which destroy the demand, may be pleaded in defence of the suit. (*b*)

consideration, in every note or instrument for the payment of money or property, to be set up as a defence. The object of the Act is to prevent a multiplicity of actions. Duncan *v.* Charles, Id. 561.

(*a*) M'Alister *v.* Reab, 4 Wendell's Rep. 483. S. C. 8 Idem, 109. Miller *v.* Smith, 1 Mason's Rep. 437. Steigleman *v.* Jeffries, 1 S. & Rawle, 477. Beecker *v.* Vrooman, 13 Johnson, 302. See, also, to the same point, Street *v.* Blay, 2 B. & Adolph. 456; Poulton *v.* Lattimore, 9 B. & Cress. 259; Pearson *v.* Wheeler, Ryan & Moody, 303; Harrington *v.* Stratton, 22 Pick. Rep. 510. In this last case, the authorities *pro* and *con.* were extensively examined.[1] In the two cases of Street *v.* Blay, and of Poulton *v.* Lattimore, it is settled, that where an article is warranted, and the warranty not complied with, the vendee may refuse to receive the article at all, or he may receive it, and bring a cross action for the breach of the warranty, or, without bringing a cross action, he may use the breach of the warranty in reduction of the damages, in an action by the vendor for the price. There is a very learned discussion and citation of authorities under the case of Cutter *v* Powell, 6 Term, 320, in Smith's Leading Cases, Law Library, N. S. vol. xxviii. on the vexed question as to the remedy on special contracts, remaining in part unperformed. To the accumulation of English cases, the learned American editors of the Law Library have given also a view of the American cases on the same subject. In Ferguson *v.* Huston, 6 Missouri Rep. 407, it was held, after an elaborate examination of the authorities, that defect or unsoundness in a chattel sold cannot be set up in bar of a recovery on a note given for such chattel, unless the vendee, on the discovery of such defect or unsoundness, returns, or offers to return the chattel, or shows it to be valueless In the learned opinion of the dissenting judge it was held, that the retention of the chattel, in a case of fraud or breach of warranty, was no waiver of the purchaser's right of defence on these grounds, by way of mitigation of damages, and to prevent circuity of action. If, however, he meant to rescind the contract for the fraud or defect, there must then have been shown a return, or tender of a return of the article.

(*b*) Evans *v.* Gray, 12 Martin's La. Rep. 475, 647. But in Fulton *v.* Griswold, 7 Martin's La. Rep. 223, it was held, that the vendee of land could not refuse payment of the price, nor could he require surety from the vendor until suit brought to evict him. And it seems now to be settled in South Carolina, that, on a sale of land, a defect of title in the vendor is no defence at law to a suit on the note given for the consideration-money, so long as the purchaser remains in possession under an equitable title. Carter *v.* Carter, 1 Bailey's Rep. 217. Bordeaux *v.* Cave, Ibid. 250. Westbrook *v.* M'Millan, Ibid. 259.

[1] See, also, Cook *v.* Castner, 9 Cush. 266.

The discovery by the vendee, before payment, of incumbrances, is also held, in Pennsylvania, to be a valid defence, in a suit for the purchase-money, to the amount of the incumbrance, whether there existed a general or special warranty. (*a*) The defendant may, by way of defence, show a breach of warranty as to the articles sold, without either returning them, or giving notice to the vendor to take them away. (*b*) In Virginia, it was provided by statute, in 1830, that a defendant might allege, by way of plea, not only fraud in the consideration or procurement of any contract, but any such failure in the consideration thereof or any such breach of warranty of the title or soundness of personal property, as would entitle the defendant, in any form of action, to recover damages at law, or to relief in equity. The rule in Ohio is, that the fraud must go to the whole consideration, or the payment of a note cannot be avoided at law, upon the ground of fraud. (*c*) This is also the law in Kentucky ; and a plea going only to a part of the consideration is bad. (*d*)

* There has been much discussion and diversity of *475 opinion on the subject of rescinding and of enforcing the specific performance of contracts, in the cases of partial failure of the consideration. In one case, (*e*) Lord Kenyon observed, when sitting in chancery, that the court had gone great lengths in compelling parties to go on with purchases, contrary

(*a*) Christy *v.* Reynolds, and Tod *v.* Gallagher, 16 Serg. & Rawle, 258, 261.

(*b*) Steigleman *v.* Jeffries, 1 Idem, 477.

(*c*) Harlan *v.* Read, 3 Ohio R. 285.

(*d*) Delany *v.* Vaughn, 3 Bibb's Rep. 379. Wallace *v.* Barlow, Ibid. 168. The rule in South Carolina in respect to warranty of title, both as to real and personal property, is thoroughly discussed and stated by Mr. Justice Earle, in Moore *v.* Lanham, 3 Hill's S. C. Rep. 299. In regard to the construction of the warranty of title, there is no difference between real and personal property. Every covenant of general warranty of title is held to be a covenant of seisin, and the vendee may bring covenant on the warranty, or resist an action for the price, without actual eviction, and whether there has been a partial or a total failure of consideration. A total or partial failure in regard to title, as well as a total or partial failure in regard to soundness, will avail a purchaser of personal property as a valid defence, when sued for the purchase-money, to the same extent, in the same form, and upon the same principles, as the like failure would avail a purchaser of real estate. The jurisprudence of South Carolina is thus rendered free from embarrassing distinctions on this subject, by the comprehensiveness, simplicity, and certainty of the rule.

(*e*) Pool *v.* Shergold, 1 Cox's R. 273.

to their original agreement and intention; but he said a case might be made out sufficient to put an end to the whole contract, when the seller could not make a good title to part of the subject sold. In the case of the Cambridge Wharf, the seller made title to all the estate but the wharf, and that part of the land was the principal object of the buyer in making the purchase, and the buyer who had contracted for the house and wharf was compelled to complete the purchase without the wharf. But, as Lord Kenyon truly observed, that was a determination contrary to all justice and reason. There have been a number of hard cases in chancery, (*a*) and in which performance has been enforced, though there was a material variance between the actual and supposed circumstances of the subject, and when those circumstances were wanting which were the strong inducement to the contract. These cases had gone to such extravagant lengths, that Lord Erskine declared (*b*) he would not follow them, nor decree specific performance, when the main inducement to the purchase had failed. In many cases, however, where the title proves defective in part, or to an extent not very essential, specific performance will be decreed, with a ratable deduction of the purchase-money, by way of compensation for the deficiency. (*c*)

(*a*) Several cases of that kind are alluded to by Lord Eldon, in 6 Ves. 678; and see also, Oldfield *v.* Round, 5 Idem, 508.

(*b*) Halsey *v.* Grant, 13 Ves. 78. Stapylton *v.* Scott, Ibid. 426.

(*c*) Milligan *v.* Cooke, 16 Ves. 1. King *v.* Bardeau, 6 Johns. Ch. Rep. 38. Smith *v.* Tolcher, 4 Russell's Rep. 305. Soule *v.* Heerman, 5 La. Rep. 358. See a statement of the difficulties on this subject by the master of the rolls, in Thomas *v.* Dering, 1 Keen. 729. Sales by an heir apparent, of expectancies or reversionary interests, will be set aside when the consideration is inadequate, and advantage was taken of his necessities. Earl of Portmore *v.* Taylor, 4 Simon's Rep. 182. Gibson *v.* Jeyes, 6 Vesey, 266 Peacock *v.* Evans, 16 Vesey, 512. Gowland *v.* De Faria, 17 Idem, 20. Addis *v.* Campbell, 4 Beavan, 401, S. P. See, in Lord Aldborough *v.* Trye, 7 Clar. & Finn. 436 the observations of Lord Cottenham, on the case of Gowland *v.* De Faria, relative to the value of expectancies. The sale of the expectation of an heir of an inheritance in real as well as personal estate, will be supported in chancery, if made *bonâ fide* and for a valuable consideration. This was so declared by the assistant vice-chancellor, in Varick *v.* Edwards, 1 Hoffman's Ch. Rep 383, 395–405, after an elaborate examination of authorities. *Post*, vol. iv. 261, S. P. So, the release by an heir apparent of his estate in expectancy, with the consent of the ancestor, on a valid consideration, with a covenant of warranty running with the land, is good and

The good sense and equity of the law on this subject is, that if the defect of title, whether of lands or chattels, be so *great as to render the thing sold unfit for the use intended, and not within the inducement to the purchase, *476 the purchaser ought not to be held to the contract, but be left at liberty to rescind it altogether. This is the principle alluded to by Pothier, and repeated by Lord Erskine and Lord Kenyon. (a) In South Carolina it has been held, that if the deficiency in the quantity of land be so great as to defeat the object of the purchase, the vendee may rescind the bargain; and if the defects were not so great as to rescind the contract entirely, there might be a just abatement of price; and this doctrine applies equally to defects in the quantity and quality of land, and for unsoundness and defects in personal property. (b) The same principle was declared in Pennsylvania, in the case of *Stoddart* v. *Smith*, (c) on a contract for the purchase of land. If there be a failure of title to part, and that part appears to be so essential to the residue that it cannot reasonably be supposed the purchase would have been made without it, as in the case of the loss of a mine, or of water necessary to a mill, or of a valuable fishery attached to a parcel of poor land, and by the loss of which the residue of the land was of little value, the contract may be dissolved *in toto*. But the court in the last case limited very much the right of rescinding a contract for a partial failure of title; for if the sale was of lots in different parts of a city, it was not dissolved by the failure of title to some of the lots, not adjoining or particularly connected with the others, nor essential to their use or enjoyment. (d) It is to be regretted

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effectual at law. Coburn v. Hollis, 3 Metcalf's Rep. 125. In Scotland, an agreement for the sale of a future or expected inheritance is lawful. Stair's Institutions, by More, vol. i. note 1, p. 63.

(a) This principle was expressly recognized, after a full and elaborate discussion of the subject, by the Court of Errors and Appeals in Mississippi, in Parkham v. Randolph, 4 How. U. S. 435.

(b) Pringle v. Witten, 1 Bay's Rep. 256. Gray v. Handkinson, Ibid. 278. Glover v. Smith, 1 Desaus. 433. Wainwright v. Read, Ibid. 573. Tunno v. Fludd, 1 M'Cord's Rep. 121. Marvin v. Bennett, 8 Paige, 312.

(c) 5 Binney's Rep. 355, 363.

(d) Where a farm was sold in gross or by its boundaries, and neither party knew the precise quantity conveyed, and the deed contained the words *more or less*, and

that the embarrassment and contradiction which accompany the English and American cases on this subject cannot be relieved by the establishment of some clear and definite rule, like that declared in France, which shall be of controlling influence and universal reception. (*a*)

* 477 * (3.) The price is an essential ingredient in the contract of sale; and it must be real, and not merely nominal and fixed, or be susceptible of being ascertained in the mode prescribed by the contract, without further negotiation between the parties. *Pretium constitui oportet, nam nulla emptio sine pretio esse potest.* (*b*)

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the quantity was afterwards ascertained to be *less* than the parties supposed, the Court of Chancery refused to interfere for the relief of the purchaser, the transaction being fair and honest, and the deficiency small. Marvin *v.* Bennett, 8 Paige's Rep. 312.[1]

(*a*) The rule in chancery, upon the principle of equitable conversion, is to consider that which was agreed to be done as done, if the execution of the agreement would be lawful and just. In pursuance of this doctrine, the purchase-money of lands, contracted to be sold during the life of the testator, is treated as personal estate. Baden *v.* Countess of Pembroke, 2 Vern. Rep. 212. Lawes *v.* Bennett, 1 Cox, 167. *Vide supra*, p. 230, n. *b*.

(*b*) Inst. 3, 24, 1. Dig. 18, 1, 2. Pothier, du Cont. de Vente, part 1, art. 2, n. 18. Brown *v.* Bellows, 4 Pick. 189 Bell on the Contract of Sale, Edin. 1844, p. 18. But if the price be not fixed, yet after delivery of the goods the contract of sale is deemed valid, and the purchaser must pay for their reasonable value. Acebal *v.* Levy, 10 Bingham, 382. Hoadly *v.* M'Laine, Ib. 482. Bell, *ub. supra*, 20. Inadequacy of price, independent of other circumstances, is no ground for relief in equity, against a bargain, unless it be so gross or excessive as to afford a necessary presumption of fraud. imposition, undue influence, or want of a reasonable judgment. Osgood *v.* Franklin, 2 Johns. Ch. Rep. 23, 24. The opinions of Sir Thomas Clarke, Lord Thurlow, Lord Ch. B. Eyre, Lord Eldon, and Sir William Grant, were all referred to in the case cited in support of that position. See also, to the same effect, Copis *v.* Middleton, 2 Madd. Ch. Rep. 410. Butler *v.* Haskell, 4 Des. S. C. Eq. Rep. 651. Glenn *v.* Clapp, 11 Gill & Johnson, 1. By the civil law, a sale for one half the value might be set aside for inadequacy; and Lord Nottingham, in Nott *v.* Hill, 2 Ch. Cas. 120, observed, that he wished it were so in England. If the price of the purchase was less than one half the value, the inequality was deemed in the civil law *enormis læsio*, and relief was afforded. This is the rule also in Louisiana. Copley *v.* Flint, 1 Rob. La. Rep. 125. At law the rule is more stern, and a promise or obligation cannot

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[1] Where a cargo of corn was sold to arrive, "the quantity to be taken from the bill of lading," and payment was made according to the bill, the purchaser was not allowed to recover a part of the price on the ground of deficiency in the cargo on arrival. Covas *v.* Bingham, 22 E. L. & Eq. 183.

(4.) Mutual consent is requisite to the creation of the contract; and it becomes binding when a proposition is made on one side and accepted on the other;[1] and on the other hand, it is no contract if there be an error or mistake of a fact, or in circumstances going to the essence of it. This is a clear principle of universal justice. *Non videntur qui errant consentire.* (*a*) In creating the contract the negotiation may be conducted by letter, as is very common in mercantile transactions; and the contract is complete when the answer containing the acceptance of a distinct proposition is despatched by mail or otherwise, provided it be done with due diligence, after the receipt of the letter containing the proposal, and before any intimation is received that the offer is withdrawn. Putting the answer by letter in the mail containing the acceptance, and thus placing it beyond the control of the party, is valid as a constructive notice of acceptance. An offer by letter, or by a special agent, is an authority revokable in itself, but not to be revoked without notice to the party receiving it, and never after it has been executed by an acceptance. There would be no certainty in making contracts through the medium of the mail, if the rule were otherwise. (*b*)[2] On the other hand, it has been

be defeated, in whole or in part, on the ground of the inadequacy of the consideration. The slightest consideration is sufficient to support the most onerous obligation. The consideration may be impeached only by showing fraud, mistake, or illegality in its concoction, or non-performance of the stipulations on the part of the promisee. Oakley *v.* Boorman, 21 Wendell, 588. See also Story's Com. on Eq. Jurisprudence, 248–254.

(*a*) Pothier on Oblig. p. 1, c. 1, No. 17, 18. Thornton *v.* Kempster, 5 Taunton, 786. Hammond *v.* Allen, 2 Sumner, 395, 399.

(*b*) Adams *v.* Lindsell, 1 Barn. & Ald. 681. Chiles *v.* Nelson, 7 Dana, 281. The distinctions on this subject are refined and subtle. In Mactier *v.* Frith, 6 Wendell's

[1] Whether want of mutuality in a contract may be taken advantage of by third persons, see Hartly *v.* Cummings, 5 M. G. & S. R. 247. If a contract contains a stipulation for the benefit of a third person, though he be an *entire stranger* to the contract, it is not at the option of either party to object to it, without the consent of the other. Davenport *v.* Bishop, 2 Y. & Coll. Cas. in Ch. 451. A contract for sale of lands, executed by vendor only, but delivered to and accepted by the purchaser, and acted upon by him, can be enforced against vendor, and want of mutuality is no defence. Worrall *v.* Munn, 1 Selden, R. 229.

[2] The doctrine of the text is fully sustained by a late case in the *Supreme Court* of the United States, and Mactier *v.* Frith, and Adams *v.* Lindsell, *supra, in notis,* approved.

held, that if A. makes an offer to B., and gives him a specified time for an answer, A. may retract before the offer is accepted,

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Rep. 103, an offer to sell made by letter, was standing and held open for acceptance at the time it was accepted, and the contract was then consummated, though the knowledge of the concurrence of wills, when the acceptance was made, was not known to the party who wrote the letter, and though he died *before notice* of the acceptance, by answer to the letter, was received, but after the time of acceptance. The offer may be deemed to stand open for acceptance until it is expressly, or by presumption, withdrawn. So, also, in Brisban *v.* Boyd, 4 Paige's Rep. 17, where A. wrote to his factor, proposing to ship to him cotton on joint account; the agent, on receipt of the letter, gives notice of his assent, and it was held, that as soon as the agent so replied, and the letter was transmitted, the contract was complete, and mutually binding. Merlin states this case in the French courts. A. writes to B. and offers to buy articles on certain conditions. B. writes an answer in the morning, and accepts the offer. He writes a second letter in the evening of that day, that he cannot accede to the offer exactly, according to all the conditions. Both answers are received by A. at the same instant, and it was held that A. was not bound by the offer, as the second letter did away the force of the first. Répertoire, tit. Vente, sec. 1, art. 3, note 11. But in the case of M'Culloch *v.* The Eagle Insurance Co. 1 Pick. Rep. 278, A. wrote by mail to B. to inquire on what terms he would insure a vessel; B. wrote an answer on 1st January, that he would insure at a certain rate; on 2d January he wrote another letter, retracting; A., before he received the last letter, wrote by mail an answer to B.'s first letter, acceding to the terms, and it was held there was no contract, and that the treaty was open until B. had received the letter of A. If A., who makes the proposal, should die or become *non compos* before his letter is received and assented to, the assent is void, because there is no concurrence of wills at the time. Pothier, Traité du Cont. de Vente, No. 32. *Vide infra,* p. 646. The better opinion of the French jurists seems to be, that as soon as an offer by letter is accepted, the consent is given, and the contract complete, although the acceptance had not been communicated to the party by whom the offer was made, provided the party making the offer was alive when the offer was accepted. Pothier, Tr. de Vente, n. 32. Duvergier, Tr. de la Vente, 6, 1, 60; and though Merlin & Toullier are of a contrary opinion, yet against them may be cited Wolf, part 3, sec. 715, and the de-

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Tayloe *v.* The Merch. Fire Ins. Co. 9 How. R. 390. The Palo Alto, Ware J., Daveis's Dist. Rep. 357. Hamilton *v.* Lycoming Ins. Co. 5 Barr's, 339. Levy *v.* Cohen, 4 Geo. R. 1. Dunlop *v.* Higgins, 1 House of Lords Cases, 381. S. C. N. Y. Legal Obs'r, Dec. 1848, (vi. 459.) This latter case, as well as some of those cited above, go the full length of the reasoning, and hold that the acceptance, though by delay or accident the letter of acceptance does not arrive at the usual time, and the goods have, in the mean time been sold to a third person, is still good and binding. So if the acceptance be by letter, within a time limited, though the agent receiving the letter do not communicate until a long time after. Wright *v.* Bigg, 21 E. L. & Eq. 591. So, if the acceptance never arrives, the contract is still binding. Vassar *v.* Camp, 14 Barb. 341. S. C. 1 Kern. 441. An inquiry in the acceptance how remittances in payment shall be made, does not so qualify the acceptance as to leave the contract still open. Clark *v.* Dales, 20 Barb. 42.

on the ground that until both parties are agreed, it is no contract, and either of them has a right to recede, and one party cannot be bound without the other. (*a*)

*V. *Of implied warranty of the articles sold.* *478

In every sale of a chattel, if the possession be at the time in another, and there be no covenant or warranty of title, the rule of *caveat emptor* applies, and the party buys at his peril. (*b*) But if the seller has possession of the article,[1] and he sells it as his own, and not as agent for another, and for a fair price,[2] he is understood to warrant the *title*. (*c*) A fair price

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cisions *supra*. The case of M'Culloch *v.* The Eagle Ins. Co. 1 Pick. 283, has been questioned as a valid authority by Mr. Duer, the learned author on Marine Insurance, vol. i. pp. 67, 116-131. His criticisms appear to be just, and his reasoning conclusive. He vindicates the decision of the K. B. in Adams *v.* Lindsell with great force, and it has received a very strong support from the able opinion of Mr. Justice Marcy, in Mactier *v.* Frith, in the New York Court of Errors, in 6 Wendell, 104.

(*a*) Payne *v.* Cave, 3 Term Rep. 148. Cooke *v.* Oxley, Ibid 653. Rutledge *v.* Grant, 4 Bing. Rep. 653. Gravier *v.* Gravier, 15 Martin's La. Rep. 206. But, see *supra*, p. 236, and *infra*, p. 510, for exceptions to the general rule that both parties must be bound, or neither can be. The good faith and justice of the case would lead to the conclusion that if A., who makes the offer, gives B. a specified time to accept, and he accepts within the time, it becomes a valid contract, and A. is bound by his offer, which left it optional in B. to accept or reject the offer within the time. The criticisms which have been made upon the case of Cooke *v.* Oxley, are sufficient to destroy its authority.

The Roman law gave an action to one who did any thing proper and beneficial to the estate of another, who was absent and ignorant of it; and it went on the ground of a positive benefit conferred, and of the equity of not permitting one man to profit by the labor of another without compensation. Dig. 3, 5, 2. The Supreme Court in Louisiana has followed this principle. Police Jury *v.* Hampton, 17 Martin's La. Rep. 398. But there is no principle in the English law which would support such an action for compensation, on the footing of a contract. See *infra, ad finem*, as to the effect of death on the validity of a contract not already consummated.

(*b*) Tanfield, Ch. Baron, Cro. Jac. 197. Holt, Ch. J., Medina *v.* Stoughton, 1 Salk. Rep. 210. If, however, the seller affirms the chattel not in his possession to be his, Mr. Justice Buller thinks he is bound to answer for the title, for the vendee has nothing else to rely upon, if the property was out of possession. Buller, J., in Pasley *v.* Freeman, 3 Term Rep. 57, 58. There is good sense and equity in the observation.

(*c*) Medina *v.* Stoughton, 1 Ld. Raym. 523. 1 Salk. Rep. 210. Adamson *v.*

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[1] McCoy *v.* Artcher, 3 Barb. S. C. Rep. 323. Where one bought an article at a sheriff's sale, and upon an offer sold *his bargain*, it was held there was no warranty of *title*. Chapman *v.* Speller, Law Journal Rep. B. p. 230, July, 1850.

[2] But a *fair price* raises no implied warranty of *quality*. Moses *v.* Mead, 1 Denio's R.

implies a warranty of title; and the purchaser may have a satisfaction from the seller, if he sells the goods as his own, and the title proves deficient.[1] This was also the rule of the civil law in all cases, whether the title wholly or partially failed. (a) With regard to the *quality* or goodness of the article sold, the seller is not bound to answer, except under special circumstances, unless he expressly warranted the goods to be sound and good, or unless he hath made a fraudulent representation, or used some fraudulent concealment concerning them, and which amounts to a warranty in law. The common law very reasonably requires the purchaser to attend, when he makes his contract, to those qualities of the article he buys, which are supposed to be within

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Jarvis, 12 J. B. Moore, 241. Crosse *v.* Gardner, Carth. Rep. 90. An affirmation by the vendor at the time of the sale, amounts to a warranty, if so intended. Medina *v.* Stoughton, *sup.* Buller, J., 3 Term, 57. Swett *v.* Colgate, 20 Johns. 196. On a sale of goods, *with warranty*, the seller must make good to the letter of the warranty; but on a simple representation, if he had no reason to suspect his representation to be untrue, he is not responsible. The *scienter* is the gist of the action. Ormrod *v.* Huth, 14 Mees. & Welsby, 651.

(a) Dig. 21, 2, 1. By the civil law there was an implied warranty that the article sold was sound; and if not, and was unfit for the purpose intended, the vendee might return it, and rescind the sale and recover back the price, though the vendor might exempt himself from liability by stipulation in cases free from fraud. Pothier, Cont. de Vente, No. 184.

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378. Mixer *v.* Coburn, 11 Met. R. 559. This is the general and long established rule of the common law; but the rule of the civil law, which is otherwise, prevails in South Carolina as well as in Louisiana. Timrod *v.* Shoolbred, 1 Bay's R. 324. 2 Idem, 19. Crawford *v.* Wilson, 2 S. C. Const. R. 353. Fuentes *v.* Caballero, 1 La. An. R. 27. Ibid. 122. On the sale of a land warrant there is an implied warranty of its validity. Presbury *v.* Morris, 18 Mis. 165. *Vide post*, p. 480.

[1] In Morley *v.* Attenborough, 3 Wels. H. & Gor. R. 500, it was held, that where a pawnbroker sells goods as forfeited, there is no implied warranty of title, and the vendor is not liable, unless there be an express warranty or an equivalent by declaration or conduct. But a warranty may be inferred from a usage of trade, or from the nature of the trade, leading to the conclusion that the vendor engaged that the purchaser should enjoy what he purchased; as where articles are bought in a shop for the sale of goods.

Baron Parke supposes that the English law is not exactly coincident with the American on the subject of implied warranty of title on the sale of personal property. See the note of the American editors as to the rule in this country, where the doctrine of the text (*supra*) is sustained. See further, Dresser *v.* Ainsworth, 9 Barb. R. 619.

Although in judicial sales there is no warranty of title, (The Monte Allegre, 9 Wheat. 644, Puckett *v.* U. S., 19 L. Reporter, 18,) yet, in a sale by government of goods captured in war, there is an implied warranty of title to the purchaser. Port *v.* U. S. (Court of Claims) 19 L. Reporter, 12.

the reach of his observation and judgment, and which it is equally his interest and his duty to exert. This distinction between the responsibility of the seller as to the title, and as to the quality of goods sold, is well established in the English and American law. (a) In *Seixas* v. * *Wood*, (b) the rule *479 was examined and declared to be, that if there was no express warranty by the seller, or fraud on his part, the buyer, who examines the article himself, must abide by all losses arising from latent defects, equally unknown to both parties; and the same rule was again declared in *Swett* v. *Colgate*. (c) There is no

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(a) 2 Blacks. Com. 451. Bacon's Abr. tit. Action on the Case, E. Comyn on Contracts, part 3, ch. 8. Doug. Rep. 20. Parkinson *v.* Lee, 2 East's Rep. 314. Defreeze *v.* Trumper, 1 Johns. Rep. 274. Johnston *v* Cope, 3 Harr. & Johns. 89. Wilson *v* Shackleford, 4 Randolph's Rep 5. Dean *v.* Mason, 4 Conn. Rep. 428. Boyd *v.* Bopst, 2 Dall. Rep. 91. Emerson *v.* Brigham, 10 Mass. Rep. 197. Swett *v.* Colgate, 20 Johns. Rep. 196. Kinmel *v.* Lichty, 3 Yeates's Rep. 262. Ritchie *v.* Summers, Ibid. 534. Willings *v.* Consequa, 1 Peters's C. C. Rep. 317. 12 Serg. & Rawle, 181, Tilghman, Ch. J. Chism *v.* Woods, Hard. Ken. Rep. 531. Lanier *v.* Auld, 1 Murphey's Rep. 138. Erwin *v.* Maxwell, 3 Idem, 241. Westmoreland *v.* Dixon, 4 Heywood's Tenn. Rep. 227. Barrett *v.* Hall, 1 Aiken's Rep. 269. M'Farland *v.* Newman, 9 Watts, 55. Law Reporter, vol. ii. p. 301. Towell *v.* Gatewood, 2 Scammon's Rep. 22. Maney *v.* Porter, 3 Humph. Tenn. R. 347. If one buys, says Heineccius, (Elem. Juris. Nat. et Gentium, b. 1, ch. 13, sec. 352, note.) any thing at a certain price, which he hath not seen nor sufficiently examined, his error ought to fall on himself, if the seller used no guile to deceive him.

(b) 2 Caines's Rep. 48. Welsh *v.* Carter, 1 Wendell's Rep. 185. Chandelor *v.* Lopus, Cro. J. 4, S. P. This last case is condemned in Bradford *v.* Manly, 13 Mass. Rep. 139. The case of Chandelor *v.* Lopus was that A. sold to B. a stone, which he affirmed to be a Bezoar stone, and which was not one; and it was held that no action lay, unless A. knew it was not a Bezoar stone, or warranted it to be one. This doctrine is so far qualified at this day that the action will lie, if it appears that the affirmation at the time of the sale was *intended* to be a warranty, or that A., from circumstances was to be *presumed* cognizant of the falsehood of the representation. What circumstances or facts will support or imply the inference of an *intention* to warrant or deceive, has opened a wide field for discussion. In Henshaw *v.* Robins, 9 Metcalf's Rep. 86, the subject was learnedly discussed, and the celebrated case of Chandelor *v.* Lopus, and the New York decision in Seixas *v.* Wood, brought under the eye of criticism. It was declared in the Massachusetts case, to be well settled law there, that on a sale of goods, with *a bill of parcels describing or clearly designating the goods sold*, there is a warranty that the goods are as described or designated in the bill; and the cases of Bradford *v.* Manly, 13 Mass. 139, Hastings *v* Lovering, 2 Pick. 214, Osgood *v.* Lewis, 2 Harr. & Gill, 495, Borrekins *v.* Bevan, 3 Rawle, 23, Batturs *v.* Sellers, 5 Harr. & Johns. 117, and 6 H. and J. 249, were referred to as containing that doctrine.

(c) 20 Johns. Rep. 196. A bare representation and no warranty as to goods sold,

doubt of the existence of the general rule of law, as laid down in *Seixas* v. *Wood;* and the only doubt is, whether it was well applied in that case, where there was a description in writing of the article by the vendor which proved not to be correct, and from which a warranty might have been inferred. But the rule fitly applies to the case where the article was equally open to the inspection and examination of both parties, and the purchaser relied on his own information and judgment, without requiring any warranty of the quality; and it does not reasonably apply to those cases where the purchaser has ordered goods of a certain character, and relies on the judgment of the seller, or goods of certain described quality are offered for sale, and when delivered, they do not answer the description directed or given in the contract. They are not the articles which the vendee agreed to purchase; and there is an implied warranty that the article shall answer the character called for, or be of the quality described, and salable in the market, and under that denomination. (*a*) When goods are discovered not to an-

will not afford an action, if the vendor believes the representation to be true in fact. Stone *v* Denney, 4 Metcalf's R. 151.[1]

(*a*) Laing *v*. Fidgeon, 6 Taunt. Rep. 108. Tindal, Ch. J., in Brown *v*. Edgington, 2 Manning & Granger. 279, 290. Weall *v* King, 12 East's Rep. 452. Gardiner *v*. Gray, 4 Camph. N. P. Rep. 144. Bridge *v*. Waine, 1 Stark. N. P. Rep. 104. Hastings *v*. Lovering, 2 Pick. Rep. 214. Woodworth, J., in Swett *v*. Colgate, 20 Johns. Rep. 204 Hyatt *v*. Boyle, 5 Gill & Johnson, 110. Osgood *v*. Lewis, 2 Harr. & Gill, 495. Borrekins *v*. Bevan, 3 Rawle's Rep. 23. The recent English cases of Gray *v*. Cox, and Jones *v*. Bright, (4 Barnew & Cress. 108; 5 Bing. 533, 3 M. & P. 155,) give countenance to the more extended doctrine of the civil law, that on the sale of an article there is an implied warranty that it is merchantable, or fit for the purpose declared. The progress of the new English doctrine, which raises, on a fair sale of an article of goods or merchandise, the implied warranty that it is *merchantable*, or *fit for the purpose intended*, is worth attending to. In Jones *v*. Bowden, (4 Taunt. Rep. 847,) the warranty was implied from the custom of the trade. In Laing *v*. Fidgeon, (6 Taunt. Rep. 108,) it was implied, that in the sale of manufactured goods they should be merchantable, or fit for some purpose.[2] In Gray *v*. Cox, (4 Barnew. & Cress. 108,) Lord Tenterden held, that if a commodity be sold for a particular purpose,

[1] But where the vendor, at the time of sale, affirms a fact as to the qualities of his goods, on the faith of which affirmation the purchaser buys, this is a warranty. Bryant *v*. Crosby, 40 Maine, 9. Sweet *v*. Bradley, 24 Barbour, (N. Y.) 549. Randall *v*. Thornton, 43 Maine, 226.

[2] It was so held in Brown *v*. Murphee, 31 Mississippi, (2 George,) 91.

swer * the order given for them, or to be unsound, the *480 purchaser ought immediately to return them to the ven-

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there was an implied warranty that it should be reasonably fit for that purpose.[1] Lord Ellenborough, in Bluett v. Osborne, 1 Starkie's Rep. 384, expressed himself to the same effect; and in Jones v. Bright, (5 Bingham's Rep. 533,) and Shepherd v. Pybus, (3 Manning & Granger, 868,) the court of C. B. established the same doctrine. The rule is not universally applied, but it approaches very near to the establishment of an implied warranty in every case. As yet it is the *usage of trade*, the *manufactured* goods, or the *specific purpose*, that raises the warranty. But the principle would apply equally to the sale of a horse for a particular purpose, as for a carriage, or to carry a female; and some of the American cases have taken hold of the new English doctrine, and shown a disposition to domesticate it. Thus, in Osgood v. Lewis, (2 Harr. & Gill, 495,) and in Van Bracklin v. Fonda, (12 Johns. Rep. 468,) and in Moses v. Mead, 1 Denio's Rep. 378, and by Cowen, J., in Hart v. Wright, 17 Wendell, 267, it was held, that on the sale of provisions for immediate domestic use, there was an implied warranty that they were wholesome; but if provisions be sold as merchandise, and not for immediate consumption, there is no implied warranty of soundness.[2] Ibid. In Gallagher v. Waring, (9 Wendell's Rep. 20,) it was held, that on a sale of cotton in bales, without sample or examination, and when the inspection of the article was equally accessible, and its quality equally unknown to both parties, there was an implied warranty that the article was merchantable. So, in the case of Harmony v. Wager, (N. Y. Superior Court, April, 1836,) on a sale by a commission merchant, of barilla, it was held, that as the defendant had not an opportunity (the article being in bales, and its intrinsic merits equally unknown to both parties) to examine the *bulk* of the article sold, he was entitled to expect a merchantable article; and that having bought, with the knowledge of the seller, the article for a particular purpose, he was entitled to an article which would answer for that purpose. These last cases go quite as far at least as any of the English cases, and trench deeply upon the plain maxim of the common law, *caveat emptor;* and I cannot but think that the old rule, and the old decisions down to that of Seixas v. Wood, were the safest and wisest guides; and that the new doctrine carried to this extent, will lead to much difficulty and vexatious litigation in mercantile business. In Hart v. Wright, 17 Wendell, 267, Judge Cowen learnedly reviews the cases on the subject, and the conclusion of the court is justly and spiritedly in favor of the old rule of the common law, in contradiction to the rule of the civil law, and he says it is the American doctrine, and emphatically so in New York. Ch. J. Bronson, in Moses v. Mead, 1 Denio, 385, is of the same opinion.[3] On a general sale of merchandise for a sound price, there is no implied warranty

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[1] It was so held in Walton v. Cody, 1 Wisc. 420. And see Babcock v. Trice, 18 Ill. 420.

[2] In Burnby v. Bollett, 16 M. & W. 644, the defendant bought provisions of a dealer, and, before taking them away, sold them to the plaintiff. They turned out to be unfit for use and a suit was brought on the implied warranty. It was held, after a thorough examination of the authorities, that the doctrine of implied warranty in the sale of provisions applied only to *common dealers* therein, and was founded, not on the principles of the common law, but on certain ancient statutes.

[3] Affirmed in the Court of Errors, 5 Denio's R. 617.

dor, or give him notice to take them back, and thereby rescind the contract; or he will be presumed to acquiesce in the quality

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that the article is fit for merchantable or manufacturing purposes. A warranty is not raised by a sound price alone, except under peculiar circumstances, as where there is a written description as to kind or quality, or goods of a certain description are contracted for, or perhaps in some other peculiar cases. So, again, in the case of Waring *v.* Mason, 18 Wendell, 425, the Chancellor and Mr. Senator Paige expressed themselves decidedly in favor of the common-law doctrine; and in the case of Wright *v.* Hart, in error from the Supreme Court to the Court of Errors, (Ibid. 449,) Chancellor Walworth and Mr. Senator Tracy, gave a strong sanction to the argument of Judge Cowen, in support of the common-law doctrine of *caveat emptor*, and the rule of the civil law was rejected. The common law on this point is now reinstated in the jurisprudence of New York. Ch. J. Gibson, also, in the Pennsylvania case of M'Farland *v.* Newman, September, 1839, Law Reporter, ii. 301, 9 Watts's Rep. 55, supports this common-law doctrine of *caveat emptor*, on the sale of chattels, in cases without fraud, misrepresentation, or warranty, understandingly made, with distinguished strength and success. In South Carolina, (as, see *infra*, p. 481.) the prior doctrine of the English law is adhered to in a case analogous to the one in New York. In the London Law Magazine, No. 7, this subject is fully and ably discussed. Again, the Supreme Court of New York, in Howard *v.* Hoey, 23 Wendell's Rep. 350, has strongly enforced the distinction between executed and executory contracts. It has declared, that in a contract of sale of an article of merchandise *at a future day*, where there is no selection or setting apart at the time of specific articles, so as to pass the property *in præsenti*, *merchantable quality*, bringing the average market price, is intended. In the case of an *executed* sale, an express warranty of quality is necessary to bind the vendor in the absence of fraud. Moses *v.* Mead, 1 Denio, 378. But if the sale be *executory*, or to deliver an article not defined at the time, on a future day, there is an implied warranty that the article shall be at least of medium quality or goodness. The rule, in such a case, of *caveat venditor*, and not *caveat emptor*, governs. If the thing comes short of being merchantable, it may be returned after the vendee has had reasonable time to inspect it. "Suitableness," says the court, "enters into every promise to deliver articles of manufacture." In this case the court seems to relax from the severity of the doctrine in 17 and 18 Wendell, and to repose upon the modern and milder English rule. It is to be regretted that the rule (whatever it may be) concerning the application of implied warranties in the sale of personal property, is not more certain and stable. In Sutton *v.* Temple, 12 Meeson & Welsby, 52, it was held, after much discussion, that on *a demise of land* simply for pasture of cattle for a certain term, at a fixed rent, there was no implied warranty that the pasture should be fit for that purpose, though where a contract was for a specific chattel, for a specific purpose, there was an implied obligation that it should be fit for that purpose. Hart *v.* Windsor, 12 Meeson & W. 68, S. P. Sedgwick on Damages, pp. 289–300, has collected the cases on the rule of damages on warranties contained in sales, and they are in perplexing contrariety; and the masterly writers on the civil law, to whom Mr. Sedgwick refers, leaves us in equal difficulty, and without any certain guide or definite rule. Id. pp. 300–307.[1]

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[1] See further, as to implied warranty of manufactured goods, Getty *v.* Rountree, 2

of the goods. (a) In the case of a breach of warranty, he may sue upon it without returning the goods;[1] but he must return them and rescind the contract in a reasonable time, before he can maintain an action to recover back the price. (b)[2] He

(a) Fisher v. Samuda, 1 Campb. N. P. Rep. 190.

(b) Fielder v. Starkin. 1 H. Blacks. Rep. 17. Weston v. Downes, Doug. Rep. 23. Towers v. Barrett, 1 Term Rep. 133. Curtis v. Hannay, 3 Esp. Rep. 82. Kellogg v. Denslow, 14 Conn. Rep. 411. Patteshall v. Tranter, 4 Neville & Manning, 649. 3 Adolphus & Ellis, 103, S. C. In this last case the decision in Fielder v. Starkin, that an action will lie on a breach of warranty of soundness of a horse sold, though it be not returned, and though notice of the unsoundness be delayed, was held to be sound law. Franklin v. Long, 7 Gill & Johnson, 407. Boorman v. Jenkins, 12 Wendell's Rep. 566. Waring v. Mason, 18 Wendell, 426. To the same purpose it has been held that if the chattel had a defect fraudulently concealed, the vendee has his election either to keep it, and sue for damages, or to return, or offer to return it within a reasonable time, and rescind the contract. Hoggins v. Becraft, 1 Dana's Ken Rep 30. The vendor, after notice that the horse warranted sound is unsound, and when an offer is made to return him, and the vendee sells him, is answerable for the difference of price, and the keep of the horse for a reasonable time. Chesterman v. Lamb, 4 Neville & Manning, 196. In Street v. Blay, 2 Barnew. & Adolph. 456, it was held that the vendee could not rescind the sale and return the property if the sale was without fraud. Cowen, J, in Cary v. Gruman, 4 Hill, 625, S. P. He has only an action on his warranty, Sedgwick on Damages, p. 290; and it is now well settled, he observes, Id. p. 290, that the rule of damages is the difference between the actual value and the value the article would have possessed if it had conformed to the warranty. As to the *measure of damages* on breaches of contract, it seems not to be explicitly settled whether in the case of a horse sold and warranted sound, which proves to have been unsound, and is resold by the buyer at a reduced price, the measure of damages is to be the difference between the original price and the price the horse sold for, or between the price the horse sold for and the value of the horse, if sound, going far beyond the original price. The *dictum* of Lord Eldon, in Curtis v. Hannay, 3 Esp. 82, is in favor of the actual value of the horse, if sound, at the

Chandl. 28. Brown v. Sayles, 1 Wms. 227. Bull v. Robison, 28 E. L. & Eq. 586. The rule of *caveat emptor* in the case of goods sold for a specific purpose without express warranty is ably maintained in Dickson v. Jordan, 11 Ired. 166. The custom of a trade was not allowed in evidence of warranty in Wetherill v. Neilson, 20 Penn. 448, nor of a sale by sample in Beirne v. Dord, 1 Seld. 95: and in Carson v. Baillie, 19 Penn 375, it was held that, where there was inspection of the article sold, no warranty could be implied from a bill of parcels.

[1] He may so do, although the vendor engages that the article may be returned, if it does not fulfil the contract. Douglass Axe Manufacturing Co. v. Gardner, 10 Cush. (Mass.) 88.

[2] If he has refused to accept the goods on account of breach of warranty, but has sold a portion before discovery of the breach, so that he cannot restore them to the vendor on demand, he is liable for their market value at the time of demand. Shields v. Pettie, 4 Const. 122.

cannot deal with the article purchased after discovery of fraud in a sale, without losing his right of action. (*a*) An offer to return the chattel in a reasonable time,[1] on breach of warranty,

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resale; but Lord Loughborough, in Fielder *v.* Starkin, 1 H. Blacks. 17, is in favor of the value, as ascertained by the original agreement, and this would seem to be in harmony with the rule of damages on the covenant of warranty in the sale of land.[2] The general rule is well settled, that in a suit by vendee for a breach of contract on the part of the vendor, for not delivering an article sold, the measure of damages is the price of the article *at the time of the breach.* The contract price, on the one hand, and the rise subsequent to the breach, are both to be disregarded. Mr. Sedgwick, in his Treatise on the Measure of Damages, p. 266, says, that in this place the author of the Commentaries appears to have overlooked the distinction running through the cases, resulting from the payment of the price *beforehand,* and which distinction is, that if the price be not advanced beforehand, the measure of damages is the value of the article contracted for at the time it was to be delivered, but if the price be previously advanced, the contract price is not the rule of damages, but the highest value of the article at the time of trial. The cases that declare or countenance this distinction are Shepherd *v.* Johnson, 2 East, 211. M'Arthur *v.* Seaforth, 2 Taunt. 257. Downes *v.* Back, 1 Starkie, 318. Harrison *v.* Harrison, 1 Carr. & P. 412 Gainsford *v.* Carroll, 2 B & Cress. 624. West *v.* Wentworth, 3 Cowen, 82. Clark *v.* Pinney, 7 Id. 681. The cases in opposition to the distinction, either expressly or impliedly, are Gray *v.* Portland Bank, 3 Mass. Rep. 364. Swift *v.* Barnes, 16 Pick. 194. Gilpins *v.* Consequa, 1 Peters's C. C. U. S. Rep. 85. Bush *v.* Canfield, 2 Conn. Rep. 485. Wells *v.* Abernethey, 5 Conn. Rep. 222. Startup *v.* Cortazzi, 2 Cr. Mees. & Roscoe, 165. Blydenburgh *v.* Welsh, Baldwin's Rep. 331. Smethurst *v.* Woolston, 5 Watts & Serg. 106. Vance *v.* Tourne, 13 Louis. Rep. 225. The learned author is mistaken in supposing I had overlooked that distinction. These commentaries are not calculated to embody all the nice, or arbitrary, or fanciful distinctions that are to be met with in the reports. I do not regard the distinction alluded to as well founded or supported. It is disregarded or rejected by some of the best authorities cited. The true rule of damages is the value of the article at the time of the breach, or when it ought to have been delivered.[3] Mr. Sedgwick seems himself to come to that conclusion amid the contrariety of opinion and cases which he cites. Treatise, pp. 260–280. This is the plain, stable, and just rule within the contract of the par-

(*a*) Campbell *v.* Fleming, 1 Adolph. & Ellis, 40. A party defrauded in a contract has his choice of remedies. He may stand to the bargain, and recover damages for the fraud, or he may rescind the contract, and return the thing bought, and receive back what he paid or sold.

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[1] See Muller *v.* Eno, 3 Duer, 421.

[2] Woodward *v.* Thatcher, 21 Vermt. R. 580, adopts the rule, as expressed by Lord Eldon, Thornton *v.* Thompson, 4 Gratt. 121.

[3] Whitney *v.* Allaire, 1 Comst. R. 305. Kingsbury *v.* Smith, 13 N. Hamp. 109. Giles *v.* O'Toole, 4 Barb. S. C. Rep. 261. N. Y. & H. R. Co. *v.* Story, 6 Idem, 419. Beals *v.* Terry, 2 Sandf. (Law) R. 127. Freeman *v.* Clute, 3 Barb. S. C. Rep. 424.

is equivalent in its effect upon the remedy, to an offer accepted by the seller, and the contract is rescinded, and the vendee can sue for the purchase-money in case it has been paid. (a) But a contract cannot be rescinded without mutual consent if circumstances be so altered by a part execution that the parties cannot be put *in statu quo;* for if it be rescinded at all, it must be

ties. Damages for breaches of contract are only those which are incidental to, and directly caused by, the breach, and may reasonably be supposed to have entered into the contemplation of the parties, and not speculative profits, or accidental or consequential losses, or the loss of a fancied good bargain.[1] Walker *v.* Moore, 10 B. & C. 416. In Masterton *v.* Mayor of Brooklyn, 7 Hill, 62, the question of damages was well discussed, and it was held that profits or advantages which were regarded as the direct and immediate fruits of the contract, are to be considered as parcel and elements of the contract, and to be allowed. See also Hayden *v.* Cabot, 17 Mass. Rep. 169. Deyo *v.* Waggoner, 19 Johns. Rep. 241. Sedgwick's Treatise, pp. 81-88. 6 Toullier, sec. 286. Flureau *v.* Thornhill, 2 Blacks. Rep. 1078. Williams *v.* Barton, 13 La. Rep. 404. Blanchard *v.* Ely, 21 Wendell, 342. But Lord Ch. J. Denman, in Cox *v.* Walker, cited in a note to Clare *v.* Maynard, 6 Adolph. & Ellis, 519, and also in the last case, laid down the rule of damages to be, the difference between the value of a horse at the sale, considering him to be sound, and the value with the defect complained of, and not the difference between the price of the first purchase and of the actual sale. So, in Shannon *v.* Comstock, 21 Wendell, 457, it was held, that in an action to recover damages for non-performance of a contract, the rule of damages was held to be the loss sustained and not the price agreed to be paid on actual performance. In Cary *v.* Gruman, 4 Hill, 625, the rule as declared by Lord Denman was adopted and the price paid was only *prima facie* evidence of the then value. In O'Conner *v* Forster, 10 Watts's Rep. 418, on a breach of contract to carry wheat from P. to Philadelphia, the difference between the value of the wheat at P. with the freight added, and the market price at Philadelphia, at the time it would have arrived there, if carried according to contract, is the measure of damages.[2] Bracket *v.* M'Nair, 14 Johnson, 170. Davis *v.* Shields, 24 Wendell's Rep. 322, to S. P. In Badgett *v.* Broughton, 1 Kelly, 591, the rule declared by the Supreme Court in Georgia was the difference between the price paid for an article warranted sound, and the value of the article in its unsound condition.

(a) Thornton *v.* Wynn, 12 Wheaton, 183.

[1] Giles *v.* O'Toole, *supra.* Lawrence *v.* Wardwell, 6 Barb. S. C. Rep. 423. Waters *v.* Towers, 20 E. L. & Eq. 410. The rule of damages on sale of goods is said, in West *v.* Pritchard, 19 Conn. R. 212, to be the value at the time the contract was broken, except when the goods were paid for in advance, or on the sale of stocks, when, if they have risen in value, the purchaser may recover the value at time of trial.

[2] Thompson *v.* Alger, 12 Met. R. 428. Camp *v.* Pulver, 5 Denio's R. 48. Comstock *v.* Hutchinson, 10 Barb. 211. Reggio *v.* Braggiotti, 7 Cush. 166. Marshall *v.* Wood, 16 Ala. 806. Foster *v.* Rogers, 27 Ala. 602. But see Wilson *v.* Little, 2 Comst. R. 443. As to the effect on the measure of damages of fraud, malice, or gross carelessness on the part of the vendor, see Sharon *v.* Mosher, 17 Barb. 518.

rescinded *in toto.* (a) The parties to a contract may rescind it at any time before the rights of third persons have intervened; but a resale of the disputed articles does not of itself rescind the contract, or destroy the right to damages for non-performance of the contract, to the extent of the loss in a resale, provided the same be made after default and due notice. (b) [1] If the sale be absolute, and the contract remains open and unrescinded, and without any agreement to rescind, the vendee of the unsound article must resort to his warranty, unless it be proved that the vendor knew of the unsoundness, and the vendee tendered a return of the article within a reasonable time. (c) [2]

In South Carolina and Louisiana, the rule of the civil law has been followed, and, as a general rule, a sale for a sound price is understood to imply a warranty of soundness *481 against all faults and defects. (d) * The same rule was for many years understood to be the law in Connecticut; but if it did ever exist, it was entirely overruled in *Dean* v. *Mason*, (e) in favor of the other general principle which has so extensively pervaded the jurisprudence of this country. Even in South Carolina, the rule that a sound price warrants a sound commodity, was said to be in a state of vibration; and it is not applied to assist persons to avoid a contract, though made for an inadequate price, provided it was made under a fair opportunity of information as to all the circumstances, and when there was no fraud, concealment, or latent defect. (f)

(a) Hunt v. Silk, 5 East's Rep. 449.

(b) Sands & Crump v. Taylor, 5 Johns. Rep. 395. Maclean v. Dunn, 4 Bing. Rep. 722.

(c) Thornton v. Wynn, 12 Wheaton, 183.

(d) Timrod v. Shoolbred, 1 Bay's Rep. 324. Whitefield v. M'Leod, 2 Idem, 380. Lester v Graham, 1 Const. Rep. S. C. 182. Crawford v. Wilson, 2 Idem, 353. Dewees v. Morgan, 1 Martin's La. Rep. 1.

(e) 4 Conn. Rep. 428.

(f) Whitefield v. M'Leod, 2 Bay's Rep. 383. The law in South Carolina seems at last to be conformable to the old general rule. It was held, in Carnochan v. Gould, in the Court of Appeals, 1 Bailey's Rep. 179, that a vendor of cotton was not liable for a defect in the quality of the cotton of an unusual character, which extended equally

[1] See *post*, n. 1, p. 497.

[2] It is settled law in England, that a mere breach of warranty without fraud, is no *answer* to an action for the price, but only a ground for a reduction of damages. Parson v.

If the article be sold by the sample, and it be a fair specimen of the article, and there be no deception or warranty on the part of the vendor, the vendee cannot rescind the sale. But such a sale amounts to an implied warranty that the article is in bulk of the same kind, and equal in quality with the sample. (a)[1] If

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through the bulk, and was fully exhibited in samples. The law in that case would not raise an implied warranty, for there was no fraud, and the buyer was possessed of all the information necessary to enable him to make a correct estimate of the value of the article. In Osgood v. Lewis, 2 Harr. & Gill, 495, implied warranties upon the sale of chattels, and arising by operation of law, were held to be of two kinds: 1. In cases where there was no fraud, as, that the provisions purchased for domestic use were wholesome, or that the article contracted for in an executory contract, and which the purchaser had no opportunity to inspect, should be salable as such in the market. 2. Where the fraud existed, as if the seller, knowing the article to be unsound, disguises it or represents it as sound.

(a) Parkinson v. Lee, 2 East's Rep. 314. Sands & Crump v. Taylor, 5 Johns. Rep. 395. Bradford v. Manly, 13 Mass. Rep. 139. Woodworth, J., in 20 Johns. Rep. 204. The Oneida Manufacturing Society v. Lawrence, 4 Cowen's Rep. 440. Andrews v. Kneeland, 6 Idem, 354. Gallagher v. Waring, 9 Wendell's Rep. 20. Boorman v. Jenkins, 12 Idem, 556. Waring v. Mason, 18 Idem, 425. Phillipi v. Gove, 4 Rob. La. R. 315. Civil Code of Louisiana, art. 2449. Moses v. Mead, 1 Denio, 378. In the sale of an article, as hemp in bales, it is held that there is no implied warranty that the interior shall correspond in quality with the exterior of the bales, and if the purchaser is at liberty to open the bales and examine, there is no sale by sample, though the interior does not correspond with the external part. Salisbury v. Stainer, 19 Wendell, 159.

Sexton, 4 M. G. & S. Rep. 899. West v. Cutting, 19 Vt. R. 536. Freeman v. Clute, 3 Barb. S. C. Rep. 424. Dawson v. Collis, 4 E. L. & Eq. 338.

If a person conveys property to another, for which he is to be paid in other specific property of greater value, and for the surplus of which he is to pay cash, and he fails to pay such cash, by reason of which the other party rescinds the contract, the party in default cannot recover the value of the property conveyed. Battle v. R. City Bank, 3 Comst. R. 88.

[1] Beirne v. Dord, 2 Sandf. S. C. Rep. 89. Brower v. Lewis, 19 Barb. 574. In a late English case, for a *false representation* on a sale of cotton by sample, which the vendor falsely represented to correspond with the bulk, it was held, that the vendee could not recover, without showing that the representations were false *to the knowledge* of the vendor, or that he was otherwise guilty of a breach of good faith. Ormrod v. Huth, 14 M. & W. R. 651. In Pennsylvania, it seems, a sale by sample, without *express* warranty, implies a warranty of the *kind* or *species* only, and not of the *quality*. Fraley v. Bispham, 10 Barr's Rep. 320. But in Nichols v. Godts, 26 E. L. & Eq. 527, a sale was made of oil, represented as *foreign rape oil*, but warranted only equal to samples. The article delivered was not foreign rape oil, but was equal to samples. *Held*, that the statement as to sample applied only to the *quality* of the oil, and that the buyer was not bound to pay for an article different in *kind* from the description in the bill of sale. In Hargous v. Stone, 1 Seld. 73, and Beirne v. Dord, Ib. 95, S. C. 4 Duer, 69, it is held that the mere exhibition of a sample is not enough to create a warranty that the bulk of the goods correspond in quality therewith. See also Ormrod v. Huth, cited *supra*.

the article should turn out not to be merchantable, from some latent principle of infirmity in the sample, as well as in the bulk of the commodity, the seller is not answerable. The only warranty is, that the whole quantity answers the sample.[1]

*482 * VI. *Of the duty of mutual disclosure.*

If there be an intentional concealment or suppression of material facts in the making of a contract, in cases in which both parties have not equal access to the means of information, it will be deemed unfair dealing, and will vitiate and avoid the contract. There may be some difference in the facility with which the rule applies between facts and circumstances that are intrinsic, and form material ingredients of the contract, and those that are extrinsic, and form no component part of it, though they create inducements to enter into the contract, or affect the price of the article. As a general rule, each party is bound to communicate to the other his knowledge of the material facts, provided he knows the other to be ignorant of them, and they be not open and naked, or equally within the reach of his observation. (*a*) In the sale of a ship, which had a latent defect known to the seller, and which the buyer could not by any attention possibly discover, the seller was held to be bound to disclose it, and the concealment was justly considered

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(*a*) The rule here laid down, though one undoubtedly of moral obligation, is, perhaps, too broadly stated to be sustained by the practical doctrine of the courts. The qualification of the rule is, that the party in possession of the facts must be under some special obligation, by confidence reposed or otherwise, to communicate them truly and fairly. *Vide infra*, pp. 484, 490. Bench *v*. Sheldon, 14 Barb. R. 72.

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[1] By a law of New York, passed April 10, 1850, (Laws, p. 673,) if there be a deficiency in quantity of *dry goods* sold at public auction, or otherwise, the vendor forfeits to the vendee an amount in value equal to the *quantity short*, in addition to the deficiency.

See Bagley *v*. Peddie, 5 Sandf. S. C. R. 192, where the court give the rules for distinguishing stipulated damages from a penalty. The courts lean strongly in favor of construing agreements as providing penalties, rather than fixed, stipulated damages. 1st. Where the construction is doubtful, the agreement is considered as intending a penalty merely. 2d. Where the instrument provides for the payment of a large sum, on failure of payment of a less sum, the larger sum is a penalty merely. 3d. Where a stipulated sum is to be paid on the performance or omission of act or acts not measurable by a pecuniary standard, such sum is liquidated damages. 4th. Where the damages for such acts or omissions are certain, or ascertainable by a jury, the sum agreed on is a penalty merely. See Cheddick *v*. Marsh, 1 New Jersey R. 463.

to be a breach of honesty and good faith. (*a*) So, if one party suffers the other to buy an article under a delusion created by his own conduct, it will be deemed fraudulent, and fatal to the contract; as, if the seller produces an impression upon the mind of the buyer, by his acts, that he is purchasing a picture belonging to a person of great skill in painting, and which the seller knows not to be the fact, and yet suffers the impression to remain, though *he knows it materially enhances *483 the value of the picture in the mind of the buyer. (*b*) One party must not practise any artifice to conceal defects, or make any representations for the purpose of throwing the buyer off his guard.[1] The same principle had been long ago declared by Lord Hardwicke, when he stated, (*c*) that if a vendor, knowing of an incumbrance upon an estate, sells, without disclosing the fact, and with knowledge that the purchaser is a stranger to it, and under representations inducing him to buy, he acts fraudulently, and violates integrity and fair dealing. The inference of fraud is easily and almost inevitably drawn, when there is a suppression or concealment of material circumstances, and one of the contracting parties is knowingly suffered to deal under a delusion. It was upon this ground that Lord Mansfield must have considered, (*d*) that selling an unsound article, knowing it to be unsound, for a sound price, was actionable. It is equivalent to the concealment of a latent defect; and the ground of action is, the deceit practised upon the buyer. (*e*)[2] The same

(*a*) Mellish *v.* Motteux, Peake's Cases, 115. This case was afterwards overruled by Lord Ellenborough, in Baglehole *v.* Walters, 3 Campb. Rep. 154, and the latter decision confirmed in Pickering *v.* Dowson, 4 Taunt. Rep. 779; but it was upon another point, respecting the effect of a sale *with all faults;* and the principle of the decision, as stated in the text, remains unmoved. The same principle was urged in Southerne *v.* Howe, 2 Rol. Rep. 5; and it was stated, that if a man sells wine knowing it to be corrupt, an action of deceit lies against him, though there be no warranty.

(*b*) Hill *v.* Gray, 1 Starkie's Rep. 434. Pilmore *v.* Hood, 5 Bingham, N. C. 97.

(*c*) 1 Vesey, 96.

(*d*) Stuart *v.* Wilkins, Doug. Rep. 18.

(*e*) Hough *v.* Evans, 4 M'Cord's Rep. 169. If a person having the legal title to

1 Baker *v.* Seahorn, 1 Swan, 64.

2 The vendor is not bound to disclose a defect, which once existed, if he believes it to exist no longer. McEntire *v.* McEntire, 8 Ired. Eq. 297.

rule applies to the case where a party pays money in ignorance of circumstances with which the receiver is acquainted, and does not disclose, and which, if disclosed, would have prevented the payment. In that case, the parties do not deal on equal terms, and the money is held to be unfairly obtained, and may be recovered back. (*a*) It applies, also, to the case where a person takes a guaranty from a surety, and conceals from him facts which go to increase his risk, and suffers him to enter into the contract under false impressions. Such concealment is held to be fraud, and vitiates the contract. (*b*) [1]

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property, stands by and acquiesces in the sale of it by another person claiming, or having color of title, he will be estopped afterwards in asserting his title against the purchaser. *Qui tacet, consentire videtur. Qui potest et debet vetare, jubet si non vetat.* Wendell *v.* Van Rensselaer, 1 Johnson's Ch. Rep. 354. Storrs *v.* Barker, 6 Idem, 166. Hobbs *v.* Norton, 1 Vern. 136. 2 Ch. Ca. 128. See also to S. P. 6 Conn. Rep. 212-214; 12 Serg. & R 23; 12 Vesey, 85, Irwin *v.* Morell, Dudley's Geo. Rep. 72; Skinner *v.* Stouse, 4 Missouri Rep. 93; Pickard *v.* Sears, 6 Adolphus & Ellis, 469; Gregg *v.* Wells, 10 Adol. & Ellis, 90; Story on Eq., vol. i. secs. 386, 391. This kind of estoppel was first established by courts of equity, and has, to a certain extent, been adopted by courts of law.

(*a*) Martin *v.* Morgan, 1 Brod. & Bing. 289. The sound doctrine on this subject was declared by Bayley, J., in Heane *v.* Rogers, 9 B. & Cress. 577, and affirmed by the court, in Dewey *v.* Field, 4 Metcalf's Mass. Rep. 381.

(*b*) Pidcock *v.* Bishop, 3 Barnew & Cress. 605. Maltby's case, cited by Lord Eldon, in 1 Dow's R. 294. Smith *v.* Bank of Scotland, Ibid. 272. In the old English law, the Writ of Deceit lay not only for personal injuries, but for frauds in relation to real property, and to which it principally applied. But a special action on the case for damages, in nature of a writ of deceit, had long ago taken the place of the other, and the writ of deceit was abolished by the statute of 3 & 4 Wm. IV. c. 2. See 3 Black. Com. 165. In the sense of a court of equity, fraud includes all acts, omissions, and concealments, which involve a breach of either legal or equitable duty, trust, or confidence justly reposed, and are injurious to another. See *infra*, p. 561. A court of chancery will exercise the power of setting aside judgments and decrees of any court, foreign or domestic, in cases of fraud. The authorities are collected in the case of Vanmeter *v.* Jones, in the able and elaborate opinion of Chancellor Vroom. 2 Green, N. J. Ch. Rep. 520. Neither a *bonâ fide debt*, nor an actual advance of money, will sustain a security infected with fraud. Sanford, Chancellor, 2 Sandford's Ch. Rep. 636. The law requires the utmost degree of good faith (*uberrima fides*) in transactions between parties standing in a peculiar relation or fiduciary character between each other, as, for instance, in the relation of client and attorney,

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[1] The concealment by the vendee of the fact that he is insolvent at the time of the sale, though evidence of fraud, does not of itself vitiate the sale. Mitchell *v.* Worden, 20 Barb. 253. Buckley *v.* Artcher, 21 Id. 585. Bidault *v.* Wales, 20 Miss. 546. Nichols *v.* Pinner, 18 New York (4 Smith), 295.

* The writers of the moral law hold it to be the duty *484 of the seller to disclose the defects which are within his knowledge. (*a*) But the common law is not quite so strict. If the defects in the article sold be open equally to the observation of both parties, the law does not require the vendor to aid and assist the observation of the vendee.[1] Even a warranty will not cover defects that are plainly the objects of the senses; (*b*) though if the vendor says or does anything what-

physician and patient, principal and agent, principal and surety, guardian and ward, trustee and *cestui que trust*, partners and part-owner. Any misrepresentation, or concealment of any material fact, or any just suspicion of artifice or undue influence, will be fatal to the validity of the transaction between them, especially in the view of a court of equity. The principle on which courts of equity act, in regard to cases arising under such a confidential or fiduciary relation, stand (independent of any ingredient of deceit or imposition which is usually mixed with such cases) upon a motive of general public policy. It applies, when confidence is reposed and confidence abused, by some advantage gained by means of the relation. Lord Eldon, in Gibson *v.* Jeyes, 6 Vesey, 278. Champion *v.* Rigby, 1 Russ. & Mylne, 539. Edwards *v.* Meyrick, 2 Hare, Rep. 60. Carter *v.* Palmer, 8 Clark & Fin. 657. Poillon *v.* Martin, 1 Sandford's Ch. Rep. 569. These were cases applicable to the relation of attorney and client. And for the general principle respecting fiduciary relations, see Story's Com. on Eq. Jurisprudence, 224, 304–323.[2] Lord Hardwicke, in the great case of Chesterfield *v.* Jansen, 2 Vesey, 125, 155, classified fraud into four kinds: (1.) Fraud, or *dolus malus*, may be actual, arising from facts and circumstances of imposition. (2.) It may be apparent from the intrinsic value and subject of the bargain itself — such as no man in his senses, and not under delusion, would make, on the one hand, and as no honest and fair man would accept, on the other. (3.) It may be inferred from the circumstances and condition of the parties; for it is as much against conscience to take advantage of a man's weakness or necessity, as his ignorance. (4.) It may be collected from the nature and circumstances of the transaction, as being an imposition on third persons. In Dent *v.* Bennett, 7 Simons, 539, the vice-chancellor declared an agreement between a medical adviser and his patient for a large sum, to be paid by the latter after his death, for past and future services, null and void. It was held to be a glaring abuse of confidence, and the vice-chancellor enforced, with spirit and energy, the doctrine, that wherever we find the relation of employer and agent existing in situations in which, of necessity, much confidence must be placed by the employer in the agent, then the case arises for watchfulness on the part of the court, that the confidence shall not be abused.[3]

(*a*) Grotius, b. 2, c. 12, s. 9. Paley's Moral Philosophy, b. 3, ch. 7.

(*b*) Schuyler *v.* Russ, 2 Caines's Rep. 202. Dyer *v.* Hargrave, 10 Vesey, 507.

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1 Keates *v.* Earl Cadogan, Eng. Law Journal Rep., April, 1841, C. P. p. 761.

2 Mann *v.* McDonald, 10 Humph. R. 275.

3 As to the jealousy with which courts regard dealings between persons who have recently borne the relation of guardian and ward, see Gale *v.* Wells, 12 Barb. R. 84.

ever, with an intention to divert the eye or obscure the observation of the buyer, even in relation to open defects, he would be guilty of an act of fraud. (*a*) A deduction of fraud may be made, not only from deceptive assertions and false representations, but from facts, incidents, and circumstances which may be trivial in themselves, but decisive evidence in the given case of a fraudulent design. (*b*) [1] When, however, the means of information relative to facts and circumstances affecting the value of the commodity be equally accessible to both parties, and neither of them does or says anything tending to impose upon the other, the disclosure of any superior knowledge which one party may have over the other, as to those facts and circumstances, is not requisite to the validity of a contract. (*c*) There is no breach of any implied confidence that one party will not profit by his superior knowledge, as to facts and circumstances

(*a*) 3 Blacks. Com. 165. 2 Rol. Rep. 5.

(*b*) If the party intentionally misrepresents a material fact, or produces a false impression by words or acts, in order to mislead, or to obtain an undue advantage, it is a case of manifest fraud. Story's Com. on Eq. Jurisprudence, 201. Nelson, J., in Welland Canal Co. *v.* Hathaway, 8 Wend. 483. Denman, Ch. J., in Pickard *v.* Sears, 6 Adolph. & Ellis, 474. Doggett *v.* Emerson, 3 Story's Rep. 700. A sale of goods procured through a false representation of the vendee in regard to his solvency and credit, passes no title as between the parties. The People *v.* Kendall, 25 Wendell, 399. Cary *v.* Hotailing, 1 Hill's N. Y. Rep. 311. See also *post*, p. 497. But in order to afford relief, the misrepresentation must be of something material, constituting an inducement or motive to the other party, and on which he placed trust and confidence, and was actually misled to his injury. Ibid. 204, 205. Representations by A. to B., in respect to a sale afterwards made by A. to C., founded on the representations which A. made to B., and he to C., are treated in the same way as if made by the vendor to C. Crocker *v.* Lewis, 3 Sumner, 1. It is fraud to sell an article as designated by another person's name, in order to give it greater currency, and the perpetrator of the fraud is liable to an action. Thomson *v.* Winchester, 19 Pick. 214.

(*c*) Laidlaw *v.* Organ, 2 Wheaton, 178. Hough *v.* Richardson, 3 Story's Rep. 659. A more stern rule of morality and law respecting the duty of disclosure of information which would materially affect the price, is laid down in Frazer *v.* Gervais, Walker's Miss. Rep. 72, and it overrules, as far as the authority of the case can go, the decision in Laidlaw *v.* Organ.

[1] A party defrauded by a contract, may affirm the contract after the discovery of the fraud, and bring an action for such fraud, or he may *recoup* the damages in an action brought by the other party. So, at least, it is held in New York. Whitney *v.* Allaire, 4 Denio's R. 554. Gray *v.* Rich, 10 Ind. 430.

open to the observation of both parties, or equally within the reach of their ordinary diligence; because neither party reposes in any such confidence, unless it be specially tendered or required. Each one, in ordinary cases, judges for himself, and relies confidently, and perhaps presumptuously, upon the sufficiency of his own knowledge, skill, and diligence. The common law affords to every one *reasonable protection *485 against fraud in dealing; but it does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information.[1] It reconciles the claims of convenience with the duties of good faith, to every extent compatible with the interests of commerce. This it does by requiring the purchaser to apply his attention to those particulars which may be supposed within the reach of his observation and judgment; and the vendor to communicate those particulars and defects which cannot be supposed to be immediately within the reach of such attention. If the purchaser be wanting of attention to these points, where attention would have been sufficient to protect him from surprise or imposition, the maxim *caveat emptor* ought to apply.[2] Even against this maxim he may provide, by requiring the vendor to warrant that

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1 The rule in England seems to be this: If the representation was false to the knowledge of the party making it, this will in general be conclusive evidence of fraud; but if the representation was honestly made, and believed at the time to be true by the party making it, though not true in point of fact, this does not amount to fraud in law, and the representation does not afford a ground of action.

This rule was applied equally to representations of quality and representations of title. Ormrod *v.* Huth, 14 M. & W. 651.

The rule finds support in numerous cases in this country. Foley *v.* Cowgill, 5 Blackf. R. 18. Sims *v.* Klein, Breese's R. 234. Dunbar *v.* Bonesteel, 3 Scam. R. 32. Miller *v.* Howell, 1 Id. 499. Craig *v.* Blow, 3 Stewart's R. 448. Van Arsdale *v.* Howard, 5 Ala. (Judge's) R. 596.

The following cases decide that misrepresentations of material facts, whether the result of fraud or mistake, vitiate the contract. Doggett *v.* Emerson, 3 Story's R. 700. Warner *v.* Daniels, 1 Wood. & M. R. 90. Mason *v.* Crosby, Ib. 342. Smith *v.* Babcock, 2 Id. 246. Snyder *v.* Findley, Coxe's R. 48. Thompson *v.* McCann, 4 B. Monroe's R. 601. Lockridge *v.* Forster, 4 Scam. R. 570. Parham *v.* Randolph, 4 How. (Miss.) 435. Buford *v.* Caldwell, 3 Mo. R. 477. 1 Story's Eq. Jurisp. §§ 193, 195. In Atwood *v.* Wright, 29 Ala. 346, it was held that misrepresentations, the result of mistake, do not amount to a fraud generally, although they may in some particular cases.

2 On the other hand, the purchaser is not bound to disclose to the vendor facts of which the vendor is ignorant, which render the property more valuable, especially if the means of knowledge be equally open to both. Kintzing *v.* McElrath, 5 Barr's R. 467.

which the law would not imply to be warranted; and if the vendor be wanting in good faith, *fides servanda* is a rule equally enforced at law and in equity. (*a*)

A mere false assertion of value when no warranty is intended, is no ground of relief to a purchaser, because the assertion is a matter of opinion, which does not imply knowledge, and in which men may differ; mere expression of judgment or opinion does not amount to a warranty. Every person reposes at his peril in the opinion of others, when he has equal opportunity to form and exercise his own judgment, *simplex commendatio non obligat.* (*b*) If the seller represents what he himself believes as to the qualities or value of an article, and leaves the determination to the judgment of the buyer, there is no fraud or warranty in the case. (*c*) An assertion respecting the article sold, must be positive and unequivocal, and one on which the buyer places reliance in order to amount to a warranty; and if the vendee has an opportunity of examining the article, the vendor is not answerable *486 * for any latent defect, without there be fraud, or an express warranty, or such a direct representation as is tantamount to it. (*d*) [1] The cases have gone so far as to hold, that if the seller should even falsely affirm that a particular sum had been bid by others for the property, by which means the purchaser was induced to buy, and was deceived as to the value, no relief was to be afforded; for the buyer should have informed himself from proper sources of the value, and it was his own folly to repose on such assertions, made by a person whose interest might so readily prompt him to invest the property with exaggerated value.

(*a*) 1 Fonb. Tr. of Equity, 371, 372.

(*b*) Harvey *v.* Young, Yelv. Rep. 21 a. Baily *v.* Merrell, 3 Bulst. Rep. 94. Cro. Jac. 386. Davis *v.* Meeker, 5 Johns. Rep. 354. Marshall *v.* Peck, 1 Dana's Ken. Rep. 611. Dugan *v.* Cureton, 1 Arkansas Rep. 41. Morrill *v.* Wallace, 9 N. H. Rep. 111. Broom's Legal Maxims, London, 1845, p. 357.

(*c*) Jendwine *v.* Slade, 2 Esp. Rep. 572.

(*d*) The Oneida Manufacturing Society *v.* Lawrence, 4 Cowen's Rep. 440.

[1] Carley *v.* Wilkins, 6 Barb. S. C. Rep. 557. Taymon *v.* Mitchell, 1 Md. Ch. 496. Gatling *v.* Newell, 9 Ind. 572. But see Foster *v.* Swasey, 2 Wood. & M. Rep. 217. Taylor *v.* Fleet, 1 Barb. S. C. Rep. 471.

Emptor emit quam minimo potest; venditor vendit quam maximo potest. (a)

The same principle was laid down in a late case in the K. B., where it was held, (b) that a false representation by the buyer in a matter merely *gratis dictum*, in respect to which the buyer was under no legal pledge or obligation to the seller for the precise accuracy of his statement, and upon which it was the seller's own indiscretion to rely, was no *ground of action.[1] There was no recognized principle *487 of law which rendered a party legally bound to allege truly, if he stated at all, the motives and inducements to the purchase, or the chances of sale to the seller. The true rule was stated to be, that the seller was liable to an action of deceit, if he fraudulently misrepresent the quality of the thing sold, in some particulars which the buyer has not equal means of knowledge with himself; (c) or if he do so in such a manner as to induce the buyer to forbear making the inquiries,

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(a) 1 Rol. Abr. 101, pl. 16. Saunders *v.* Hatterman, 2 Iredell's N. C. Rep. 32. In the case of Eakins *v.* Tresham, 1 Sid. Rep. 146. 1 Lev. Rep. 102, the same law was declared; but a distinction was there taken between the false assertion touching the *value* of the property, and touching the rate of the previous *rent*, and an action was held to lie in the latter case, for the rent was of a matter of fact resting in the private knowledge of the landlord and his tenants, and the tenants might refuse to inform the purchaser, or combine with the landlord to mislead him. The court, in Lysney *v.* Selby, 2 Lord Raym. 1118, followed the decision in Eakins *v.* Tresham, though they considered it to be questionable; and the distinction seems to have been essentially disregarded in the Scotch case of Kinaird *v.* Lord Dean, cited by Mr. Sugden from 1 Coll. of Decis. 332. The doctrine in the case of Rolle was adopted by the Chief Justice of Maine, in the case of Cross *v.* Peters, 1 Greenleaf's Rep. 389; and by the Chief Justice of North Carolina, in the case of Fagan *v.* Newson, 1 Dev. 22. But in Bowring *v.* Stevens, 2 Carr & Payne, 337, on the sale of a lease of a public house, the seller falsely represented that his returns averaged so much a month; and it was held that an action lay for the deceit.

(b) Vernon *v.* Keys, 12 East's Rep. 632.

(c) A false representation in a contract for the sale of fixtures and fittings of a public house as to the amount of business attached to the house, has been held sufficient to avoid the contract. Hutchinson *v.* Morley, 7 Scott, 341.

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[1] A conjectural estimate of value is not a misrepresentation; and concealment, to be fraudulent and material, must be a concealment of something which the party was bound to disclose. Irvine *v.* Kirkpatrick, 3 Eng. L. & Eq. 17.

which, for his own security and advantage, he would otherwise have made. (*a*)

The rule in equity is more rigid on this subject than it is at law. Lord Hardwicke held, (*b*) that where the seller had falsely affirmed a farm to have been valued by two persons at a certain price, and that assertion had induced the purchaser to contract, it was such a misrepresentation as would induce a court of equity to withhold a decree for a specific performance. But there is a settled distinction in equity between enforcing specifically and rescinding a contract; and an agreement may not be entitled to be enforced, and yet not be so objectionable as to call for the exercise of equity jurisdiction to rescind it. It does not follow that a contract of sale is void in law merely because equity will not decree a specific performance. (*c*) [1]

(*a*) It is settled that a material misrepresentation of a fact by *mistake*, and upon which the other party is induced to act, is a ground for relief in equity, equally as if it had been a wilful and false assertion, for it operates with equal injury. Pearson *v.* Morgan, 2 Bro. 388. M'Ferran *v.* Taylor, 3 Cranch, 270. Rosevelt *v.* Fulton, 2 Cowen, 133. Lewis *v.* M'Lemore, 10 Yerger, 206.

(*b*) Buxton *v.* Lister, 3 Atk. Rep. 386.

(*c*) Seymour *v.* Delancey, 6 Johns. Ch. Rep. 222. The cases on this point are there collected and reviewed. Though the decision in that case was afterwards reversed in the Court of Errors, the general doctrines in it were not affected but admitted. Inadequacy of price is of itself a sufficient ground of defence to a bill in equity by a purchaser for a specific performance, when the party contracting to sell was an expectant heir. Peacock *v.* Evans, 16 Vesey, 512. Ryle *v.* Brown, 13 Price's Exc. Rep. 758. On the other hand, a court of equity will rescind a contract for the sale of land when the intrinsic nature and subject of the bargain itself, or the attending circumstances, are clearly indicative of fraud. King *v.* Cohorn, 6 Yerger's Tenn. Rep, 75. So a bill for the rescission of a contract for the purchase of land will be sustained, if the defendant fails at the hearing to show that he is then able to give a good title, or to give possession, and there be no adequate remedy at law for the breach of the contract. Hepburn *v.* Dunlop, 1 Wheaton, 179. Williams *v.* Carter, 3 Dana's Ken. Rep. 199. Seamore *v.* Harlan, Ibid. 412. In the case of King *v.* Hamilton, 4 Peters's U. S. Rep. 311, it was adjudged, that the equity power of decreeing a specific performance of contracts was to be exercised in sound discretion, and with an eye to the substantial justice of the case, and never when the exercise of it would be inequitable and unjust. If damages would be an inadequate compensation for non-performance

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[1] There is a distinction, too, between enforcing specific covenants and restraining acts in breach of covenants. In a class of cases, as the engagements of opera singers, &c., courts cannot enforce specifically the performance, but they will restrain the breach of negative covenants. Lumley *v.* Wagner, 13 Eng. L. & Eq. 252. Bradley *v.* Bradley, 1 Barb. Ch. R. 125. Dupre *v.* Thompson, 4 Barb. S. C. Rep. 279.

* An action will lie against a person not interested in *488 the property, for making a false and fraudulent repre-

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of a contract, equity will grant relief. Storer *v.* Great W. R. Road Co. 2 Y. & Coll. Cas. in Ch. 48.

The general rule is, that a court of chancery will not decree a specific performance of an agreement for the sale and purchase of *stock or of chattels*. But there are so many exceptions and qualifications attending the rule, that its force is greatly impaired; and more recent and better authority would seem to be, that when justice requires it, chancery will in such cases, decree a specific performance. For the general rule, see Cud *v.* Rutter, 1 P. Wms. 570. S. C. 5 Viner's Abr. 538. Cappur *v.* Harris, Bunb. Rep. 135. Dorison *v.* Westbrook, 5 Viner's Abr. 540. Nutbrown *v.* Thornton, 10 Vesey, 159. For exceptions to it, and in favor of specific performance, see Colt *v.* Nuttervill, 2 P. Wms. 304. Duke of Somerset *v.* Cookson, 3 Id. 390. Buxton *v.* Lister, 3 Atk. Rep. 383. Taylor *v.* Neville, cited, Ibid. 384. Lord Eldon, in Lady Arundell *v.* Phipps, 10 Vesey, 148. Wright *v.* Bell, 5 Price's Exc. Rep. 325. Adderley *v.* Dixon, 1 Simons & Stuart, 607. Lynn *v.* Chaters, 2 Keen, 521. Withy *v.* Cottle, 1 Sim. & Stu. 174. Clark *v.* Flint, 22 Pick. Rep. 231. The true principle in equity is, that specific performance of an agreement relating to chattels ought to be decreed, when equity and conscience requires it, as in the case of pictures and other things of peculiar value and attachment, and when the remedy by action at law for damages would be inadequate, and no competent or just relief could be otherwise afforded. Mitford on Pleadings in Chancery, 168, edit. N. Y. 1833. Story's Com. on Eq. Jurisprudence, vol. ii. 18, 26–48, where the English chancery cases on the subject are critically examined. In Sarter *v.* Gordon, and Young *v.* Burton, domestic slaves brought up in the family are declared to come within the reason of the exception. 2 Hill's S. C. Ch. Rep. 126, 127. 1 M'Mullan's S. C. Eq. Rep. 255. As to the specific performance of contracts for the sale of *lands*, see *supra*, pp 470–476, and more particularly, *infra*, vol. iv. p. 451. With respect to contracts entered into for fraudulent or illegal purposes, the law refuses its aid to enable either party to disturb such parts of it as have been *executed;* and as to such parts as remain *executory*, it leaves the parties where it finds them. Nellis *v.* Clark, 20 Wendell, 24. S. C. 4 Hill, 429. Mellen, Ch. J., in Smith *v.* Hubbs, 1 Fairfield, 71. M'Kinnell *v.* Robinson, 3 Mees. & Wels. 434.

The case of marine insurance is different from the ordinary contract of sale, and rests on a different principle. The parties do not deal in that instance on the presumption of equal knowledge and vigilance as to the subject-matter of the contract, and hence a different rule of law prevails. The insurer is essentially *passive*, and is known to act, and professes to act, upon the information of the assured. In an insurance contract, the special facts, as Lord Mansfield has observed, (Carter *v.* Boehm, 3 Burr. Rep. 1905,) upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only. "The *underwriter trusts to his representation*," and proceeds upon confidence that he does not keep back any circumstance in his knowledge. Lindenau *v.* Desborough, 8 Barnew. & Cress. 586. Though the suppression should happen through mistake, without any fraudulent intention, the policy is void. The contract of insurance is formed upon principles peculiar to itself; and the common law maxim of *caveat emptor* has no application, and professes to have none. So, in the case of work done, and articles made by a mechanic, the buyer

*489 sentation *to the seller, whereby he sustained damage by trusting the purchaser on credit of such misrepresentation. (*a*) This principle was first established in England after great discussion and opposition in the case of *Pasley* v. *Freeman*, (*b*) and though that case met with powerful resistance, it has been repeatedly recognized, and the doctrine of it is now well settled, both in the English and American jurisprudence. (*c*)

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professes to repose upon the superior knowledge and skill of the mechanic in his trade, and to know nothing of the mystery of the art; and if the latter does not furnish his work done in a workmanlike manner, he is guilty of a breach of an implied contract; *spondet peritiam artis.* Jones *v.* Bright, Danson & Lloyd, 304. Leflore *v.* Justice, 1 Smedes *v.* Marshall, Miss. Rep. 381. See also *infra*, p. 558. The reason of the distinction between these cases and the ordinary contract of sale is very apparent; and the common law has carried the doctrine of disclosures by each party in the formation of the contract of sale, to every reasonable and practicable extent that is consistent with the interests of society. The maxim of *caveat emptor*, and that other maxim, *vigilantibus et non dormientibus jura subveniunt*, when discreetly applied, as in the English law, are replete with sound and practical wisdom.

(*a*) Upton *v.* Vail, 6 Johns. Rep. 181. Bean *v.* Herrick, 3 Fairfield, 262. In the case in 6 Johns. Rep. the doctrine in the case of Pasley *v.* Freeman was recognized, discussed, and settled, in the Supreme Court of New York. It was again recognized, discussed, and settled, in Gallager *v.* Brunel, 6 Cowen's Rep. 346; and once more recognized, discussed and settled, in Benton *v.* Pratt, 2 Wendell's Rep. 385; and again, and very elaborately and powerfully enforced, in Allen *v.* Addington, 7 Wendell's Rep. 1. S. C. 11 Idem, 374.[1] This is a striking sample of what are termed the *homonymiæ* of the civil law. But the statute of 6 Geo. IV. ch. 14, commonly called Lord Tenterden's Act, has done away the application of the doctrine of Pasley *v.* Freeman to English cases. That Act extends the statute of frauds, by requiring a memorandum in writing, signed by the party to be charged, of representations of another's character and ability, with a view to credit to be given him. It equally applies to cases of verbal acknowledgments of debts barred by the statutes of limitations; and it wonderfully relieves the courts, the profession, and the country, from the evils of fluctuating and contradictory decisions.[2] These provisions of the English statutes were adopted in the Massachusetts Revised Statutes for 1836, and in the Revised Statutes of Vermont, 1839, p. 317. See Lyde *v.* Barnard, 1 Mee. & W. 101, on the doubtful construction of Lord Tenterden's Act.

(*b*) 3 Term Rep. 51.

(*c*) Eyre *v.* Dunsford, 1 East's Rep. 318. Haycraft *v.* Creasy, 2 Idem, 92. Carr, *ex parte*, 3 Ves. & Bea. 110. Hamar *v.* Alexander, 5 Bos. & Pull. 241. Wise *v.* Wilcox, 1 Day's Rep. 22. Russell *v.* Clark, 7 Cranch's Rep. 92. Munroe *v.* Gardner, 1 Mills, S. C. 328. Hart *v.* Tallmadge, 2 Day's Rep. 381. Patten *v.* Gurney, 17 Mass. Rep. 182. See also 7 Vermont R. 67, 79.

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[1] The doctrine was ably enforced in Zabriskie *v.* Smith, 3 Kernan, (N. Y.) 322.

[2] The Code of Procedure of New York, requires debts barred by the statute of limitations to be acknowledged by writing.

The principle is, that fraud, accompanied with damage, is a good cause of action; (a) and the solidity of the principle was * felt and acknowledged by the writers on the civil law. (b) [1] Misrepresentation, without a design, is not sufficient for an action. But if recommendation of a purchaser, as of good credit, to the seller, be made in bad faith, and with knowledge that he was not of good credit, and the seller sustains damage thereby, the person who made the representation is bound to indemnify the seller. (c) [2] It is a very old head of equity, said Lord Eldon, (d) that if a representation be made to another person, going to deal in a matter of interest upon the faith of that representation, the former must make the representation good if he knew it to be false. *490

Lord Thurlow, in *Fox* v. *Mackreth*, (e) allowed of much lati-

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(a) Fraud without damage, or damage without fraud, says Coke, J., in 3 Bulstrode's Rep. 95, gives no case of action; but where these two do concur and meet together, there an action lieth. By fraud, LeBlanc, J., said in 2 East's Rep. 108, he understood an intention to deceive, whether from an expectation of advantage to the party himself, or from ill-will towards the other. Both of these propositions contain true doctrine on the point. If the false representation be made, knowing it to be false, and injury follows, the law infers a fraudulent intent, and the person who makes it is responsible for the consequences. Tindal, Ch. J., in Foster *v.* Charles, 6 Bingham, 396. 7 Id. 105. But it is not requisite to show that the defendant *knew* the representation to be untrue. It is sufficient if the representation be untrue, and made for a fraudulent purpose, and to induce the plaintiff to do what he does do to his prejudice. Taylor *v.* Ashton, 11 Meeson & Welsby, 401. Malice and want of reasonable cause is a ground for damages. De Medina *v.* Grove, 10 Ad. & El. N. S. 152. This appears to be the sound doctrine and the wholesome discipline of the law on the point.

(b) Dig. 50, 17, 47.

(c) Pothier, Traité du Contrat de Mandat, No. 21.

(d) Evans *v.* Bicknell, 6 Vesey, 182.

(e) 2 Bro. 420. Lord Eldon, to the same point, in Turner *v.* Harvey, Jacob's Rep. 178.

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[1] If a man tells an untruth to induce another to alter his situation, who thereby suffers damage, an action lies, though no fraud nor injury was intended. Watson *v.* Poulson, 7 Eng. L. & Eq. 585. Turnbull *v.* Gadsden, 2 Strobh. Eq. 14. Smith *v.* Mitchell, 6 Geo. R. 458.

[2] Where a person procures the sale and delivery of articles by fraudulent and false representations, he acquires no property in them, or right of possession, and the vendor may pursue him and retake the property, with such reasonable force as may be necessary. Hodgeden *v.* Hubbard, 18 Vermont R. 504.

tude of concealment on the part of the purchaser. The latter, according to his opinion, would not be bound, in negotiating for the purchase of an estate, to disclose to the seller his knowledge of the existence of a mine on the land, of which he knew the seller was ignorant.[1] If the estate was purchased for a price of which the mine formed no ingredient, he held, that a court of equity could not set aside the sale, because there was no fraud in the case, and the rule of nice honor must not be drawn so strictly as to affect the general transactions of mankind. From this and other cases it would appear, that human laws are not so perfect as the dictates of conscience; and the sphere of morality is more enlarged than the limits of civil jurisdiction. There are many duties that belong to the class of imperfect obligations which are binding on conscience, but which human laws do not, and cannot undertake directly to enforce. But when the aid of a court of equity is sought to carry into execution such a contract, then the principles of ethics have a more extensive sway; and a purchase made with such a reservation of superior knowledge, would be of too sharp a character to be aided and forwarded in its execution by the powers of the Court of Chancery. (*a*) In *Turner* v. *Harvey*, (*b*) relief was given in equity against a contract, where the purchaser knew that the vendors (who were assignees of a bankrupt) were ignorant of a circumstance considerably increasing the value of the property. And while it was admitted to be the *general* rule that the purchaser was not bound to give the vendor information, as to the value of the property, yet it was said that *very little* was sufficient to affect the application of the principle, as if a single word be dropped tending to mislead the vendor. And though there be cases in which a contract improvidently entered into by a trustee will not be cancelled by the court, yet they will not lend the aid of the court to excuse it. But if a person stands in the relation of trustee, or *quasi* trustee to another, as agent,

(*a*) Parker *v.* Grant, 1 Johns. Ch. Rep. 630.
(*b*) Jacob's Rep. 169.

[1] Butler's Appeal, 26 Penn. 63.

factor, steward, attorney, or the like, if he would purchase of his principal or employer, any property committed to his care, he must deal with the utmost fairness, and conceal nothing within his own knowledge which may affect the price or value; and if he does, the bargain may be set aside. (*a*) Bargains between trustee and *cestui que trust* are viewed with great jealousy, and they will not be sustained, unless under very unexceptionable circumstances. (*b*) It is a rule in equity, (*c*) that all the material facts must be known to both *parties, to render the agreement fair and just in all its parts; and it is against all the principles of equity that one party, knowing a material ingredient in an agreement, should be permitted to suppress it, and still call for a specific performance. (*d*) *491

Pothier (*e*) contends that good faith and justice require that neither party to the contract of sale should conceal facts within his own knowledge, which the other has no means at the time of knowing, if the facts would materially affect the value of the commodity. But he concludes, in conformity with the doctrine of Lord Thurlow, that though misrepresentation or fraud will invalidate the contract of sale, the mere concealment of material knowledge which the one party has, touching the things sold, and which the other does not possess, may affect the conscience, but will not destroy the contract; for that would unduly restrict the freedom of commerce; and parties must, at their own risk, inform themselves of the value of the commodities they deal in. (*f*) He refers to the rules of morality laid down by Cicero; and he justly considers some of them as being of too severe and elevated a character for practical application, or the cognizance

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(*a*) Farnam *v.* Brooks, 9 Pick. Rep. 212.

(*b*) Fox *v.* Mackreth, 2 Bro. 400. Coles *v.* Thecothick, 9 Vesey, 246. Dunbar *v.* Tredennick, 2 Ball & Beatty, 314. Boyd *v.* Hawkins, 2 Dev. Eq. 207-211, 215. See also *infra*, vol. iv. p. 438.

(*c*) Ellard *v.* Lord Llandaff, 1 Ball & Beatty, 251. Buxton *v.* Lister, 3 Atk. Rep. 383.

(*d*) There is a valuable reference to, and criticism on, the cases in illustration of the maxim, *caveat emptor*, in Broom's Selection of Legal Maxims, p. 354, London edition.

(*e*) Traité du Contrat de Vente, n. 238-241.

(*f*) Pothier, Ibid. No. 298.

of human tribunals. (*a*) The general rule on this subject (though it has its exceptions, like other general rules), is, that ignorance of the law, with a full knowledge of the facts, and under circumstances repelling all presumption of fraud and imposition, furnishes no ground, either in law or equity, to rescind agreements, or reclaim money paid voluntarily under a claim of right, or to set aside solemn acts of the parties. (*b*)[1] Another rule of

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(*a*) Cicero, de Officiis, lib. 3, secs. 12–17, states the case of a corn merchant of Alexandria, arriving at Rhodes in a time of great scarcity, with a cargo of grain, and with knowledge that a number of other vessels, with similar cargoes, had already sailed from Alexandria to Rhodes, and which he had passed on the voyage. He then puts the question whether the Alexandrian merchant was bound in conscience to inform the buyers of that fact, or to keep silence, and sell his wheat for an extravagant price; and he answers it by saying, that, in his opinion, good faith would require of a just and candid man, a frank disclosure of the fact. *Ad fidem bonam statuit pertinere notum esse emptori vitium quod nosset venditor. Ratio postulat ne quid insidiose, ne quid simulate.* Grotius (b. 2, c. 12, sec. 9,) and Puffendorf (Droit de la Nature, liv. 5, c. 3, sec. 4,) as well as Pothier and others, dissent from the opinion of Cicero, and hold that one party is only bound not to suffer the other to be deceived as to circumstances relating *intrinsically* to the substance of the article sold. Rutherforth, on the other hand, in his Institutes, b 1, ch. 13, § 13, coincides with Cicero as to the case of the merchant at Rhodes, and disagrees with Grotius, on whom he comments. It is a little singular, however, that some of the best ethical writers under the Christian dispensation, should complain of the moral lessons of Cicero as being too austere in their texture, and too sublime in speculation, for actual use. There is not, indeed, a passage in all Greek and Roman antiquity equal, in moral dignity and grandeur, to that in which Cicero lays it down as a fixed principle, that we ought to do nothing that is avaricious, nothing that is dishonest, nothing that is lascivious, even though we could escape the observation of gods and men. (De Off. 3, 8.) How must the accomplished author, even of so exalted a sentiment, have been struck with awe, humiliation, and reverence, if he had known that there then existed in the province of Judea, the records of sublimer doctrines; in which were taught the existence, the unity, the power, the wisdom, the justice, the benevolence and all-pervading presence of that *high and lofty One that inhabiteth eternity, and searcheth all hearts, and understandeth all the imaginations of the thoughts of the children of men.*

(*b*) Doctor & Student, dial. 2, ch. 46. Bilbie *v.* Lumley, 2 East, 469. Shotwell *v.* Murray, 1 Johns. Ch. Rep. 512. Lyon *v.* Richmond, 2 Idem, 51, 60. Storrs *v.* Barker, 6 Idem, 166. Brisbane *v.* Dacres, 5 Taunt. Rep. 143. Milnes *v.* Duncan, 6 Barnew. & Cress. 671. Goodman *v.* Sayers, 2 Jac. & Walk. 262, 263. Story's Com. on

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[1] A rule, permitting a more extended right of recovery, has been laid down in Connecticut. It was held that money paid under a mistake of *law or fact*, which the party was under no legal or moral obligation to pay, and which the other party has no right to retain, may be recovered. The case of Clarke *v.* Dutcher, 9 Cowen, 674, was disapproved. Northrop *v.* Graves, 19 Conn. R. 548. The opinion is well worthy of a perusal.

To the same effect is Culbreath *v.* Culbreath, 7 Geo. R. 64. *Contra*, and agreeable to

equal validity, is, that acts done and contracts made, under mistake or ignorance of a material fact, are voidable and relievable

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Eq. Jurisprudence, §§ 95, 125. Marshall *v.* Collett, 1 Younge & Coll. 238. Rankin *v.* Mortimere, 7 Watts, 372. Good *v.* Herr, 7 Watts & Serg. 253-6-8. Clarke *v.* Dutcher, 9 Cowen, 674. Bronson, Ch. J., 2 Denio, R. 40. Norton *v.* Marden, 3 Shepley's Rep. 45. Norris *v.* Blethen, 19 Maine, 348. In Underwood *v.* Brockman, 4 Dana, 314-318, and Ray and Thornton *v.* Bank of Kentucky, 3 B. Monroe, 510, the Court of Appeals in Kentucky ably and fairly discussed the question, whether relief ought to be granted on a contract made, or payment made, with full knowledge of all the facts, but through mistake as to the law, and the conclusion was, that relief might be granted when the contract was entered into or payment made in consideration of a mistaken belief of a legal liability. But the court said, that a fair compromise would not be disturbed on account of any mistake as to the law of the case. See also Gratz *v.* Redd, 4 B. Monroe, 190, money paid by mistake, either of law or fact, may be recovered back. In the case of Elliott *v.* Swartwout, 10 Peters's R. 137, it was held, that if an agent pays over to his principal, after notice not to pay, moneys illegally demanded and received by him, he remains personally liable. The same rule was adopted in Ohio, holding that a mistake of the parties in point of law might be corrected in equity. M'Naughten *v.* Partridge, 11 Ohio Rep. 223. Evants *v.*

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the rule laid down in the text, is Peterborough *v.* Lancaster, 14 N. Hamp. R. 382. Baltimore & S. R. Co. *v.* Faunce, 6 Gill's R. 68.

The party must show, not merely ignorance of facts, but that he could not, with due diligence, obtain information. Wason *v.* Wareing, 15 Eng. L. & Eq. 121.

The contract cannot be rescinded for a mistake, unless the parties can be restored to their original rights. Martin *v.* McCormick, 4 Sandf. S. C. R. 366. A contract made under mutual mistake may be avoided. Ketchum *v.* Catlin, 21 Vermont R. 191.

It has also been held, that money paid by an agent, unless by the *special direction* of his principal, under a mistake of the legal rights of the latter, may be recovered. Per Ware, J., United States *v.* Bartlett, Daveis's D. C. Rep. 19.

Even persons in discharge of a trust are not bound to know the laws of another country, though they concern and affect the discharge of their duties. Leslie *v.* Baillie, 2 Y. & Coll. Cas. in Ch. 91. Burge's Com. on Col. and Foreign Laws, vol. ii. p. 741.

In several cases a distinction, not very easy to define, has been recognized between *ignorance* of law and a *mistake* of law. The first is said to be incapable of proof, but the latter may be proved; and the inclination seems to be, to give relief in the latter case. Champlin *v.* Laytin, 18 Wend. R. 422. Hall *v.* Reed, 2 Barb. Ch. R. 505, per Walworth. It was held, in Gwynn *v.* Hamilton, 29 Ala. 233, that there is no distinction between mistakes of law and ignorance of law; and, in Gordere *v.* Downing, 18 Ill. 492, the court refused relief against a pure mistake of the legal effect of language used in a deed, where there was no allegation of fraud, oppression, or mistake of fact.

Ignorance of the law of a foreign government, or of the statute laws of another state of the American Union, is ignorance of fact. Bank of Chilicothe *v.* Dodge, 8 Barb. R. 233. President of Merchants' Bank *v.* Spalding, 12 Barb. R. 302.

Though a draft of a banking institution of Newport, payable at a future day, is void by statute, yet a bank in another state, advancing money on such draft, in good faith, may recover back the money as paid under a mistake as to fact. Bank of Chilicothe *v.* Dodge, *supra*. Equitable relief in mistake of law is the exception rather than the rule. Newell *v.* Stiles, 21 Geo. 118.

in law and equity. (a) It has been held, that even where a party contracted under a clear mistake of his legal rights, and such rights were of a doubtful character, he might be relieved in

Strode, Ibid. 480. On the other hand, in Cadaval v. Collins, 4 Adolph. & Ellis, 858, and in Clarke v. Dutcher, 9 Cowen, 674, it was declared that money paid *bona fide*, and with full knowledge of the fact, cannot be recovered back, though there was no debt, and that the case of Marriot v. Hampton, 7 Term, 269, was rightfully decided, where it was held, that money recovered by due process of law without fraud or undue compulsion, ought not to be recovered back. The text of the Roman law contained propositions seemingly contradictory on the point, whether a payment of money made under a mistake of the law could be reclaimed. See Dig. 22, 6, 1, 7, 8, and Code, 1, 18, 10. Vinnius and D'Aguesseau contended that the money might be recovered back, unless the person making the payment was under a natural or moral obligation to make it. Voet and Pothier were of a contrary opinion, and the French civil code followed the former authorities, and made no distinction whether it be error of law or of fact. The question has become exceedingly perplexed by contradictory opinions and decisions. In Burge's Commentaries on Colonial and Foreign Laws, vol. iii. 727–739, there is a review of the authorities in the civil and English law on the question. An able writer in the American Jurist for April and July, 1840, vol. xxi., has also examined very critically and at large, all the cases, decisions, and *dicta*, and he concludes that there is no solid ground for the distinction between mistakes of law and mistakes of fact, as to the right to relief, and that the preponderance of authority is unequivocally on that side. It would be inadmissible in a work so general and comprehensive as the present one, to enter into the discussion. I have no doubt that injustice may sometimes result from a strict adherence to the rule refusing relief where the contract is founded on a mistake in law. But I incline to the opinion that true policy dictates that we take the law according to what I understand to be the more prevalent doctrine in the English and American courts; and that the contracts and acts of competent parties, when free from fraud of every kind, and made or done with full knowledge of all the facts, ought not to be disturbed on the allegation of ignorance of the law. It strikes my mind that such investigations as the relaxation of the rule would lead to, must be hazardous to the conscience, and pernicious as precedents. In the Spanish law the rule is explicitly laid down, that what is paid through ignorance of law cannot be recovered back, because, says the text, we are all obliged to know the laws of the kingdom; though payments through error, mistake, or ignorance of facts of what was not due, may be recovered back. Institutes of the Civil Law of Spain, by Aso & Manuel, b. 2, tit. 11, ch. 2. Mr. White, in his Recopilaçion of the Laws of Spain and the Indies, says that every chapter of that work constitutes the *corpus juris civilis* of Texas.

(a) Milnes v. Duncan, 6 Barn. & Cress. 671. The *dictum* of Bailey, J., in this last case, that money paid by mistake, though with means of knowledge of the fact, cannot be recovered back, is contradicted by Mr. Baron Parke, Kelly v. Solari, 9 Meeson & Welsby, 54. In this last case it was adjudged that money paid under a *bonâ fide* forgetfulness of facts, which disentitled the defendant to receive it, may be recovered back. Garwood v. Eldridge, 1 Green, N. J. Ch. R. 145. The mistake or ignorance for which a contract will be relieved in equity, must be of a material fact, essential to its character, and such as the party would not by reasonable diligence have known,

equity. (a) The distinction in the above rules was equally known to the civil law. (b) In *Lawrence* v. *Beaubein*, (c) the distinction between ignorance of the law and a mistake of the law was learnedly discussed, and it was held that the latter might be ground for relief in equity, though the former could not. (d) A third general rule on the subject is, that equity will rectify a mistake and give relief, and decree specific performance in cases of written contract, where there is a plain mistake clearly made out by satisfactory parol proof, or even fairly and necessarily implied. (e)

*VII. *Of passing the title by delivery.*[1] *492

(1.) When the terms of sale are agreed on, and the

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when put upon inquiry. Broadwell v. Broadwell, 1 Gilman's Ill. R. 599, S. P. Waite v. Leggett, 8 Cowen, 195. Story's Com. Id. 155. Buller, J., in Lowry v. Bourdieu, Doug. 467. Stevens v. Lynch, 12 East, 38. Champlin v. Laytin, 18 Wendell, 407. Cummins v. White, 4 Blackf. Ind. Rep. 356. Foreign laws are treated as facts, and ignorance of them is a ground for relief, like the ignorance of any other fact. Burge's Com. on Colonial and Foreign Laws, vol. ii. 741.

(a) Lammot v. Bowly, 6 Harr. & Johnson, 500, 525, 526.

(b) Pothier, Pand. 22, 6, 3, n. 4–7. Ibid. sec. 4, n. 10, 11. Ibid. 41, tit. 4, 1, 2, sec. 15. Code 1, 18, 10.

(c) 2 Bailey's S. C. Rep. 623.

(d) Mr. Justice Bronson, in Champlin v. Laytin, 18 Wendell, 416, thought that the distinction taken in the Carolina case, between ignorance of the law and mistake of the law, was not solid.

(e) Gillespie v. Moon, 2 Johns. Ch. Rep. 595. Lyman v. United Ins. Co. Ib. 630. Keisselbrack v. Livingston, 4 Id. 144. Andrews v. Essex F. & M. Ins. Co. 3 Mason, 10, 15. Dunlap v. Stetson, 4 Id. 349, 372. Hunt v. Rousmanier, 8 Wheaton, 174, 211. Story's Com. on Eq. Jurisprudence, 164, 176. Newsom v. Bufferlow, 1 Dev. N. C. Eq. 379 1 Yeates's Penn. Rep. 132, 138, 437. Ball v. Storie, 1 Sim. & Stu. 210. Lord Eldon, 10 Vesey, 227. Tilton v. Tilton, 9 N. H. Rep. 385. Moale v. Buchanan, 11 Gill & Johnson, 314. Mr. Justice Story, in his Com. on Eq. Jurisprudence, 121–194, has reviewed and collected most of the English and American cases, and drawn the proper conclusions from them with his customary ability and accuracy. Mr. Justice Turley, in Trigg v. Read, 5 Humphrey's Tenn. R. 529, has elaborately and ably examined the refined distinctions on this subject. So, in Duer on Insurance, vol. i. p. 132, note 11, the cases in equity correcting a clear mistake in a policy of in-

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[1] The omission of the mode or the time of payment, or even of the price itself, does not necessarily render a sale defective. The price will be inferred to be a *reasonable* one. Valpy v. Gibson, 4 M. G. & Scott's R. 864.

Many of the decisions quoted in the text, at page [494,] and in the following pages, will

bargain is struck, and everything that the seller has to do with the goods is complete, the contract of sale becomes absolute as between the parties, without actual payment or delivery, and the property and the risk of accident to the goods vest in the

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surance are collected. In Rogers v. Atkinson, 1 Kelly's Geo. R. 12, Ch. J. Lumpkin accurately collects and examines the principal English and American cases leading to the establishment of the principle, that equity relieves against mistakes as well as fraud in contracts in writing. The subject was very learnedly discussed in that case.

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be observed, on examination, not to apply to the statute of frauds, but to be illustrative of the general rules governing the contract of sale, independently of the statute. Indeed, the mass of mercantile contracts are in writing, and to such contracts the statute has no application. The distinction between the general rule of law on this subject, and the rules arising from the 17th section of the statute, must be borne in mind.

1. Where the statute does not apply, it may be laid down generally, as it may also be gathered from the text, [pp. 491-510,] that if the parties have agreed, the one to buy and the other to sell specific and determined articles, of which the price, weight, measure, or requisite fitness have been ascertained or agreed upon, or if suitable means have been provided by which these qualities or conditions may be ascertained, and the articles are put in that state for which the parties contracted, the property passes *eo instanti*, by virtue of the contract of sale, and without delivery.

This is not inconsistent with the lien that may remain to the vendor for payment of the price; and, though the general rule is as above stated, the parties may, by the form of the contract, or by special reservations, provide that some other act shall be a condition precedent to the passing of the property.

2. Under the statute of frauds a different class of questions arises; and many of the cases mentioned in the text, relate to the construction of the clause of the 17th section, which provides, that no contract for the sale of goods, &c., shall be good, "*unless the buyer accepts part of the goods sold, and actually receives the same.*"

Two things, it will be observed, are required by this clause, viz: an *acceptance* of part of the goods, and an *actual receipt* of the same.

1. Questions have arisen in several of the cases, as to the nature of the *acceptance* required, and the decisions are somewhat contradictory.

A series of English cases seemed to have established, that unless there has been such a dealing on the part of the purchaser as to deprive him of any right to object to the quantity or quality of the goods, there cannot be any part acceptance under the statute. Howe v. Palmer, 3 B. & Ald. 321. Tempest v. Fitzgerald, Id. 680. Hanson v. Armitage, 5 Id. 557. Carter v. Toussaint, Id. 855. Smith v. Surman, 9 B. & Cress. 561. Norman v. Phillips, 14 M. & W. 277. Hunt v. Hecht, 20 E. L. & Eq. 524. Cunliffe v. Harrison, 5 E. L. & Eq. 539. Shepherd v. Pressey, 32 N. H. 49.

But in a very recent case in the Q. B., Lord Chief Justice Campbell, in an elaborate opinion, dissents from this doctrine, and holds that an acceptance may be sufficient to satisfy the statute, although the purchaser has a right to object to the quantity of the article, and to repudiate the sale. Morton v. Tibbett, 15 Q. B. 428. See, also, Curtis v. Pugh, 10 Ad. & El. N. S. 114; Parker v. Wallis, 37 E. L. & Eq. 26.

2. The decisions just referred to do not affect the question of *receipt* under the statute. This is examined in a subsequent part of the lecture, (pp. 500, 505.)

Two propositions seem to be well established on this point, viz: that there can be no

buyer. (a) He is entitled to the goods on payment or tender of the price, and not otherwise, when nothing is said at the sale as to the time of delivery, or the time of payment.[1] The payment or tender of the price is, in such cases, a condition precedent implied in the contract of sale, and the buyer cannot take the goods, or sue for them, without payment; for, though the vendee acquires a right *of property* by the contract of sale, he does not acquire a right *of possession* of the goods *until *493 he pays or tenders the price. (b) But if the goods are sold upon credit, and nothing is agreed upon as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him;[2] though the right of possession is not absolute, but is liable to be defeated, if he becomes insolvent before he obtains possession. (c) If the seller has even despatched

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(a) Noy's Maxims, ch. 42. 2 Blacks. Com. 448. Lord Ellenborough, in Hinde v. Whitehouse, 7 East's Rep. 571. Code Napoleon, No. 1583. Civil Code of Louisiana, art. 2431. Tarling v. Baxter. 6 Barnew. & Cress. 360. Fletcher v. Howard, 2 Aikin's Vt. Rep. 115. Potter v. Coward, Meig's Tenn. Rep. 22. Mr. Justice Story observed, in the case of the Brig Sarah Ann, 2 Summer's Rep. 211, that he knew of no principle of law which establishes that a sale of personal goods is invalid, because they are not in possession of the rightful owner, but are withheld by a wrongdoer. The sale is not, under such circumstances, the sale of a right of action, but a sale of the thing itself, and good to pass the title against every person not holding the same under a *bonâ fide* title, for a valuable consideration, without notice, and *a fortiori* against a wrongdoer.

(b) Glanville, b. 10, ch. 14. Langfort v. Tiler, 1 Salk. 113. Hob. Rep. 41. 1 H. Blacks. Rep. 363. Bloxam v. Sanders, 4 Barnew. & Cress. 941. Lafon v. De Armas, 12 Rob. La. Rep. 598, 622. See *infra*, p. 497, S. C.

(c) Hanson v. Meyer, 6 East's Rep. 614. Bayley, J., in Bloxam v. Sanders, 4 Barnew. & Cress. 941, and in Simmons v. Swift, 5 Id. 857.

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receipt while the vendor retains his lien; and, again, the receipt is sufficient, when the goods come into the actual possession and control of the vendee. Within those limits there are numerous decisions depending on a great variety of facts and circumstances. Most of them will be found in the text and notes, to which reference has been made. The subject of acceptance and receipt under the statute of frauds is thoroughly examined in Browne on the Statute of Frauds, pp. 316-348.

[1] And payment must be made in a reasonable time, or the vendor is released from the contract. Conway v. Bush, 4 Barb. S. C. Rep. 564.

[2] So held in Kimbro v. Hamilton, 2 Swan, 190; Cartland v. Morison, 32 Me. 190; Hall v. Robinson, 2 Coms. 293. But *contra* in McGoon v. Ankeny, 11 Ill. 558; O'Keefe v. Kellogg, 15 Id. 347.

the goods to the buyer, and insolvency occurs, he has a right, in virtue of his original ownership, to stop them *in transitu*; for, though the property is vested in the buyer, so as to subject him to the risk of any accident, he has not an indefeasible right to the possession; and his insolvency, without payment of the price, defeats that right, equally after the *transitus* has begun, as before the seller has parted with the actual possession of the goods. Whether default in payment, when the credit expires, will destroy that right of possession, if the vendee has not before that time obtained actual possession, and put the vendor in the same situation as if there had been no bargain for credit, was left undecided in *Bloxam* v. *Sanders*, (*a*) though as between the original parties that consequence would follow. (*b*)

(2.) To make the contract of sale valid in the first instance according to statute law, there must be a delivery or tender of it, or payment, or tender of payment, or earnest given, or a memorandum in writing signed by the party to be charged; and if nothing of this kind takes place, it is no contract, and the owner may dispose of his goods as he pleases. (*c*) [1]

*494 The English statute of *frauds of 29 Car. II. ch. 3, sec. 17, (the provisions of which prevail in the United States, with the exception of Louisiana,)[2] declares, that no contract for the sale of goods, for the price of £10 or upwards, shall be good, except the buyer shall accept part of the goods, so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part payment; or, unless some

(*a*) 4 Barnew. & Cress. 941.

(*b*) This has been decided in Hunter *v*. Talbot, 3 Smedes & Marshall, 754, and in New *v*. Swain, Dan. & Lloyd's Merc. Cases, 193, where it was held, that if the buyer does not pay when the time of payment arrives, the seller in that case has a right to retain the goods. It was held in that case, that the right of the seller to retain the goods existed, though the goods were left with the seller on rent. If, however, the rent had been actually received, it would seem to have amounted to an actual transfer.

(*c*) Noy's Maxims, ch. 42. Tempest *v*. Fitzgerald, 3 Barnew. & Ald. 680.

[1] The delivery required to satisfy the 17th section of the statute of frauds, may be subsequent to the agreement. Marsh *v*. Hyde, 3 Gray, 331. McKnight *v*. Dunlop, 1 Seld. 537.

[2] And Virginia, Chapman *v*. Campbell, 13 Gratt. 105.

note or memorandum in writing of the bargain be made, and signed by the parties to be charged, or their agents thereunto lawfully authorized. (a) If, therefore, earnest-money be given,

(a) The New York Revised Statutes, vol. ii. p. 136, secs 3, 8, apply to the sale of goods, chattels, or things in action, for the price of fifty dollars or more, and declare that there must be a note or memorandum of such contract, in writing, *subscribed* by the parties to be charged, or the lawful agent of the party; or the buyer accept and receive part of the goods, or the evidences, or some of them, of the things in action; or at the time pay some part of the purchase-money. The statute puts equitable transfers of choses in action on a footing similar to that on which sales of goods stand. The English statute is not so broad. It does not reach *things in action*, as shares in a banking company. Humble v. Mitchell, 3 Perry & Davison, 141. S. C. 11 Adolph. & Ellis, 205. The New York statute requires the name of the party to be changed to be literally *subscribed*, or signed below or at the end of the memorandum, and the more loose doctrine under the English statute as to signing is not sufficient. Davis v. Shields, 26 Wendell, 341.[1] In Connecticut, the price limited is $35, and in New Jersey, $30, or upwards. In England, the provisions of the 17th section of the statute of frauds have been lately extended by statute to contracts for the sale of goods, "notwithstanding the goods may not, at the time of the contract, be actually made." The Revised Statutes of Massachusetts, of 1836, and of Connecticut, 1838, and of New Jersey, 1794, follow the words of the English statute of frauds.

The English Statutes of Frauds and Perjuries, 29 Car. II. c. 3, carries its influence through the whole body of our civil jurisprudence, and is in many respects the most comprehensive, salutary, and important legislative regulation on record, affecting the security of private rights. It seems to have been intended to embrace within its provisions the subject-matter of all contracts, and a sketch of its essential parts may facilitate the knowledge and study of it.

The 1st section enacts, that parol leases, estates, interests of freehold, or terms of years in land, shall have the effect of estates at will only.

The 2d excepts leases not exceeding three years, and where the rent received shall be at least two thirds of the improved value.

The 3d, that no leases, or interests of freehold, or terms for years, shall be assigned, granted, or surrendered, except by deed or note, in writing, signed, &c.

The 4th, that no action shall be maintained to charge an executor or administrator upon any special promise to answer out of his own estate — or to charge the defendant upon any special promise to answer for the debts, default, or miscarriage, of another — or to charge any person upon an agreement made in consideration of marriage — or upon any contract or sale of lands, or any interest in or concerning them — or upon any agreement not to be performed within a year, unless the agreement, or some note thereof, be in writing, signed, &c.

The 5th and 6th apply to devises of land.

[1] See, also, James v. Patten, 2 Seld. 9, where the Court of Appeals held that the contract must be literally *subscribed*, overruling the decision of the Supreme Court in 8 Barb. 344.

though of the smallest value, or there be a delivery or payment in whole or in part, or a note or memorandum of the contract duly signed, the contract is binding, and the property passes to the vendee, with the risk and under the qualifications already stated. (*a*) Whether a delivery of part of an entire stock, lot, or parcel of goods, be a virtual delivery of the whole, so as to vest in the vendee the entire property in the whole without payment, was a point much debated in *Hanson* v. *Meyer*, (*b*) and left undecided by the court. It was held, in that case, not to amount to such a delivery, provided any other act was necessary to precede payment or delivery of the residue; but if everything to be done on the part of the vendor be completed, a delivery of part of a cargo or a lot of goods, has, under certain circumstances, been considered a delivery of the whole, *495 so as to vest the property. (*c*) *To constitute a part

The 7th, 8th, and 9th, apply to declarations and assignments of trusts, which are required to be in writing, except implied trusts.

The 10th gives a remedy against the lands of *cestui que trust.*

The 11th relieves heirs from liabilities out of their own estates.

The 12th regulates, *pur auter vie.*

The 13th, 14th, 15th, and 16th sections apply to judgments and executions.

The 17th enacts that no contract for the sale of goods of £10, and upwards, shall be good, unless the buyer accepts part of the goods sold, and actually receives the same, or gives something in earnest to bind the bargain, or in part payment; or some note or memorandum in writing, of the bargain, be made and signed, &c.

The intention was to comprehend within the 4th and 17th sections, the subject-matter of every parol contract, of which uncertainty in the terms was likely to produce perjury. In Scotland, France, Holland, &c., there is no such provision as the English statute of frauds, and sales of goods may be established by parol proof, though in France such latitudinarian proof is specially applicable to mercantile cases. Mr. Bell questions the superior policy or safety of the strict rule of evidence required by the English statute of frauds. Bell on the Contract of Sale, Edin. 1844, pp. 63–73.

(*a*) Noy's Maxims, *ub. sub.* Shep. Touch. 224. Bach *v.* Owen, 5 Term Rep. 409. A *bill of sale* of personal property, duly perfected, passes the title as effectually as actual delivery. The enrolment is a substitute for actual delivery, and the vendee is clothed with the constructive possession, and competent to convey. Clary *v.* Frayer, 8 Gill & Johnson, 398. *Vide infra*, p. 531, S. P.

(*b*) 6 East's Rep. 614.

(*c*) Slubey *v.* Heyward, 2 H. Blacks. Rep. 504. Hammond *v.* Anderson, 4 Bos. & Pull. 69. Sands & Crump *v.* Taylor & Lovett, 5 Johns. Rep. 395. Parke, J., in Smith *v.* Surman, 9 Barn. & Cress. 561. If an entire contract be partially within the statute of frauds, the whole is void, for an entire agreement cannot be separated. Chater *v.* Beckett, 7 Term, 201.

acceptance, so as to take the case out of the statute, there must have been such a dealing on the part of the purchaser as to deprive him of any right to object to the quantity of the goods, or to deprive the seller of his right of lien.[1] But the facts and circumstances which may amount to an acceptance of part of the goods sold, has been a fruitful source of discussion, and subtle distinctions have been raised and adopted. (*a*)

The vendee cannot take the goods, notwithstanding earnest be given, without payment. Earnest is only one mode of binding the bargain, and giving to the buyer a right to the goods upon payment; (*b*) and if he does not come in a reasonable time after request, and pay for and take the goods, the contract is dissolved, and the vendor is at liberty to sell the goods to another person. (*c*) If anything remains to be done, as between the seller and the buyer, before the goods are to be delivered, a present right of property does not attach in the buyer. This is a well-established principle *in the doctrine of *496 sales. (*d*)[2] But when everything is done by the seller, as

(*a*) In Scotland, it has been held that where the commodity, like a cargo of grain, requires a protracted course of delivery, and part only had been delivered, the residue, undelivered in point of fact, was not to be deemed delivered in point of law, so as to exempt it from the creditors of the seller. Collins *v.* Marquis's Creditors, 1 Bell's Com. 173, n. § 158. But Mr. Bell seems to think the English decisions, cited in the preceding note, contain the better law.

(*b*) *Earnest* is a token or pledge passing between the parties by way of evidence or ratification of the sale. Its efficacy was recognized in the civil law, (Inst. 3, 24,) and it was in use in the early ages of the English law, as a means of binding the parties and completing the sale. Glanville, b. 10, c. 14. Bracton, b. 2, c. 27. It is mentioned in the statute of frauds, and in the French Code, as an efficient act; but it has fallen into very general disuse in modern times, and seems rather to be suited to the manners of simple and unlettered ages, before the introduction of writing, than to the more precise and accurate habits of dealing at the present day. It has been omitted in the New York Revised Statutes.

(*c*) Langfort *v.* Tiler, 1 Salk. Rep. 113. Goodall *v.* Skelton, 2 H. Blacks. Rep. 316. In Greaves *v.* Ashlin, 3 Campb. Rep. 426, Lord Ellenborough denied the right of the seller in such a case to put an end to the contract. It was held in Neil *v.* Cheves, 1 Bailey's S. C. Rep. 537, that if time and place for delivery be appointed, and the purchaser does not attend, or offer to pay, the vendor may rescind the contract even though he had previously received part of the purchase-money.

(*d*) Hanson *v.* Meyer, 6 East's Rep. 614. Withers *v.* Lyss, 4 Campb. Rep. 237.

1 See note (1), *ante*, p. 492.

2 Hutchinson *v.* Hunter, 7 Barr's Rep. 140. Scudder *v.* Worster, 11 Cush. 573. Field

to a parcel of the quantity sold, to put the goods in a deliverable state, the property, and consequently the risk of that parcel passes to the buyer; and as to so much of the entire quantity as requires further acts to be done on the part of the seller, the property and the risk remain with the seller. (a) The goods sold must be ascertained, designated, and separated from the stock or quantity with which they are mixed, before the property can pass. (b) It is a fundamental principle, pervading everywhere the doctrine of sales of chattels, that if the goods of different value be sold in bulk, and not separately, and for a single price, or *per aversionem*, in the language of the civilians, the sale is perfect and the risk with the buyer; but if they be sold by number, weight, or measure, the sale is incomplete, and the risk continues with the seller, until the specific property be separated and identified. (c) [1]

Wallace v. Breeds, 13 East's Rep. 522. Busk v. Davis, 2 Maule & Selw. 397. Shepley v. Davis, 5 Taunt. Rep. 617. Simmons v. Swift, 5 Barn. & Cress. 857. M'Donald v. Hewett, 15 Johns. Rep. 349. Barrett v. Goddard, 3 Mason's Rep. 112. Allman v. Davis, 2 Iredell's N. C. Rep. 12. The rule, as drawn from the case of Whitehouse v. Frost, in 12 East, 614, by Mr. Selwyn, is, that when goods are sold, if anything remains to be done on the part of the seller, as between him and the buyer, to ascertain the price, quantity, or individuality of the goods before delivery, a right of property does not attach in the buyer.

(a) Rugg v. Minett, 11 East's Rep. 210. Henderson v. Brown, Newfoundland Rep. 90.

(b) Austen v. Craven, 4 Taunt. Rep. 644. White v. Wilks, 5 Idem, 176. Outwater v. Dodge, 7 Cowen's Rep. 85. Woods v. M'Gee, 7 Ohio Rep. (part 2,) 128.

(c) Vinnius's Com. in Inst. 3, 24, 3, sec. 4. Dig. 18, 1, 35, 3. Pothier, Traité du Contrat de Vente, No. 308. Code Napoleon, No. 1585. Civil Code of Louisiana, art. 2433. Zagury v. Furnell, 2 Campb. Rep. 240. Simmons v. Swift, 5 Barn. & Cress. 857. Devane v. Fennell, 2 Iredell's N. C. Rep. 36. By the English statute of 5 & 6 Wm. IV. c. 63, new provisions were introduced for verifying and adjusting the

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v. Moore, Hill & Den. 418. Golder v. Ogden, 15 Penn. 528. Stevens v. Eno, 10 Barb. 95. Messer v. Woodman, 2 Fost. 172. Evans v. Harris, 19 Barb. 416. The fact of earnest or part payment does not alter the case, and the money paid may be recovered if the contract fails. Joyce v. Adams, 4 Seld. 291. Nesbit v. Burry, 25 Penn. 208. But separation is enough to pass the property, though writing or other acts may remain to be performed. Cunningham v. Ashbrook, 20 Mis. 553. See, however, Waldron v. Chase, 37 Me. 414, where it is held, that when a certain number of bushels out of a quantity of corn is paid for, and a part taken, though the rest has not been separated from the heap, the property and risk are in the vendee. And see Sweeny v. Owsley, 14 B. Mon. (Ky.) 413.

[1] But if the vendor presents a bill of the articles as being of a certain amount, and the

(3.) Where no time is agreed on for payment, it is understood to be a cash sale, and the payment and the delivery are immediate and concurrent acts, and the vendor may refuse to deliver without payment, and if the payment be not immediately made, the contract becomes void. (a) [1] If he does deliver freely and absolutely, and without any fraudulent contrivance on the part of the vendee to obtain possession, and without exacting or expecting simultaneous payment, there a confidence and credit are bestowed, and the precedent condition of payment is waived, and the right of property passes. (b)[2] This rule is understood not to apply to cases where payment is expected *simultaneously with delivery, and is omitted, *497 evaded, or refused, by the vendee, on getting the goods under his control; for the delivery in such a case is merely con-

standard models of weights and measures. The Winchester bushel, and all other local measures were abolished, and heaped measures were abolished, and the stone weight was regulated at fourteen standard pounds avoirdupois, and a hundred weight at eight such stones, and a ton at twenty such hundred weight, and no one was allowed to sell by any other weights or measures than the imperial weights and measures prescribed by the act.

(a) Comyn's Dig. tit. Agreement, B. 3. Bell on the Contract of Sale, Edin. 1844, pp. 20, 21.

(b) Haswell v. Hunt, cited by Buller, J., in 5 Term Rep. 231. Harris v. Smith, 3 Serg. & Rawle, 20. Chapman v. Lathrop, 6 Cowen's Rep. 110, S. P. 1 Denio, 51.

vendee assents, that is sufficient. Olyphant v. Baker, 5 Denio's R. 379. To prevent the property passing, something must be required to ascertain the quantity, *by the very terms of the contract.* Dennis v. Alexander, 3 Barr's R. 50. So it has been held, that if a portion of the bricks in a kiln be sold by the thousand, but not counted or marked, though clearly identified, and possession of the yard containing the whole be delivered to the vendee, the property in those sold passes. It is left to the vendee to make his own selection. Crofoot v. Bennett, 2 Comst. R. 258. See, also, Brewer v. Salisbury, 9 Barb. 511. And when it is clear, by the terms of a contract, that the parties intended the sale should be complete before the article sold is weighed or measured, the property will pass before this is done; even though the price cannot be otherwise fixed. Boswell v. Green, 1 Dutch. (N. J.) 390.

[1] Leven v. Smith, 1 Den. 571. Under the clause of the statute of New York, making every agreement for the purchase of goods void "unless the buyer shall *at the time* pay some part of the purchase-money," &c., 2 R. S. 136, it has been decided, that if payment be made in a reasonable time, it is sufficient. Thompson v. Alger, 12 Met. R. 428. It has been decided, that if the price was to be applied to the payment of a precedent debt, the application must be *actually made*, by receipt or otherwise. Clarke v. Tucker, 2 Sandf. (Law) R. 157.

[2] Furniss v. Hone, 8 Wend. 247. Smith v. Lynes, 1 Selden, R. 41. S. C. 3 Sandford, S. C. R. 203. Davis v. Bradley, 24 Vt. 55.

ditional, and the non-payment would be an act of fraud, entering into the original agreement, which would render the whole contract void, and the seller would have a right instantly to reclaim the goods. (*a*) The obtaining goods upon false pretences, under color of purchasing them, does not change the property. (*b*) [1] If it was even a condition of the contract, that the seller was to receive, upon delivery, a note, or security for payment at another time, he may dispense with that condition, and it will be deemed waived by a voluntary and absolute delivery, without a concurrent demand of the security. (*c*) But if the delivery in that case be accompanied with a declaration on the part of the seller, that he should not consider the goods as sold until the security be given, or if that be the implied understanding of the parties, the sale is conditional, and the property does not pass by the delivery, as between the original parties; though, as to subsequent *bonâ fide* purchasers or creditors of the vendee, the conclusion might be different. (*d*) [2]

(*a*) Leedom *v.* Philips, 1 Yeates's Rep. 529. Harris *v.* Smith, 3 Serg. & Rawle, 20. Palmer *v.* Hand, 13 Johns. Rep. 434. Bainbridge *v.* Caldwell, 4 Dana's K. Rep. 213. A purchase of goods with a preconceived design not to pay for them, is a fraud, and will avoid the sale. No title passes to the vendee. Earl of Bristol *v.* Wilsmore, 1 Barn. & Cress. 514. Root *v.* French, 13 Wendell, 570. Ash *v.* Putnam, 1 Hill's N. Y. Rep. 302. *Vide post*, p 514, n., and *ante*, p. 484. Cary *v.* Hotailing, 1 Hill, 311. Kilby *v.* Wilson, Ryan & Moody, 178. Abbots *v.* Barry, 5 Moore, 98, 102.

(*b*) Noble *v.* Adams, 7 Taunt. Rep. 59.

(*c*) Payne *v.* Shadbolt, 1 Campb. Rep. 427. Carleton *v.* Sumner, 4 Pick. Rep. 516. Smith *v.* Dennie, 6 Idem, 262.

(*d*) Hussey *v.* Thornton, 4 Mass. Rep. 405. Marston *v.* Baldwin, 17 Idem, 606. Corlies *v.* Gardner, 2 Hall's N. Y. S. C. Rep. 345. Reeves *v.* Harris, 1 Bailey's S. C. Rep. 563. Lucy *v.* Bundy, 9 N. H. Rep. 298. Lafon *v.* De Armas, 12 Rob. La.

[1] Malcom *v.* Loveridge, 13 Barb. R. 372, holds that a *bonâ fide*-purchaser of goods, for a valuable consideration, from a person who obtained them from the owner by false pretences, amounting to a felony, will hold them against the first vendor, if he voluntarily parted with the possession, and intended to part with the title. A similar decision was made by the N. Y. Superior Court, in Keyser *v.* Harbeck, 3 Duer, 373. See, also, White *v.* Garden, 5 E. L. & Eq. 379; Jennings *v.* Gage, 13 Ill. R. 610; Williams *v.* Given, 6 Gratt. R. 268; Acker *v.* Campbell, 23 Wend. 372; Kingsford *v.* Merry, 34 E. L. & Eq. 607; Titcomb *v.* Wood, 38 Me. 561; Caldwell *v.* Bartlett, 3 Duer, 341; Smith *v.* Lynes, 1 Seld. 4. But see Sawyer *v.* Fisher, 32 Maine R. 28.

[2] In Coggill *v.* H. & N. H. R. R. Co. 3 Gray, 545, it is held that the vendor in a conditional sale may recover the property even from one who has purchased of the vendee in good faith and without notice. Haven *v.* Emery, 33 N. H. 66. In Herring *v.* Hoppock,

Where there is a condition precedent attached to a contract of sale and delivery, the property does not vest in the vendee on delivery, until he performs the condition, or the seller waives it;[1] and the right continues in the vendor, even against the creditors of the vendee. (a)[2] If the delivery of the goods precedes for a short time the delivery of the note to be given for the price, according to particular usage in that species of dealing, and which usage is known to the buyer, the case falls within the same *principle, and the delivery is *498 understood to be conditional.[3] The condition is not deemed to be waived, and the seller will have a right in equity to consider the goods as held in trust for him, until the vendee performs the condition, and gives the note with security; and his right to the goods will be good, as against the buyer and his voluntary assignee, though not as against a *boná fide* purchaser from the vendee. (b)[4] It is the better and sounder doc-

Rep. 598. In this last case, after much learned discussion, it was held, that when the purchaser of a thing sold has acquired as against the seller a right to demand it, the sale is not complete as to third persons, until the price be paid and possession delivered; and if neither of them be done, a sale in good faith to a third person, followed by payment and delivery, will be good. The remedy for the first purchaser, if any, is by an action *ex empto* for damages.

(a) Barrett v. Pritchard, 2 Pick. Rep. 512. Bishop v Shillito, 2 Barn. & Ald. 329, n. Strong v. Taylor, 2 Hill's Rep. 326.

(b) Haggerty v. Palmer, 6 Johns. Ch. Rep. 437; and see Lord Seaforth's case, 19 Ves. 235, in which the vendor's lien was carried at least equally far; and see, also, Whitwell v. Vincent, 4 Pick. Rep. 449; Corlies v. Gardner, 2 Hall's N. Y. Rep. 345; Russell v. Minor, 22 Wendell, 661, and D'Wolf v. Babbett, 4 Mason's Rep. 294, to

15 N. Y. (1 Smith) 409, it was held that where property was delivered to a vendee, in a conditional sale, and the condition was not performed, the vendee had no interest in the property which would be the subject of a levy and sale on execution. And see Hart v. Carpenter, 24 Conn. 427.

[1] A sale with a right of resale by the vendor, in default of payment by vendee, is a *conditional* sale, and the resale *annuls* the first sale. Lamond v. Davall, 9 Ad. & El. N. S. 1030. See Staats v. Hodges, Hill & Denio, (N. Y.) 211, in which certain acts were held not to amount to a waiver of a condition.

[2] Nor is the right of the vendor affected by his recovering a judgment for the price, nor by the article sold having been left in his possession against his will. Root v. Lord, 28 Vt. 568.

[3] Fleeman v. McKean, 25 Barbour, (N.Y.) 474.

[4] But in Sargent v. Metcalf, 5 Gray, (Mass.) 306, the vendor's right to the goods was held to be good against a purchaser in good faith and without notice of the conditions.

trine, and one established by the later cases, that a written agreement to deliver by a certain time goods sold, cannot be enlarged as to the time by a subsequent parol agreement, for that would contravene the statute of frauds, by making the right of action of the agreement to rest partly in writing and partly in parol. (*a*)

(4.) By the civil law, the right of property was not vested in the purchaser without delivery; nor even by delivery, without payment of the price, unless the goods were sold on a credit. (*b*) The risk of the goods was, nevertheless, thrown on the buyer before delivery, and as soon as the contract of sale was completed, even though the title was still in the vendor. *Periculum reivenditæ, nondum traditæ, est emptoris.* (*c*) Pothier endeavors

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the same point. In the case in Hall, six days intervened between the delivery of the goods and the call for the note; and in the last case it was held, that if on a sale the delivery of goods be conditional, and the vendor assents to a qualified delivery, for the convenience of the vendee, and with the understanding that the property is not to pass absolutely, unless the terms of sale be complied with, the vendor in that case is not divested of his right to retake the goods. Copland *v.* Bosquet, 4 Wash. Cir. Rep. 588, S. P. But in Mills *v.* Hallock, 2 Edw. V. Ch. Rep. 652, the sale at auction was on approved notes, and the goods were delivered, and twenty-five days thereafter the vendee failed and assigned his property. As there was no custom proved authorizing such a delay, the title was held to be completely vested before the assignment, and passed with it. The rule in Canada is, that, if goods be sold for cash, and not paid for, they may be followed and claimed in an action of revendication, if brought within eight days, and if the goods have remained in the state in which they were delivered. Aylwin *v.* McNally, Stuart's Lower Canada Rep. 541.

By the Code of Lousiana, art. 3194, the vendor of a chattel not paid for has a preference for the price, over other creditors of the vendee, whether the sale was made on credit or without, if the property remains in the possession of the purchaser, and the privilege exists, though the vendor has taken a note from the buyer. This privilege is extinguished by the destruction of the thing sold; but it is held, that if the vendee sells the goods before he has paid for them, the money due by the second vendee will represent the goods, and the first vendor's privilege will attach thereon. Martin, J., in Thayer *v.* Goodale, 4 La. Rep. 222.

(*a*) Goss *v.* Lord Nugent, 5 B. & Adol. 58. Stowell *v.* Robinson, 3 Bing. N. C. 928. Harvey *v.* Grabham, 5 Ad. & E. 61.

(*b*) Inst. 2, 1, 41. Ibid. 3, 24, 3. Code, lib. 2, tit. 3, 1, 20. Dig. 18, 1, 19. Bynk. Quæst. Jur. Priv lib 3, ch. 15. Pothier, Traité du Contrat de Vente, n. 322. Id. Traité de la Propriéte, part prem., c. 2, art. 232, 242. Domat, b. 4, tit. 5, sec. 2, art. 3. This is also the rule in the Scots law. Bell's Principles of the Laws of Scotland, 3d edit. p. 28. Before delivery, the vendee has only the *jus ad rem*, and not the *jus in re.*

(*c*) Inst. 3, 24, 3, but the seller was nevertheless bound to protect the property

to vindicate this principle of the civil law, in answer to the objections of Puffendorf, Barbeyrac, and others, who insisted that the civil law in this respect was not founded on principles of natural justice. (*a*) We think the common law very reasonably fixes the risk where the title resides; and when the bargain *is made and rendered binding by giving earnest, *499 or by part-payment, or part delivery, or by a compliance with the requisitions of the statute of frauds, the property, and with it the risk, attach to the purchaser. But though the seller has parted with the title, he may retain possession until payment; and he has even the equitable right of stoppage *in transitu*, in the case of the insolvency of the purchaser; and that right assumes that the vendor has divested himself of the legal title, and that the property has passed to the vendee, while the actual possession is in some third person in its transit to the vendee.

(5.) Delivery of goods to a servant or agent of the purchaser, (*b*) or to a carrier or master of a vessel, when they are to be sent by a carrier or by water, is equivalent to delivery to the purchaser; and the property, with the correspondent risk, imme-

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until the delivery. Ib. 3, 24, 3. Pothier, Traité du Contrat de Vente, part 2, ch. 1, sec. 1, art. 3.

(*a*) Heineccius, in his excellent treatise on the law of nature, says, that the risk of the thing purchased, after the bargain is completed, though without delivery, ought to fall on the buyer, in cases free from fault or delay on the part of the seller, *quia emptor jure naturæ sine traditione sit dominus.* Jur. Nat. et Gentium, b. 1, ch. 13, sec. 353. The Code Napoleon, No. 1583, has dropped the rule of the civil, and followed that of the English common law; and it holds, that the property passes to the buyer as soon as the sale is perfected, without either delivery or payment. The Civil Code of Louisiana, art. 2431, follows the words of the Code Napoleon. In the case of Meade *v.* Smith, 16 Conn. R. 356-366, Mr. Justice Storrs has given a succinct, correct, and learned view of the common and civil law on the subject of the delivery or non-delivery of the article sold, or the efficacy of the contract of sale.

The contract of sale, as regulated by the civil law, is examined and discussed at large, with sound judgment and extensive and accurate learning, in the American Jurist, No. 26, for April, 1835, (vol. xiii.) Pothier's elaborate and excellent treatise on the contract of sale, (Traité du Contrat de Vente,) is founded on the civil law, as illustrated by the French civilians, and adopted and regulated by the French law. Toullier has also written largely on the law of contracts (Droit Civil, vols. vi. and vii.) as existing under the new civil code, and these two distinguished civilians are equally admirable for their logic and simplicity.

(*b*) Leeds *v.* Wright, 3 Bos. & Pull. 320. Dixon *v.* Baldwin, 5 East's Rep. 175.

diately vests in the purchaser, subject to the vendor's right of stoppage *in transitu*. (*a*) [1] A delivery by the consignor of goods on board of a ship chartered by the consignee, is a delivery to the consignee; (*b*) and the rule is the same, if they were put on board a general ship for the consignee. (*c*) The effect of a consignment of goods by a bill of lading, is to vest the property in the consignee. A delivery to any general carrier, where there are no specific directions out of the ordinary usage, is a constructive delivery to the vendee; and the rule is the same whether the goods be sent from one inland place to another, or beyond sea. But if there be no particular mode of carriage specified, and no particular course of dealing between the parties, the property and the risk remain with the vendor while in the hands of the common carrier. (*d*) [2] *500 *The delivery to the agent must be so perfect as to create a responsibility on the part of the agent to the buyer; (*e*) and if the goods be forwarded by water, the vendor ought to cause them to be insured, if such has been the usage; (*f*) and he ought, in all cases, to inform the buyer, with due diligence, of

(*a*) Evans *v.* Marlett, 1 Lord Raym. 271. Dutton *v.* Solomonson, 3 Bos. & Pull. 582. Dawes *v.* Peck, 8 Term Rep. 330. Ludlows *v.* Bowne & Eddy, 1 Johns. Rep. 15. Summeril *v.* Elder, 1 Binney's Rep. 106. Griffith *v.* Ingledew, 6 Serg. & Rawle, 429. King *v.* Meredith, 2 Campb. Rep. 639. Copeland *v.* Lewis, 2 Starkie's N. P. Rep. 33.

(*b*) Inglis *v.* Usherwood, 1 East's Rep. 515. Fowler *v.* M'Taggart, cited in 7 Term Rep. 442. Bohtlingk *v.* Inglis, 3 East's Rep. 395.

(*c*) Coxe *v.* Harding, 4 East's Rep. 211. Brown *v.* Hodgson, 2 Campb. Rep. 36. Groning *v.* Mendham, 5 Maule & Selw. 189.

(*d*) Coates *v.* Chaplin, 2 Gale & Davison, 552.

(*e*) Buckman *v.* Levi, 3 Campb. Rep. 414. If the vendor takes upon himself actually to deliver the goods to the vendee, he stands to the risk; but if the vendee orders a particular mode of conveyance, the vendor is excused. Lord Mansfield, in Vale *v.* Bayle, Cowp. Rep. 294. Goodwyn *v.* Douglas, 1 Cheeve's Law & Eq. S. C. Rep. 174.

(*f*) Cothay *v.* Tute, 3 Camp. 129.

[1] But delivery to a carrier is held not to satisfy the statute of frauds, unless the carrier was the agent of the vendee, with power to accept the goods. Meredith *v.* Meigh, 22 E. L. & Eq. 91. Frostburg Mining Co. *v.* N. E. Glass Co. 9 Cush. 115. Lloyd *v.* Wight, 20 Geo. 574.

[2] Jones *v.* Bradner, 10 Barb. R. 193.

the consignment and delivery. (a) Until the party, receiving a consignment or remittance made on account of the consignor, has done some act recognizing the appropriation of it to a particular specified purpose, and the party claiming under the appropriation has signified his acceptance of it, so as to create a privity, the property and its proceeds remain at the risk and on the account of the remitter or owner. (b)

(6.) Symbolical delivery will, in many cases, be sufficient and equivalent in its legal effects, to actual delivery. The delivery of the key of the warehouse in which goods sold are deposited, or transferring them on the warehouseman's or wharfinger's book to the name of the buyer, is a delivery sufficient to transfer the property. (c) [1] So, the delivery of the receipt of the storekeeper for the goods, being the documentary evidence of the title, has been held to be a constructive delivery of the goods. (d) There may be a symbolical delivery when the thing does not admit of actual delivery. The delivery must be such as the nature of the case admits. (e) We have a striking instance of this in the Pandects, (f) where the delivery of wine is held to be made by the delivery of the keys of the wine cellar; and the consent of the party upon the spot is sufficient possession of a column of granite, which, by its weight and magnitude, was not susceptible of any other delivery; and possession *was *501 taken by the eyes and the declared intention.[2] In the

(a) Bell on the Contract of Sale, Edin. 1844. p. 89.

(b) Tiernan v. Jackson, 5 Peters's U. S. Rep. 580. Williams v. Everett, 14 East, 582. Grant v. Austen, 3 Price, R. 58, S. P.

(c) Lord Hardwicke, 1 Atk. Rep. 171. Lord Kenyon, 7 Term Rep. 71. 1 East's Rep. 194. Harman v Anderson, 2 Campb. Rep. 243. Pothier, Traité du Droit de Propriété, No. 199 Dig. 41, 1, 9, 6.

(d) Wilkes & Fontaine v. Ferris, 5 Johns. Rep. 335.

(e) Lord Kenyon, 1 East's Rep. 194. (f) Dig. 41, 2, 1, 21.

1 Packard v. Dunsmore, 11 Cush. 282. In Vining v. Gilbreth, 39 Me. 496, delivery of the key was held sufficient to pass a shop built on the land of another, and therefore, under the circumstances, personal property. It was held in Stevens v. Stewart, 3 Cal. 140, that when delivery is essential to the contract, a symbolic delivery is effectual only when it can be immediately followed by actual delivery.

2 This illustration was noticed in the nearly parallel case of Shindler v. Houston, 1 Comst. 261, in which it was held, that a naked verbal agreement, though the property was designated by the parties at the time, was not a sufficient delivery and acceptance within

sale of a ship, or goods at sea, the delivery must be symbolical, by the delivery of the documentary proofs of the title; and the delivery of the grand bill of sale is a delivery of the ship itself. (a)[1] A bill of sale of timber, and materials of great bulk lying on the banks of a canal, or marking the timber, has been held to be a delivery sufficient to make the possession follow the right. It was as complete a delivery and possession as the subject-matter reasonably admitted. (b)[2] Taking a bill of parcels and an order from the vendor on the storekeeper for the goods, and going and marking them with the initials of one's name, has been held a delivery. (c) Taking a bill of parcels, and the order on the warehouseman, and paying the price, has been held to be a complete and executed contract, so as to pass the property and the risk of the articles sold. (d) The mere communication of the vendor's order on a wharfinger or warehouseman for delivery, and assented to by him, passes the property to the vendee. (e)[3] Even the change of mark on bales of goods in a

(a) Atkinson v. Maling, 2 Term Rep. 462.

(b) Manton v. Moore, 7 Term Rep. 67. Stoveld v. Hughes, 14 East's Rep. 308. *Videri trabes traditas quas emptor signasset.* Dig. 18, 6, 14, 1. If the vendee be already in possession of the goods, the sale to him by agreement of the parties is complete by the assent of the vendor, without any other than constructive delivery; for he has possession, in fact, already. Inst. 2, 1, 43. Carter v. Willard, 19 Pick. 6, 7. Shurtleff v. Willard, Ib. 210; and if the goods sold be in the custody of a third party for the vendor, a notice to him by the parties is a good constructive delivery. Tuxworth v. Moore, 9 Pick. 347. Carter v. Willard, 19 Idem, 1.

(c) Hollingsworth v. Napier, 3 Caines's Rep. 182. A mere delivery of a bill of parcels, without more, is not a sufficient delivery of the goods to prevent the attachment of them at the instance of a creditor of vendor. Lanfear v. Sumner, 17 Mass. Rep. 110. Carter v. Willard, 19 Pick. R. 1.

(d) Pleasants v. Pendleton, 6 Randolph's Rep. 473.

(e) Lucas v. Dorrien, 7 Taunt. Rep. 279. Searle v. Keeves, 2 Esp. Rep. 598. Bentall v. Burn, 3 Barn. & Cress. 423.

the statute of frauds. Some *act* of acceptance was held to be necessary to satisfy the statute.

[1] So where personal property at the time of sale is, from its situation, incapable of delivery, the delivery of the bill of sale or other evidence of title, is sufficient to transfer the *property* and the *possession*. Gibson v. Stevens, 8 How. U. S. 384. Stanton v. Small, 3 Sandf. S. C. R. 230.

[2] Montgomery v. Hunt, 5 California, 223.

[3] But the delivery and acceptance of an order is not an acceptance of the goods within the statute of frauds. There must be a selection and acceptance of the goods, and the

warehouse, by direction of the parties, has been held to operate as an actual delivery of the goods. (a) [1] A delivery of part of a parcel of articles selected and purchased without any objection at the time as to the delivery of the residue, takes the case out of the statute of frauds as to the whole of the goods so purchased. (b) [2] The case would be different if the purchaser paid for the articles delivered, and left the residue undelivered and wholly unpaid for. (c) If the vendor takes the vendee within sight of ponderous articles, such as logs lying within a boom, and shows them to him, it amounts to a delivery, though the vendee should suffer them to lie within the boom, as is usual with such property, * until he have occasion to use *502 them. (d) Delivery of a sample has been sufficient to transfer the property, when the goods could not be actually delivered until the seller had paid the duties; that fact being known and understood at the time, and when the buyer accept-

(a) Lord Ellenborough, 14 East's Rep. 312. The selecting and marking of sheep, in the possession of B., who is desired to retain possession of them for the vendee, was held to be a sufficient delivery to complete the sale and pass the property. Barney v. Brown, 2 Vermont Rep. 374. 1 Bell's Com. 176. Campbell v. Barry, Ibid. The Vermont and the Scotch decisions were founded on the same circumstances.

(b) Slubey v. Heyward, 2 H. Blacks. 509. Baldey v. Parker, 2 B. & Cress. 37. Elliott v. Thomas, 3 Mees. & Wels. 170. Mills v. Hunt, 20 Wendell, 431. Delivery of part of goods, sold for the whole, applies to all the goods embraced by the contract of sale, although they happen to be scattered in different and distant places. Shurtleff v. Willard, 19 Pick. Rep. 202, 210, 211.

(c) Walworth, Ch., in Mills v. Hunt, 20 Wendell, 434.

(d) Jewett v. Warren, 12 Mass. Rep. 300, S. P. Shindler v. Houston, 1 Denio, 49.[3]

assent of the wharfinger to hold them for the vendee. Farina v. Home, 16 M. & W. 119. Stevens v. Stewart, 3 Cal. 140. See also Godts v. Rose, 33 E. L. & Eq. 268, and note.

[1] Squires v. Payne, 6 California, 654.

[2] But the rule will be otherwise, if the contract be for the sale of separate and distinct parcels to be delivered at distinct periods of time. Seymour v. Davis, 2 Sandf. (Law) R. 239. Where contracts for the sale of several parcels are reduced into one, of which a memorandum is signed by the vendor, a delivery of any part to the vendee takes the whole out of the statute of frauds. Biggs v. Wisking, 25 E. L. & Eq. 257. If several owners make a joint sale, and one of them delivers a portion of his parcel, this is a part delivery to satisfy the statute of frauds. Field v. Runk, 2 Zabr. 525. But the question whether the delivery of a part was intended for the whole must be left to the jury. Pratt v. Chase, 40 Me. 269, and cases cited.

[3] But the judgment in this case was reversed in the Court of Appeals. S. C. 1 Comstock, 261. See the decision in the Court of Appeals, cited *supra*, p. [*501.]

ed of the sample as part of the quantity purchased.(a) The delivery must always be according to the subject-matter of the delivery, and the property must be placed under the control and power of the vendee. (b)

Cutting off the spiles of wine-casks, and marking the initials of the purchaser's name on them, has been held an incipient delivery, sufficient to take the case out of the statute. (c) So if the purchaser deal with the commodity as if it were in his actual possession, this has been held to supersede the necessity of proof of actual delivery. (d) Where a purchaser at the merchant's shop, marked the goods which he approved of, and laid them aside on the counter, and went for a porter to remove them, without receiving a bill of parcels, or stipulating a time of payment, or tendering the merchant's note, which he was to offer in payment, it has been held, that the property in the goods was not changed by that transaction. (e) Since that decision, a more relaxed rule has, at times, been adopted; and it has been held, that on the purchase of a horse without *503 memorandum, payment *or actual delivery, the verbal request of the buyer that the vendor keep the horse in his possession for a special purpose, and the consent on the part of the vendor, amounted to a constructive delivery, sufficient to take the sale out of the statute. (f) This case has since been questioned, as carrying the doctrine of constructive delivery to the utmost verge of safety; and the latter cases seem to have resumed a stricter doctrine, and qualified the inference to be drawn from the acts of the buyer. The presumption of a de-

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(a) Hinde v. Whitehouse, 7 East's Rep. 558. But generally, as a substitute for actual or constructive delivery, the taking of samples has no effect. Hill v. Buchanan, cited in a note to 1 Bell's Com. 182.

(b) 2 N. H. Rep. 318. Incorporeal rights are not susceptible of actual delivery, and a quasi-possession is taken, when the use commences, as a right of way. So, the delivery of a debt or chose in action, consists in the assignment of it, with notice. Pothier, Traité du Droit de Propriété, Nos. 214, 215.

(c) Anderson v. Scott, 1 Campb. Rep. 235, n.

(d) Chaplin v. Rogers, 1 East's Rep. 192. Blenkinsop v. Clayton, 1 Moore's Rep. 328.

(e) Dutilh v. Ritchie, 1 Dall. Rep. 171. So also, to the same point, Baldey v. Parker, 2 Barn. & Cress. 37; S. C. 3 Dow. & Ry. 220.

(f) Elmore v. Stone, 1 Taunt. Rep. 458.

livery is not readily allowed, when there has been none in fact; for it goes to deprive the seller of the possession and of his lien, without payment. (a)[1] The purchase of a part of a heap of grain, or of other goods in bulk, if the same be not measured off and separated at the time, is not valid, even through the seller afterwards measured it off and set it apart for the vendee. (b) On the other hand, probity in dealing, the interests of commerce, and the variety, extent, and rapidity of circulation of property, which it has introduced, require that delivery should frequently be presumed from circumstances; and a destination of the goods by the vendor to the use of the vendee, the marking them, or making them up to be delivered, or the removing them for the purpose of being delivered, may all entitle the vendee to act as owner. (c) But the presumption fails when positive evidence contradicts it, as in the case of a refusal on the part of the vendor to part with the goods until payment; (d) and on the part of the vendee to take the goods when inspected; (e) *or the delivery be of a sample which is not part of the bulk of the commodity sold. The good sense of the doctrine on the subject would seem to be, that, in order to satisfy the statute, there must be a delivery of the goods by the vendor, with an intention of vesting the right of possession in the vendee, and an actual acceptance by the vendee, with an intention of taking possession as owner. (f) *504

If the subject-matter of the contract does not exist *in rerum*

(a) Tempest v. Fitzgerald, 3 Barn. & Ald. 680. Carter v. Toussaint, 5 Idem, 855. Dole v. Stimpson, 21 Pick. 384.

(b) Howe v. Palmer, 3 Barn. & Ald. 321. Salter v. Knox, 1 Bell's Com. 181, n. S. P. Eagle v. Eichelberger, 6 Watts, 29. See *supra*, p. 496, S. P.

(c) Lord Loughborough, 1 H. Blacks. Rep. 363. 1 Campb. N. P. Rep. 233. Parker v. Donaldson, 2 Watts & Serg. 1.

(d) Goodall v. Skelton, 2 H. Blacks. Rep. 316.

(e) Kent v. Huskinson, 3 Bos. & Pull. 233. The delivery to the carrier will not conclude the vendee, and be construed into an actual acceptance of the goods, so long as the vendee retains the right of inspection upon the ultimate delivery, and to object to either the quantity or quality of the goods. Astey v. Emery, 4 Maule & Selw. 264. Hanson v. Armitage, 5 Barn. & Ald. 559.

(f) Phillips v. Bistolli, 2 Barn. & Cress. 511.

[1] Holmes v. Hoskins, 28 E. L. & Eq. 564.

natura, at the time of the contract, but remained to be thereafter fabricated out of raw materials, or materials not put together, it is consequently incapable of delivery, and not within the statute of frauds; and the contract is valid without a compliance with its requisitions. (*a*) The case rests entirely on contract, and no property passes, until the article is finished and delivered. (*b*)

(*a*) Towers *v.* Osborne, Str. 506. Groves *v.* Buck, 3 Maule & Selw. 178. Littledale, J., in Smith *v.* Surman, 9 Barn. & Cress. 561. Mixer *v.* Howorth, 21 Pick. 205. See also *infra*, p. 511, n. c.

(*b*) Mucklow *v.* Mangles, 1 Taunt. Rep. 318. Atkinson *v.* Bell, 8 Barn. & Cress. 277. In the Scotch law, if goods be purchased from a manufacturer, before some necessary operation of his art be completed, as if one buys a ship on the stocks, or a vase in the hands of a goldsmith, unfinished, or cotton goods upon the loom, in a state of preparation, and the price to be paid, there is held, in these cases, to be a constructive delivery sufficient to pass the property; and this was the doctrine of the civil law. 1 Bell's Com. 176, 178 This may be very reasonable doctrine; but the English rule, according to the case in Taunton, is more strict, and it requires the chattel to be finished, and in a state for delivery, and to be delivered, according to the nature of the case, to change the property. In Woods *v.* Russell, 5 Barn. & Ald. 942, Ch. J. Abbott laid down the principle, that where a ship is built upon special contract, and portions of the price were to be paid according to the progress of the work, those payments appropriate specifically to the purchaser the vessel so in progress, and vest the property as between him and the builder, so as to entitle him to insist on the completion of that very vessel. The same principle is declared in the Scots law. Simpson *v.* Duncanson, cited in Bell on the Contract of Sale, Edin. 1844, p. 17. But the court of K. B., in Clark *v.* Spence, 4 Adolph. & Ellis, 448, admitted with reluctance the authority for this new principle, and said that the general and prior rule of law was, that, under a contract for building a vessel, or anything not existing in specie at the time of the contract, no property vested in the purchaser during the progress of the work, even though the precise mode and time of payment were fixed, nor until the thing was delivered, or ready for delivery, and approved of by the purchaser; and that the purchaser was not bound to deliver the identical article, if another answered the specification in the contract. The court nevertheless followed the authority of Woods *v.* Russell.[1] In Lunn *v.* Thornton, 1 Man. Gr. & Sc. 379, it was adjudged that personal property, not belonging to the grantor or vendor at the time of the grant or bill of sale, would not pass by it, as if a bill of sale be executed of goods in a shop, and other goods be afterwards added to them by the vendor to give effect to the grant; the grantor must ratify it by some act done by him after he has acquired the property.[2] The 14th rule in Lord Bacon's Maxims is to the same effect.

[1] Butterworth *v.* McKinley, 11 Humph. 206. Read *v.* Fairbanks, 24 E. L. & Eq. 220. Wood *v.* Bell, 36 E. L. & Eq. 148. But in Andrews *v.* Durant, 1 Kern. 35, the New York Court of Appeals rejected the English rule, and held, that, in a case similar to Wood *v.* Russell, or Clark *v.* Spence, the property would not pass to the vendee before the completion of the work. See also Moody *v.* Brown, 34 Me. 107.

[2] Hotchkiss *v.* Oliver, 5 Denio's R. 315.

If the buyer unreasonably refuses to accept of the article sold, the seller is not obliged to let it perish on his hands, and run the risk of the solvency of the buyer. The usage, on the neglect or refusal of the buyer to come in a reasonable time, after notice, and pay for and take the goods, is for the vendor to sell the same at auction, and to hold the buyer responsible for the deficiency in the amount of sales. (a) [1]

*(7.) The place of delivery is frequently a point of *505 consequence in the construction of the contract of sale. If no place be designated by the contract, the general rule is, that the articles sold are to be delivered at the place where they are at the time of the sale. The store of the merchant, the shop of the manufacturer or mechanic, and the farm or granary of the farmer, at which the commodities sold are deposited or kept, must be the place where the demand and delivery are to be made, when the contract is to pay upon demand, and is silent as to the place. This appears to be the general doctrine on the subject. (b) Pothier *distinguishes be- *506

(a) Sands & Crump *v.* Taylor & Lovett, 5 Johns. Rep. 395. Adams *v.* Minick, cited in 5 Serg. & Rawle, 32. Girard *v.* Taggart, Ibid. 19. M'Combs *v.* M'Kenman, 2 Watts & Serg. 216. Where the purchaser refused to pay for a thing sold by the sheriff at a public sale, and the sheriff resells the article at a lower price, the rule of damages against the purchaser is the difference between the first bid and the second sale, for that is the loss actually sustained. Lamkin *v.* Crawford, 8 Alabama Rep. N. S. 153.

(b) Pothier, Traité des Oblig. No. 512. Traité du Contrat de Vente, Nos. 45, 46, 51, 52. Code Napoleon, n. 1609. Toullier, Droit Civil Français, tom. vii. n. 90. Civil Code of Louisiana, art. 2469. Adams *v.* Minick, *ub. sup.* Lobdell *v.* Hopkins, 5 Cowen's Rep. 516. Chipman's Essay on the Law of Contracts, 29, 30. Goodwin *v.* Holbrook, 4 Wendell's Rep. 380.[2]

The Code Napoleon, in respect to the contract of sale, and in respect to all other contracts, seems to be, in a great degree, a concise abridgment or summary of the writings of Pothier. M. Dupin, in his dissertation prefixed to the edition of the works of Pothier, published in Paris in 1827, says, that three fourths of the Code Civil have been literally extracted from Pothier's treatises. The utility of the latter, and their great merit in learning, perspicuity, and accuracy of illustration, are far from

[1] It is declared not to be necessary in New York, that such sale should be by auction; it may be in the ordinary manner, upon notice to the party in default. Crooks *v.* Moore, 1 Sandf. (Law) R. 297. Conway *v.* Bush, 4 Barb. S. C. Rep. 564. Bogart *v.* O'Regan, 1 E. D. Smith (N. Y.) 590.

[2] Bronson *v.* Gleason, 7 Barb. S. C. Rep. 472.

tween contracts for a thing certain, as for all the wine of the vintage of the vendor, and a contract for anything intermediate, as a pair of gloves, a certain quantity of corn, wine, &c. In the former case, the delivery is to be at the repository where the wine was at the time of the contract; and this is reasonably supposed to be the understanding of the parties, as the purchaser would then be able to see that he had the whole quantity agreeably to the contract. In the latter case, the property is to be delivered at the debtor's place of residence, unless the parties lived near each other, and the thing be portable; in which case the place of payment would be the creditor's residence. (*a*) The common law on the subject of the delivery of specific articles which are portable, makes a distinction between the contract of sale, and the contract to pay a debt at another time in such articles. We have seen, that in the contract of sale the delivery is to be at the place where the vendor has the article; but in the other case, the weight of authority would seem to be in favor of the rule, that the property was to be delivered at the creditor's place of residence, though the cases on the subject are not easily reconcilable with each other.

Lord Coke lays down the rule, (*b*) that if the contract be to

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being superseded or eclipsed by the simplicity, precision, and brevity of the code The aid of the French civilians of the former school has been found as indispensable as ever. The Code Napoleon and Code de Commerce deal only in general rules and regulations. They are not sufficiently minute and provisional to solve, without judicial discussion, the endless questions that constantly arise in the business of life. The citation of adjudged cases, M. Dupin says, is so very common in the French courts, that there seems to be an emulation who shall cite the most. (Jurisprudence des Arrets, Pref.) Between the years 1800 and 1827, there were upwards of two hundred original treatises and compendiums, upon different titles of the law, published in France. M. Toullier has undertaken a commentary upon the French Civil Law, according to the order of the Code, which has already extended to twelve volumes, and in 1839, his Droit Civil, the 5th edition, was published at Paris in fifteen volumes; and, as far as I may be permitted to judge, from a very imperfect knowledge of the French law, he seems to rival even Pothier himself in the comprehensiveness of his plan, and in the felicity of its execution. In 1844, the Cours de Droit Français suivant le Code Civil, by M. Duranton, was published at Paris in twenty-two volumes.

(*a*) Pothier, Traité des Oblig. Nos. 512, 513. Bradley *v.* Farrington, 4 Arkansas Rep. 532.

(*b*) Co. Litt. 210 b.

deliver specific articles, as wheat or timber, the obligor is not bound to carry the same abroad, and seek the obligee, (as in the case of payment of money,) but he must call upon the obligee before the day, to know where he would receive the articles, and they must be delivered, or the obligor must be ready and able to make the delivery, at the place designated by the obligee. (a) This doctrine was admitted in the case of *Aldrich* v. *Albee*, (b) in which it was declared, that if *no place be mentioned in the contract, to deliver specific articles, (and which in that case were hay, bark, and shingles,) the creditor had the right to name the place. It is evident, however, that this rule must be received with considerable qualification, and it will depend, in some degree, upon the nature and use of the article to be delivered. The creditor cannot be permitted to appoint an unreasonable place, and one so remote from the debtor that the expense of the transportation of the articles might exceed the price of them. If the place intended by the parties can be inferred, the creditor has no right to appoint a different place. But if no place of performance be designated, and none can be clearly inferred from collateral circumstances, it seems to have been again admitted that the creditor may designate a reasonable place for the delivery of the articles. (c) Mr. Chipman (d) states it as a rule of the common law, well understood and settled in Vermont, that if a note be given for cattle, grain, or other portable articles, and no place of payment be designated in the note, the creditor's place of residence at the time the note is given, is the place

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(a) In the case of the payment of money, the old law was declared, as late as the case of Smith *v.* Smith, 2 Hill's N. Y. Rep. 351, that if no place of payment be agreed on, the party who is to pay must seek the other, if within the state; and a tender at his residence, in his absence, is not good.

(b) 1 Greenleaf's Rep. 120. In the subsequent case, in the same court, of Bixby *v.* Whitney, 5 Idem, 192, it was declared to be well settled, that where no place is appointed for the delivery of specific articles, the obligor must go before the day of payment to the obligee, and know what place he will appoint to receive them. The first act is to be done by the debtor, and if he omits to do it, he is in default. See also Bean *v.* Simpson, 16 Maine Rep. 49; Howard *v.* Miner, 20 Id. 325, and Mingus *v.* Pritchet, 3 Dev. N. C. Rep. 78, S. P.

(c) Currier *v.* Currier, 2 N. H. Rep. 75.

(d) Essay on the Law of Contracts for the Payment of Specific Articles, 25, 26.

of payment. The same rule is declared in New York, when the time, but not the place of the payment of the portable article is fixed. (d) If the article be not portable, but ponderous and bulky, then Lord Coke's rule prevails, and the debtor must seek the creditor, or get him to name a place; and if no place, or an unreasonable one be named, the debtor may deliver the articles at a place which circumstances shall show to be suitable and convenient for the purpose intended, and presumptively in the contemplation * of the parties when the contract was made. (b)[1] There is a material difference in the reason of the thing, between a tender of cumbersome goods, and those which are portable; and the same removal from one place to another is not equally required in the two cases. (c) There is another class of cases, in which the position is assumed, that if the parties have not designated any particular place of delivery, it is to be at the debtor's residence, or where the property was at the time of the contract; as in the case of a note payable in farm produce, without mentioning time or place, the place of demand and delivery is held to be at the debtor's farm. (d) It is likewise adjudged, that where a person in the character of a bailee, promises to deliver specific goods on demand, though the demand may be made wherever he may be at the time, his offer to deliver at the place

(a) Goodwin v. Holbrook, 4 Wendell's Rep. 377. If the place of payment of specific articles be at the election of the payee, it is a privilege, which, if not exercised in a reasonable time, is waived, and the debtor may elect the place, and there tender the articles and give notice to the payee. Adm. of Peck v. Hubbard, 11 Vermont Rep. 612.

(b) Chipman's Essay on the Law of Contracts for the Payment of Specific Articles, 27. Howard v. Miner, 20 Maine Rep. 325.

(c) Stone v. Gilliam, 1 Show. Rep. 149.

(d) Lobdell v. Hopkins, 5 Cowen's Rep. 516. So also in Minor v. Mitchie, Walker's Miss. Rep. 24, it was held, that if no time or place be specified in the contract for the delivery of specific articles, the debtor is not bound to seek the creditor, but the latter, to entitle himself to sue, must allege and prove a special demand. This is more reasonable than Lord Coke's rule. The law relative to the practical execution of contracts for payment in goods or specific articles, is well expounded in Chipman on Contracts. See also Roberts v. Beatty, 2 Penn. Rep. 65; Cowen, J., 20 Wendell, 199; Barr v. Myers, 3 Watts & Serg. 295.

[1] Williams v. Adams, 3 Sneed, (Tenn.) 359.

where the property is, or at his dwelling-house or place of business, will be sufficient. (*a*)

If the debtor be present in person or by his agent, and makes a tender of specific articles at the proper time and place, according to contract, and the creditor does not come to receive them, or refuses to accept them, the better opinion is, that if the article be properly designated and set apart, (and such designation is necessary,) (*b*) the debt is thereby discharged. (*c*) [1] If the debtor be sued, he may plead the tender and refusal, and he will be excused by the necessity of the case from pleading *uncore prist*, and bringing the cumbersome articles into court; (*d*) and it is not like the case of a tender of money which the party is bound to keep good, and on a plea of tender to bring the money into court. The creditor *is entitled to the *509 money at all events, whatever may be the fate of the plea; (*e*) and there is equal reason that he should be entitled to the specific articles tendered. But in *Weld* v. *Hadley*, (*f*) it was decided, after a very able discussion, that on a tender and refusal of specific articles, the property did not pass to the creditor. This was contrary to the doctrine declared in other

(*a*) Scott *v.* Crane, 1 Conn. Rep. 255. 5 Idem, 76. Mason *v.* Briggs, 16 Mass. Rep. 453. Slingerland *v.* Morse, 8 Johns. Rep. 474.

(*b*) Wyman *v.* Winslow, 2 Fairfield, 398.

(*c*) Co. Litt. 207 a. Peytoe's case, 9 Co. 79 a. Bro. tit. Touts temps prist, pl. [illegible] Smith *v.* Loomis, 7 Conn. Rep. 110. Garrard *v.* Zachariah, 4 Stewart's Ala. Rep. 272. Thaxton *v.* Edwards, Ibid. 524. Savary *v.* Goe, 3 Wash. C. C. Rep. 140. Robinson *v.* Batchelder, 4 N. H. Rep. 46. Lamb *v.* Lathrop, 13 Wendell, 95.

(*d*) Bro. *ub sup.* In Johnson *v.* Baird, 3 Blackf. Ind. Rep. 182, in an action on a promise to pay a certain sum in hats, at a certain time and place, it was held to be a good defence, that the defendant had the hats ready for delivery at the time and place, and that no person was present to receive them. But the plea also contained the *uncore prist*, and the court said it was necessary that the plea should state where the articles were, and that they were either left at the place properly designated, or that they were retained, and were still ready for delivery. Dorman *v.* Elder, Ibid. 490. Fleming *v.* Potter, 7 Watts, 380, S. P. No demand was held to be necessary in the latter case, but the defendant must show that he was ready at the time and place.

(*e*) Le Grew *v.* Cooke, 1 Bos. & Pull. 332.

(*f*) 1 N. H. Rep. 295.

[1] Brown *v.* Berry, 14 N. H. R. 459.

cases; (a) and the weight of argument, if not of authority, and the analogies of the law, would appear to lead to the conclusion, that on a valid tender of specific articles, the debtor is not only discharged from his contract, but the right of property in the articles tendered passes to his creditor. (b) The debtor may abandon the goods so tendered; but if he elects to retain possession of the goods, it is in the character of bailee to the creditor, and at his risk and expense. (c)

With respect to part performance of an entire contract for the sale and delivery of personal property of a given quantity, at a specified price and time, or for the performance of certain labor and service, a delivery of a less quantity than that agreed on, or a refusal or omission to perform the entire labor or service,[1] without any act or consent of the other party, will not entitle the party who has delivered in part, or performed in part, to recover any compensation for the goods which have been delivered, or the service which has been performed. The entire performance is a condition precedent to the payment of the

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(a) Nichols v. Whiting, 1 Root's Rep. 443. Rix v. Strong, Ibid. 55. Slingerland v. Morse, 8 Johns. Rep. 474.

(b) Code Napoleon, No. 1257. Pothier, Traité des Oblig. No. 545. Smith v. Loomis, *supra*. Mitchell v. Merrill, 2 Blackf Ind. Rep 87. Lamb v. Lathrop, 13 Wendell, 95. In Bailey v. Simonds, 6 N. H. Rep. 159, it was held, that if a note be payable in goods at a particular place, on demand, the maker must have the goods always ready at the place. Mason v. Briggs, 16 Mass. Rep 453, S. P.

(c) Mr. Chipman, in the able essay to which I have already referred, supposes that the debtor may sell the goods which he so retains, if they be perishable articles, and he will be accountable for the net proceeds. He has reasoned well, and upon sound legal principles, in support of his position, that on the tender and refusal of specific articles, the debt is discharged on the one hand, and the title to the property transferred to the creditor on the other. In Illinois, it is declared by statute, that if no place be specified in the written contract for the payment or delivery of specific articles, the obligor may tender them at the payee's place of residence. But if the article be too ponderous, or the payee has no known place of residence, the obligor may tender them at his own place of residence. Such tender vests the property in the creditor. Revised Laws of Illinois, edit. 1833, pp. 484, 485.

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1 A *substantial and bona fide* performance of a condition, where the variations are quite trifling and wholly unintentional, will, in general, be sufficient. Smith v. Gugerty, 4 Barb. S. C. Rep. 614.

price, and the courts cannot absolve men from their legal engagements, or make contracts for them.(a)[1]

(a) Waddington v. Oliver, 5 B. & Puller, 61. M'Millan v. Vanderlip, 12 Johnson, 165. Jennings v. Camp, 13 Johnson's R. 94. Champlin v. Rowley, 13 Wendell, 258. S. C. 18 Wendell, 187. Mead v. Degolyer, 16 Id. 632. Stark v. Parker, 2 Pick. Rep. 267. Olmstead v. Beale, 19 Idem, 528. See also *supra*, p. 258, and Steamboat Co. v. Wilkins, 8 Vermont Rep. 54. Helm v. Wilson, 4 Missouri Rep. 41. Wooten v. Reed, 2 Smedes & Marshall, Miss. R. 585. Givhan v. Dailey, 4 Ala. R. N. S. 336. The cases of Oxendale v. Wetherell, 9 Barn. & Cress. 386, and Britton v. Turner, 6 New Hampshire, 481, considered the rule as rather stern, and relaxed its severity; and in Mead v. Degolyer, above mentioned, Mr. Justice Cowen intimated that a court of chancery might, perhaps, feel itself driven to interfere in some of these hard cases, and it was repulsive to Lord Tenterden's ideas of justice, that if a man agreed to deliver two hundred and fifty bushels of wheat by a certain day, and fell short but one bushel, the vendee should get the two hundred forty-nine for nothing. But in Champlin v. Rowley, 18 Wendell, 191, the chancellor repudiated the doctrine in the case of Oxendale v. Wetherell, with much severity.

It is said to be now settled, that after a rescission and abandonment of a special agreement, compensation for partial performance may be recovered. Porter v. Woods, 3 Humph. Tenn. Rep. 60.[2] On this vexed question of the right of a party to redress, who fails to perform an entire contract, except in part, the numerous and conflicting authorities, both English and American, have been industriously collected by Mr. Sedgwick, in his very valuable Treatise on the Measure of Damages. The principal ones, besides those already referred to, are to be seen in that treatise, pp. 219–232, and found to be against any remedy, in 6 Term, 320; 3 Taunton, 52; 2 Starkie, 256;

[1] Paige v. Ott, 5 Denio's R. 406. Monell v. Burns, 4 Id. 121. 4 Barb. S. C. Rep. 36. Badgley v. Heald, 4 Gilm. R. 64. Davis v. Maxwell, 12 Met. R. 286. Witherow v. Witherow, 16 Ohio R. 238. Miller v. Goddard, 34 Me. 102. It seems that, when a certain quantity of goods is sold to arrive by a certain ship, and, on arrival, only a part of them belongs to the vendor, a tender of that part is no performance of the contract, and the vendor is not released. Fischel v. Scott, 28 E. L. & Eq. 404. If a person employed on an entire contract of service is compelled to leave before the expiration of the time, by reason of sickness, he may recover for the time he has served. Seaver v. Morse, 20 Vt. Rep. 620. The measure of damages in such cases is the *actual damages* suffered. Derby v. Johnson, 21 Vt. Rep. 17. Clark v. Marsiglia, 1 Denio's R. 317. The Supreme Court of Vermont, in Derby v. Johnson, considered Koon v. Greenman, 7 Wend. 121, hardly reconcilable with the above rule. See, also, Shaffer v. Lee, 8 Barb. R. 412. Hochster v. DeLatour, 20 E. L. & Eq. 157.

[2] Where the parties deviate from a contract for work, the contract price, so far as applicable, will be the rule of damages. If the employer terminate the contract, he is liable for the profits the contractor would have made if allowed to complete the work. If the contractor elects to consider the contract as rescinded, he cannot recover profits on the unexecuted work. Clark v. The Mayor, 4 Comst. R. 338. Where complete performance becomes impossible by act of law, the contractor may recover for work done at contract prices. Jones v. Judd, 4 Comst. R. 412. On the general subject, see Snow v. Ware, 13 Met. R. 42. White v. Oliver, 36 Me. 92.

I have thus endeavored to mark the prominent and most practical distinctions, on the very diffusive subject of the delivery requisite to pass the title to goods, or to take the case out of the operation of the statute of frauds. But even in this general view of the subject, it has been difficult to select those leading principles which were sufficient to carry us safely through the labyrinth of cases that overwhelm and oppress this branch of the law.

*510 *VIII. *Of the memorandum required by the statute of frauds.*

The statute of frauds, of 29 Car. II. ch. 3, sec. 4, declared, that no action should be brought to charge any executor or administrator, upon any special promise,[1] to answer damages

9 Barn. & Cress. 92; 2 Mass. 147; 2 Pick. 267, 332; 9 Johnson, 327; 8 Cowen, 63; 18 Wendell, 187. The condition precedent precludes the action. The cases in relaxation of the rule, besides those already referred to, are Buller, N. P. 139; 4 Bosan. & Puller, 351, 5; 7 Pick. 181: 8 Id. 178. If there has been any acquiescence in a part performance, so as to benefit the party accepting, or the non-performance was owing to any act of the other party, or arose from inevitable necessity, it seems most reasonable, that if any benefit has been conferred, and no *mala mens* mingle with the default, a reasonable allowance should be made for the part performed. The decision of Parker, J, in Britton *v.* Turner, in 6 N. H. 485, is supported by very impressive remarks.

It is to be observed, that as to the rule of damages for breach of contract in personal actions, the motive or *animus* of the party in default is disregarded, and the damages are limited to the pecuniary loss for the breach of the agreement, without reference to the fraud or malice of the party, for such considerations being properly to actions *on the case*, or for *deceit.*, Sedgwick on Damages, pp. 206–212. Mr. Sedgwick says that the rule of damages in actions for breach of contract is now generally regulated by the discretion of the court, according to fixed principles, and the court will not allow an unconscionable recovery, and that jurors have not an arbitrary discretion over the terms of the contract, and for this is cited 1 Bibb. 541; 3 J. J. Marshall, 35; 10 Mass. 459; 2 Brod. & Bing. 680; Sedgwick, 214, 215. Indeed, as Mr. Sedgwick has observed in another place, the settled tendency of our law, as well as all sound reasoning, is to reduce the measure of damages as far as possible, cases of tort and wrong excepted, to fixed legal rules. But the contradictions and variations in the multitudinous cases which are cited and dispersed throughout his treatise, show a very great failure in the effort.

[1] A *covenant* to pay the debt of another is not within the statute. Douglass *v.* Howland, 24 Wend. R. 35. Id. 256. Barnum *v.* Childs, 1 Sandf. (Law) R. 68. Edelen *v.* Gough, 5

out of his own estate; (*a*) or to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person;[1] or to charge any person, upon any agreement made upon consideration of marriage; (*b*) or upon any agreement that was not to be performed in one year, (*c*) unless there was some memorandum or note in writing of the agree-

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(*a*) The New York Revised Statutes, vol. ii. p. 113, sec. 1, have improved upon the phraseology of the English statute, by adding, *or to pay the debts of the testator or intestate out of his own estate:*

(*b*) This did not apply to mutual promises to marry. Cork *v.* Baker, Str. Rep. 34; and in the New York Revised Statutes, vol. ii. p. 135, sec. 2, this exception is expressly made.[2]

(*c*) The statute only applies to agreements which are, by express stipulation, *not to be* performed within a year. It does not apply to an agreement which appears from its terms to be capable of performance within the year, nor to cases in which the performance of the agreement depends upon a contingency which may or may not happen within the year.[3] Peter *v.* Compton, Skinner, 353. Tolley *v.* Greene, 2 Sandford's Ch. Rep. 91. Fenton *v.* Emblers, 3 Burr. Rep. 1278. Wells *v.* Horton, 12 B. Moore, 177. Moore *v.* Fox, 10 Johns. Rep. 244. M'Lees *v.* Hale, 10 Wendell's Rep. 426. Peters *v.* Westborough, 19 Pick. Rep. 364. Lockwood *v.* Barnes, 3 Hill, 128. An inchoate performance within the year, under a parol agreement, is not sufficient to take the case out of the statute. The statute excepts agreements only that are to be *performed,* that is, completed within the year. Boydell *v.* Drummond, 11 East, 142. Birch *v.* Earl of Liverpool, 9 B. & Cr. 392. Hinckley *v.* Southgate, 11 Vermont Rep. 428. Lockwood *v.* Barnes, 3 Hill, 128. Herrin *v.* Butters, 20 Maine Rep. 119. Johnson *v.* Watson, 1 Kelly, 348. The statute of frauds does not apply to executed contracts, which have been completely performed on both sides.

Gill, 103. The latter case declares that "value received" will have the same effect on the contract. A promise by one to share in the expenses, for which others have become liable, if made to those persons, is not a promise to pay the debt of another within the statute of frauds. Flemm *v.* Whitmore, 23 Missouri, (2 Jones,) 430.

[1] It is held, that a promise to pay *one's own debt* to a third person, is not within the statute of frauds. Barker *v.* Bucklin, 2 Denio's R. 45. Blunt *v.* Boyd, 3 Barb. S. C. Rep. 209. Antonio *v.* Clissey, 3 Rich, 201. Nor is a promise to pay over money collected or remitted. Prather *v.* Vineyard, 4 Gilm. R. 40. Wyman *v.* Smith, 2 Sandf. (Law) R. 331. The responsibility of a *del credere* factor may be assumed by parol. Sherwood *v.* Stone, 4 Kernan, (14 N. Y.) 267.

To take the case out of the statute, the *entire credit* must be given to the *collateral* promisor. Brady *v.* Sackrider, 1 Sandf. (Law) R. 514. King[illegible] *v.* Balcome, 4 Barb. S. C. Rep. 131. Gleason *v.* Briggs, 2 Wms. (28 Vt.) 135.

[2] A married man, promising to marry a woman, she being ignorant of his being married, is liable to an action for a breach of promise, on his marriage being made known to her. Millward *v.* Littlewood, 1 E. L. & Eq. 408.

[3] Lyon *v.* King, 11 Met. R. 411. Blanding *v.* Sargent, 33 N. H. 239. Wiggins *v.* Keizer, 6 Ind. 252. A contract of service for more than a year, but subject to determination within the year, on a given event, is within the statute. Dobson *v.* Collis, 37 E. L. & Eq. 499. But see Tolley *v.* Greene, 2 Sandf. Ch. R. 91.

ment, signed by the party to be charged, or his agent. The statute in respect to the memorandum, applied also to contracts for the sale of goods, wares, and merchandise, in cases where there was no delivery and acceptance of part, or payment in part, or something in earnest given. (*a*) This statute is assumed to be the basis of the statute laws of the several states on this subject. It has been frequently reënacted in New York, and the last revision of the statute law of the state has not changed its force or construction, (*b*) and it applies equally to the grant or assignment of any existing trust in goods and things in action, as well as to lands. (*c*)[1] The signing of the agreement by one party only is sufficient, provided it be the

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Nor does the statute apply to the case of goods sold and to be delivered within the year, but where the price was not to be paid until after the expiration of the year. Donellan *v.* Reed, 3 B. & Adolph. 899. Holbrook *v.* Armstrong, 1 Fairfield's Rep. 31. Johnson *v.* Watson, 1 Kelly, 348. The design of the statute, said Lord Holt, was not to trust the memory of witnesses beyond one year. Lord Raymond's Rep. 317; and it was adjudged, in Broadwell *v.* Getman, 2 Denio's N. Y. Rep. 87, that a parol agreement which was not *wholly* to be performed within a year, was void, even though one of the parties had a longer time than a year for the performance, and the authority of the decision in Donellan *v.* Reed was questioned and not acceded to.

(*a*) The statute applies to the contract of sale of goods to be made and delivered within the year. Gardner *v.* Joy, 9 Metcalf's Rep. 177.

(*b*) New York Revised Statutes, vol. ii. p. 113, sec. 1. Ibid. vol. ii. p. 135, sec. 2. Ibid. vol. ii. p. 136, sec. 3. Ibid. vol. ii. p. 137, sec. 2. But the New York statute uses the word *subscribed*, instead of the word *signed*, in the statute of Charles II. The Massachusetts Revised Statutes of 1836, and the Revised Laws of Illinois of 1833, and of Indiana, 1838, and of Connecticut, 1838, and of New Jersey, 1794, follow closely the English statute of frauds. But in Pennsylvania, the provision in the 4th section requiring a promise in writing to be held for the debt, default or miscarriage of another, is not adopted. The New York statute contains a provision which puts an end to the question which has much agitated and divided the courts of law in England and in this country. (See *infra*, vol. iii. pp. 121, 122,) by requiring the consideration to be expressed in the memorandum.[2]

(*c*) It seems not to be settled in England whether *stock* be comprehended under the words *goods, wares, and merchandise,* in the 17th section of the statute. Pickering *v.* Appleby, Comyn's Rep. 354. Mussell *v.* Cooke, Prec. in Ch. 533. Colt *v.* Netterville, 2 P. Wms. 308. See *supra*, 494, note. Treasury checks are held not to be in-

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[1] A license to flow lands is within the statute. French *v.* Owen, 2 Wisc. 250. So is a right to maintain a dam on the land of another. Moulton *v.* Faught, 41 Maine, 298.

[2] The New York Code of Procedure, sec. 335, requires certain engagements, therein styled *undertakings*, to be entered into on appeals; held, that these undertakings are not within the statute of frauds, and need not express a consideration. Thompson *v.* Blanchard, 3 Comst. R. 335.

party sought to be charged. He is estopped by his signature from denying that the contract was validly executed, though the paper be not signed by the other party who sues for a performance. (a) It is sufficient, likewise, if the note or *memorandum be made by a broker employed to effect *511 the purchase; and, if he settles the bargain, he is considered as agent for both parties, and the instrument is liberally construed without a scrupulous regard to forms. (b) The signature may be with a lead pencil, according to the practice in cases of hurried business. The mark of one unable to write, or even a printed name, under certain circumstances, is a sufficient signature; and if the name be inserted in such a manner as to have the effect of authenticating the instrument, it is immaterial in what part of it the name be found. (c) [1] The contract

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cluded in the words. Beers v. Crowell, Dudley's Geo. Rep. 28.[2] But in Massachusetts it is held, that a contract for the sale of manufacturing stock is within the statute of frauds. Tisdale v. Harris, 20 Pick. 9.

(a) Allen v. Bennet, 3 Taunt. Rep. 169. Lord Manners, in 2 Ball & Beatty, 370. Sir William Grant, in 3 Ves. & Beames, 192. Sir Thomas Plumer, in 2 Jac. & Walk. 426. Flight v. Bolland, 4 Russell's Rep. 298. Ballard v. Walker, 3 Johns. Cas. 60. Seton v. Slade, 7 Vesey, 265. Clason v. Bailey, 14 Johns. Rep. 487. Douglass v. Spears, 2 Nott & M'Cord, 207. Palmer v. Scott, 1 Russell & Mylne, 391. Davis v. Shields, 26 Wendell's Rep. 341.

(b) Goom v. Aflalo, 6 Barn. & Cress. 117. The agent under the statute must be a third person, and not one of the principals, and his authority may be by parol. Farebrother v. Simmons, 5 B. & Ald. 333.

(c) Stokes v. Moore, 1 Cox's Rep. 219. Selby v. Selby, 3 Merivale's Rep. 2. Ogilvie v. Foljambe, Ibid. 53. Knight v. Crockford, 1 Esp. 190. Saunderson v. Jackson, 2 Bos. & Pull. 238. Schneider v. Norris, 2 Maule & Selw. 286. Clason v. Bailey, 14 Johns. Rep. 484. Thornton v. Kempster, 5 Taunt. Rep. 786. Penniman v. Hartshorn, 13 Mass. Rep. 87.

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[1] It *would seem* that railway shares are not within the statute. Vaupell v. Woodward, 2 Sandf. Ch. R. 143, and n. *a*, p. 146. Duncuft v. Albretch, 12 Simons, 189. Shares in a Cost-book Mining Co. are held to be neither within the 4th nor the 17th sections of the statute. Watson v. Spratley, 28 E. L. & Eq. 507. Powell v. Jessop, 36 Id. 274. An agreement to sell a promissory note is not within the statute, and need not be in writing. Whittemore v. Gibbs, 4 Fost. 484. Hudson v. Weir, 29 Ala. 294. *Contra* in Mass. Baldwin v. Williams, 3 Met. 365. Work, labor, and materials, supplied in printing a book were held not to be within the statute, in Clay v. Yates, 36 E. L. & Eq. 540. An agreement to buy certain bank bills belonging to the vendor, but in the hands of a third party, is within the statute. Gooch v. Holmes, 41 Maine, 523. Growing crops are not within the statute. Bours v. Webster, 6 Cal. 660.

[2] But see *supra*, p. [*494,] note.

must, however, be stated with reasonable certainty, so that it can be understood from the writing itself, without having recourse to parol proof. (*a*) Unless the essential terms of the sale can be ascertained from the writing itself, or by a reference contained in it to something else, the writing is not a compliance with the statute; and if the agreement be thus defective, it cannot be supplied by parol proof, for that would at once introduce all the mischiefs which the statute of frauds and perjuries was intended to prevent. (*b*) [1]

(*a*) Bailey & Bogart *v.* Ogdens, 3 Johns. Rep. 399. Champion *v.* Plummer, 4 Bos. & Pull. 252. Elmore *v.* Kingscote, 5 Barn. & Cress. 583. If a bill of parcels be delivered to, and accepted by the purchaser, with his name in it, from the commission merchant, it is a sufficient memorandum of the sale of the goods within the statute of frauds. Batturs *v.* Sellers, 5 Harr. & Johns. 117. But a written agreement may be waived, and the term of it varied by a subsequent parol agreement, for that becomes a new subsequent contract. Thomas *v.* Currie, Brevard's MSS. Rep. cited in Rice's Dig. tit. Agreement, sec. 117. Neil *v.* Cheves, 1 Bail. S. C. Rep. 537. In Langford *v.* Cummings, 4 Alabama R. N. S. 49, it was declared, that either the time or the place of performance fixed in a written contract, may be changed or modified by a subsequent parol agreement. A mutual promise by parol may be waived, and the party discharged by parol, before any breach. King *v.* Gillett, 7 M. & W. 55. Medomak Bank *v.* Curtis, 24 Maine Rep. 36.

(*b*) Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. Rep. 280, 281. Abeel *v.* Radcliff, 13 Johns. Rep. 297. *Vide supra*, p. 498. It was held, in the cases of Towers *v.* Osborne, Str. Rep. 506, and Clayton *v.* Andrews, 4 Burr. Rep. 2101, that a contract for the sale of goods, to be *thereafter produced by work and labor*, was not within the statute of frauds, which only related to sales where the delivery was to be immediate, and the buyer immediately answerable. In the one case, the coach was to be afterwards made, and in the other, the wheat was to be threshed; and as the article contracted to be sold was to be first manufactured, or labor bestowed upon it, the contract might be deemed to be one for work and labor in making or preparing an article for delivery. These cases have been since somewhat questioned, and the latter went quite far with its distinction. It seems now to be settled, that the statute of frauds extends to executory as well as to executed contracts; and that if the article sold existed at the time *in solido*, and was capable of delivery, the contract is within the statute of frauds; but if the article is to be afterwards manufactured, or prepared by work and labor for delivery, the contract is not within the statute. Rondeau *v.* Wyatt, 2 H. Blacks. R. 63. Cooper *v.* Elston, 7 Term R. 14. Smith *v.* Surman, 9 B. & Cress. 561. Gadsden *v.* Lance, 1 M'Mullan's S. C. Eq. R. 87. Hight *v.* Ripley, 19 Maine R. 137. Bennett *v.* Hull, 10 Johns. Rep. 364. Crookshank *v.* Burrell, 18 Idem, 58. Sewall *v.* Fitch, 8 Cowen's Rep. 215. Jackson *v.* Covert, 5 Wendell, 139.[2] These latter cases

[1] Salmon F. M. Co. *v.* Goddard, 14 How. U. S. 446. As to entry by broker, sufficient to satisfy the statute, see Sivewright *v.* Archibald, 6 E. L. & Eq. 286.

[2] Robertson *v.* Vaughn, 5 Sandf. S. C. R. 1. Allen *v.* Jarvis, 20 Conn. 38. Courtwright *v.* Stewart, 19 Barb. 455. Illay *v.* Yates, 36 E. L. & Eq. 540.

*IX. *Of sales of goods, as affected by fraud.* *512

Though there be a judgment against the vendor, and the purchaser has notice of it, that fact will not, of itself, affect the validity of the sale of personal property. But if the *purchaser, knowing of the judgment, purchases *513 with the view and purpose to defeat the creditor's exe-

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admit the distinction above stated to be well settled, and that it goes to sustain the correctness of the decisions in Strange, if not in Burrow, though not entirely upon the ground assumed in them. And yet, in Garbutt *v.* Watson, 5 Barn. & Ald. 613, the decision of Clayton *v.* Andrews is strongly and justly shaken, as having pushed the distinction to an extreme of refinement; and though, in the last case, the sacks of flour sold were not then prepared, but were to be got ready for delivery in a few weeks, yet the sale was held to be within the statute, and that though the flour was not ground at the time, it was still a contract for the sale of goods, and not for work and labor and materials found. This seems to be the most reasonable construction of such a contract. See also to the S. P., Downs *v.* Ross, 23 Wendell, 270; and see, in Scott *v.* Eastern Co. R. Co. 12 Meeson & Welsby, 33, where part of the goods are made and delivered, and the residue are to be manufactured according to order, the whole forms one entire contract, and the acceptance of part applies to the whole, so as to satisfy the statute of frauds.

The Court of Appeals in Maryland, in Eichelberger *v.* M'Cauley, 5 Harr. & Johns. 213, followed, with some reluctance, the case of Clayton *v.* Andrews, and declared that it was not to be extended to cases where the work and labor to be done might be, of themselves, considered parts of the contract. The English statute of 9 Geo. IV. ch. 14, entitled, "An act for rendering a written memorandum necessary to the validity of certain promises and engagements," has provided for this case, by declaring that the statute of frauds of 29 Car. II. ch. 3, shall extend to all contracts for the sale of goods of the value of ten pounds and upwards, notwithstanding the goods may be intended to be delivered at some future time, or may not, at the time of the contract, be actually made, procured, or provided, or fit, or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.[1] It was said, in the last century, at Westminster Hall, that the statute of frauds of 29 Car. II. had not been explained at a less expense than one hundred thousand pounds sterling. I should suppose, from the numerous questions and decisions which have since arisen upon it, that we might put down the sum at a million and upwards. How hazardous it would now seem to be, to attempt to recast the statute in new language, or to disturb the order and style of its composition, considering how costly its judicial liquidation has been, and how applicable its provisions are to the daily contracts and practical affairs of mankind. It has been affirmed in England, that every line of it

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[1] In Hardell *v.* McClure, 1 Chand. 271, the Supreme Court of Wisconsin considers this statute as merely declaratory of the true construction of the statute of C. II.: and decide that, though there is no corresponding enactment in that state, yet the class of cases covered by it comes under the statute of frauds. Kirby *v.* Johnson, 22 Missouri, (1 Jones,) 354.

cution, it is iniquitous and fraudulent, notwithstanding he may have given a full price, for it is assisting the debtor to injure the creditor. The question of fraud depends upon the motive. The purchase must be *boná fide*, as well as upon a valuable consideration. The rule has been repeatedly declared and established. (*a*) Whether it would be an act of fraud sufficient to vacate the contract, if the purchaser, knowing of his own insolvency and utter incapacity to make payment, but without using any device or contrivance to deceive the vendor, purchases goods of another, who is ignorant of his insolvency, and sells them under the belief of the solvency as well as *514 good faith of the buyer, is a question which *was raised, but left undecided, in *Conyers* v. *Ennis*. (*b*) It has been since decided in another case, (*c*) that the mere insolvency of the vendee, and the liability of the goods to immediate attachment by his creditors, though well known to himself, and not disclosed to the vendor, would not, of itself, avoid the sale. In that case there was no false assertion, or fraudulent misrepresentation or deceit practised, or concert, or secret agreement, with any other person, and there was no direct evidence that the vendee knew at the time that he was insolvent. The decision was put upon the ground that the credit was, in fact, obtained without any fraudulent intent, and the validity of the sale would depend upon the decision of the question, whether there was fraud in fact. (*d*)

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was worth a subsidy; and uniform experience shows how difficult it is, by new provisions, to meet every contingency, and silence the tone of sharp, piercing criticism, and the restless and reckless spirit of litigation.

(*a*) Lord Mansfield, 1 Burr. Rep. 474. Cowp. Rep. 434. Dallas, Ch. J., 8 Taunt. Rep. 678. Beals *v.* Guernsey, 8 Johns. Rep. 446. Duncan, J., 7 Serg. & Rawle, 89.

(*b*) 2 Mason's Rep. 236.

(*c*) Cross *v.* Peters, 1 Greenleaf's Rep. 376.

(*d*) It was settled in the Court of Errors of New York, in Lupin *v.* Marié, 6 Wendell's Rep. 77, that where goods are delivered unconditionally to the vendee, a mistake or error as to his solvency will not invalidate the contract, or entitle the vendor to relief; for the vendor of personal property has no lien on the goods sold and delivered. But if there be fraud, in fact, on the part of the buyer, in respect to the purchase, the vendor may elect either to affirm the sale and sue for the price, or to treat the sale as void, and follow the goods or proceeds even into the hands of a third person, who received them without paying any new consideration. Lloyd *v.* Brewster, 4 Paige's Ch. Rep. 537. Cary *v.* Hotailing, 1 Hill's N. Y. Rep. 311. George *v.* Kimball, 24

If the vendee discovers that he is insolvent, and that it is not in his power to pay for the goods, the courts have allowed him to rescind the contract, and return the goods to the seller with his assent, provided he did it before the contract was consummated by an absolute delivery and acceptance, and provided it was done in good faith, and not with the colorable design of favoring a particular creditor. He cannot rescind the contract after the transit has ceased, and the goods have been actually received in his possession, and the rights of other creditors have attached. (*a*)

* (1.) On the subject of fraudulent sales, another and *515 a very vexatious question has arisen, as to the legal consequence and effect of an agreement between the parties at the time of the sale, that possession was not to accompany and follow the bill of sale of the goods. There is no doubt of its being evidence of fraud; but the great point has been, whether the fraud which was to be inferred in such a case, was an infer-

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Pick. Rep. 241. If, however, the purchaser from the fraudulent vendee has actually paid for the goods, he will hold them. See the last case, *supra*. A fraudulent purchaser of goods gives no title as against the vendor, nor will such a purchaser's transfer of the goods, to pay or secure a *bonâ fide* creditor for a preexisting debt, vest a title in the creditor. But if the under or second purchaser obtains the goods *bonâ fide*, in the usual course of trade, by giving value, or incurring responsibilities on the strength of a pledge of the goods, he may hold the goods as against the original vendor. Root *v.* French, 13 Wendell, 576. Trott *v.* Warren, 2 Fairfield, 227. Mowrey *v.* Walsh, 8 Cowen, 238. Rowley *v.* Bigelow, 12 Pick. 307. But these latter cases are questioned in Ash *v.* Putnam, 1 Hill's N. Y. Rep. 306–7, and, with the exception of commercial paper, the rule is, that he who has acquired no title can convey none. *Vide suprà*, p. 324, note. In the jurisprudence of some parts of continental Europe, it is admitted that there exists a presumption *juris et de jure* of fraud, if the buyer becomes insolvent within a few days (and which, in some cases, has been fixed at three) after receiving the goods. Voet, Com. ad Pand. 6, 1, 14, cites several authorities in support of this rule. In 1736, it was attempted to be introduced into the law of Scotland as a rule, that the *cessio fori*, within three days after the purchase, should be received as evidence *per se* of fraud; but such a strict and precise test was finally rejected, in 1788, in the case of Allan & Stewart *v.* The Creditors of Stein, 1 Bell's Com 244–248.

(*a*) Barnes *v.* Freeland, 6 Term Rep. 80. Richardson *v.* Goss, 3 Bos. & Pull 119. Neate *v.* Ball, 2 East's Rep. 117. Dixon *v.* Baldwin, 5 Idem, 175. Salte *v.* Field, 5 Term Rep. 211. In Neate *v.* Ball, Lord Kenyon said, it was much to be wished that, where goods continued in bulk, and discernible from the general mass of the trader's property at the time of bankruptcy, that they could be returned to the original owners who had received no compensation for them, but that it could not be done without breaking in upon the whole system of the bankrupt laws.

ence of law to be drawn by the court, and resulting inevitably from the fact, or whether the fact was only evidence of fraud to be drawn by the jury, and susceptible of explanation. The history and diversity of the decisions on this subject, form a curious and instructive portion of our jurisprudence.

By the English statutes of 3 Hen. VII. and 13 Eliz. ch. 5, which have been reënacted in New York, (*a*) and the essential provisions of which have been adopted generally throughout the United States, all conveyances of goods and chattels not made *bonâ fide* and upon good consideration, but in trust for the use of the person conveying them, or made to delay, hinder, or defraud creditors, are declared to be void; and it is everywhere admitted, (*b*) that the statutes of fraud of 13 and 27 Eliz. were declaratory of the principles of the common law; and the decisions of the English courts, are, therefore, applicable to questions of constructive fraud arising in this country. (*c*)

Twyne's case, (*d*) which arose in the Star Chamber in the 44th Eliz., is the basis of the decisions on the question of fraud arising from possession being retained by the vendor.

Among other *indicia* of fraud upon which the court * 516 relied, * and adjudged the deed fraudulent in that case, a prominent one was, that the vendor, after a bill of sale of chattels for a valuable consideration to a creditor, continued in possession, and exercised acts of ownership over the goods. Afterwards, in *Stone* v. *Grubham*, (*e*) upon a bill of sale of chattels, being a lease for years, the vendor continued in possession; but as the conveyance was only conditional upon payment of

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(*a*) *Vide supra*, p. 440.

(*b*) Lord Mansfield, Cowp. Rep. 434. Marshall, Ch. J., 1 Cranch's Rep. 316. Robertson *v.* Ewell, 3 Munf. Rep 1. Story, J., 1 Gall. Rep. 423.

(*c*) By *constructive frauds*, are meant such contracts or acts as, though not originating in any actual evil design or contrivance to perpetrate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate public or private confidence, or to impair or injure the public interests, deemed equally reprehensible with positive fraud, and therefore are prohibited by law, as within the same reason and mischief as contracts and acts done *malo animo*. Story's Com. on Equity Jurisprudence, 261.

(*d*) 3 Co. 87, S. P. *Infra*, p. 532, note.

(*e*) 2 Bulst. Rep. 225.

money, it was held, that the possession did not avoid the sale, as by the terms of the deed the vendee was not to have possession until he had performed the condition. The rule was explicitly declared in Shepherd's Touchstone, in the time of James I., that if a debtor secretly made a general deed of his goods to one creditor, and continued the use and occupation of the goods as his own, the deed was fraudulent, and void against a subsequent judgment and execution creditor, notwithstanding the deed was made upon good consideration. (*a*) Again, in *Bucknal* v. *Roiston*, (*b*) a bill of sale of goods was given by way of security or pledge for money lent, and a trust in the vendor to keep the goods, and sell them for the benefit of the vendee, appeared on the face of the deed; and for that reason it was held by the lord chancellor not to be fraudulent. One of the counsel in that case observed, that it had been ruled forty times in his experience at Guildhall, that if a man sells goods, and still continues in possession as visible owner of them, the sale was fraudulent and void as to creditors. The case of a mortgage of goods was afterwards held, in *Ryall* v. *Rowles*, (*c*) not to form an exception to the general rule recognized in the former cases. It was declared by very strong authority in that case, that a mortgagee of goods, permitting the mortgagor to keep possession, had no specific lien against general assignees under a commission of bankruptcy; and he was understood to confide in the personal credit of the vendor, and not in any security. Though * that case was decided upon the Bankrupt Act of 21 James I., and not upon the statutes of Elizabeth, the reasoning of the court, relative to the distinction between absolute and conditional sales and mortgages, was founded on general principles applicable to every case. It was the doctrine of the case, that in a mortgage of goods the mortgagee takes possession; and that there was no reason, unless in very special cases, why an absolute or conditional vendee of goods should leave them with the vendor, unless to procure a collusive credit. There was no distinction, it was admitted, under the 13 Eliz., between conditional and absolute sales of

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(*a*) Shep. Touchstone, 66. (*b*) Prec. in Ch. 285.
(*c*) 1 Vesey, 348. 1 Atk. Rep. 165

goods, provided they were fraudulent; and continuance in possession by the mortgagor was fraudulent at common law, and void by the statute of Elizabeth.

The doctrine of that case was powerfully sustained by Lord Mansfield, in *Worsely* v. *De Mattos & Slader.* (*a*) That case arose under the Bankrupt Act of 21 James I., and it was held by the K. B., that a mortgage of goods, with possession retained by the mortgagor, was fraudulent in law, equally as it would be upon an absolute sale. To give a creditor priority by such a mortgage, when the mortgagor is allowed to appear and act as owner, is enabling him to impose upon mankind by false appearances; for where possession is not delivered, goods may be mortgaged a hundred times over, and open a plentiful source of deceit. But in *Cadogan* v. *Kennett,* (*b*) where household goods, by settlement before marriage, in consideration of the marriage, and of the wife's marriage portion, were conveyed to trustees in trust for the settler for life, remainder to his wife for life, and remainder to the sons of the marriage, it was held, that those goods were protected from execution in favor of a creditor existing at the time of the settlement, though the grantor continued in possession of the goods. The transaction was fair and honest in point of fact, and it was part of the trust that the *518 goods should continue in the house. * Other subsequent cases have established the rule, that the wife's goods may, before marriage, be conveyed to trustees with her husband's assent, for her use during coverture, and such property will not be liable to his debts. (*c*) Again, in *Edwards* v. *Harben,* (*d*) the K. B. laid down the principle emphatically, that if the vendee took an absolute bill of sale, to take effect immediately by the face of it, and agreed to leave the goods in possession of the vendor for a limited time, such an absolute conveyance, without the possession, was such a circumstance *per se* as made the transaction fraudulent in point of law. It was admitted, however, that if the want of immediate possession be consistent with the deed, as it was in *Bucknal* v. *Roiston,* and

(*a*) 1 Burr. Rep. 467.
(*b*) Cowp. Rep. 432.
(*c*) Haselinton *v.* Gill, 24 Geo. III. 3 Term Rep. 620, n. Jarman *v.* Woolloton, 3 Ibid. 618.
(*d*) 2 Term, 587.

Lord Cadogan v. *Kennett*, and as it is if the deed be conditional, and the vendee is not to have possession until he has performed the condition, the sale was not fraudulent, for there the possession accompanied and followed the deed within the meaning of the rule.

After the English rule on this subject had been thus discussed, declared, and settled, it was repeatedly held, that an absolute bill of sale of chattels, unaccompanied with possession, was fraudulent in law, and void as against creditors. (*a*) The change of possession was required to be substantial and exclusive. But, on the other hand, there have been many exceptions taken, and many qualifications annexed to the general rule; and it has become difficult to determine when the circumstance of possession, not accompanying and following the deed, are *per se* a fraud in the English law, or only presumptive evidence of fraud resting upon the facts to be disclosed at the trial. It certainly is not anything more, if the purchaser was not a creditor at the time, and * the goods were under execution, and the * 519 transaction was notorious, and not, in point of fact, either clandestine or fraudulent.

In *Kidd* v. *Rawlinson*, (*b*) goods were purchased on execution by a stranger, and left in possession of the debtor for a temporary, and honest, and humane purpose; and as the parties did not stand in the relation of debtor and creditor, Lord Eldon, as Ch. J. of the C. B., held, that the title was in the vendee. He admitted that a bill of sale of goods might be taken as security on a loan of money, and the goods fairly and safely left with the debtor. The decision in this case was conformable to one made by Lord Holt under similar circumstances; (*c*) and Lord Eldon many years afterwards, when lord chancellor, (*d*) adhered to the same doctrine, and declared, that possession of chattels by the vendor was only *primâ facie* evidence of fraud. If the

(*a*) Paget *v.* Perchard, 1 Esp N. P. Rep. 205 Wordall *v* Smith, 1 Campb. N. P. Rep. 332. In Eastwood & Brown, Ryan *v* Moody, 312 Lord Tenterden dissented from the doctrine in Wordell *v.* Smith, and he held non-delivery into possession to be only *primâ facie* evidence of fraud.

(*b*) 2 Bos. & Pull. 59.

(*c*) Cole *v.* Davies, 1 Lord Raym. 724.

(*d*) Lady Arundell *v.* Phipps, 10 Vesey, 145.

property cannot be reached by bankruptcy, and the possession be according to the deed which creates the title, and the title be publicly created, it is not fraudulent. Other cases have protected the purchaser of goods seized on execution, (and whether the purchase was from the sheriff or the defendant seemed to be immaterial,) from subsequent executions, though the goods were suffered to continue in the possession of the defendant, on the ground that the transaction was necessarily notorious to the whole neighborhood, and the execution notice to the world; and the cases being free from fraud in fact, were, under those circumstances, free from the inference of fraud in law. (*a*) The question of fraud in such cases is declared to be a question of fact for the jury. The purchaser of goods sold at auction, by trustees, under an assignment by an insolvent debtor, is also protected, though he leave the goods in the possession of *520 * the prior owner, provided it be a matter of fact to be found by a jury, that the assignment was not made with a fraudulent intent, and that the sale was notorious. (*b*)

So, a person may lend his goods for another's use, and except in cases of bankruptcy under the statute of 21 James I., they will be protected from the creditors of the person for whose use they were supplied. (*c*) In *Steward* v. *Lombe*, (*d*) as late as 1820, the court of C. B. even questioned very strongly the general doctrine in *Edwards* v. *Harben*, that actual possession was necessary to transfer the property in a chattel, and the authority of the case itself was shaken. (*e*) The conclusion from the more recent English cases would seem to be, that though a continuance in possession by the vendor or mortgagor be *primâ*

(*a*) Watkins *v.* Birch, 4 Taunt. Rep. 823. Jezeph *v.* Ingram, 8 Ibid. 838. Latimer *v.* Batson, 4 Barn. & Cress. 652. But in Imray *v.* Magnay, 11 Meeson & Welsby, 267, where goods were seized on execution, under a judgment fraudulent against creditors, and they *remained unsold* in the hands of the sheriff, who received a subsequent execution, founded on a *bonâ fide* debt, and *after notice of the fraud*, neglected to sell on the latter writ, and returned it *nulla bona*, he was held liable to an action for a false return.

(*b*) Leonard *v.* Baker, 1 Maule & Selw. 251.

(*c*) Dawson *v.* Wood, 3 Taunt. Rep. 256.

(*d*) 1 Brod. & Bing. 506.

(*e*) The case was, however, corroborated in Reed *v.* Wilmot, 7 Bingham, 583, and by Mr. Justice Lawrence, in 1 Taunton, 382.

facie a badge of fraud, if the chattel, sold or mortgaged, be transferable from hand to hand, yet the presumption of fraud arising from that circumstance may be rebutted by explanations showing the transaction to be fair and honest, and giving a reasonable account of the retention of the possession. The question of fraud arising in such cases is not an absolute inference of law, but one of fact for a jury; and if the personal chattels savor of the reality, as for instance, the engines, utensils, and machinery belonging to a manufacturing establishment, no presumption of fraud will arise from the want of delivery. (*a*) So a bill of sale of goods is good as between the parties, though no possession be given at the time, when the interests of third persons are not concerned. (*b*)

The law on this subject is still more unsettled in this country than it is in England.

* In the Supreme Court of the United States, the doctrine in *Edwards* v. *Harben* has been explicitly and fully adopted; and it is declared, that an absolute bill of sale is itself a fraud in law, unless possession accompanies and follows the deed. (*c*) This decision, of course, leaves open for discussion the distinction taken in that case between a bill of sale absolute, and one conditional upon its face, and also the conclusions in the other cases where the continuance of possession in the vendor is consistent with the deed. The principle of the decision at Washington has been adopted in the circuit courts of the United States, and we may consider it to be a settled prin- *521

(*a*) Eastwood *v.* Brown, Ryan & Moody, 312. Wooderman *v.* Baldock, 8 Taunt. Rep. 676. Jezeph *v.* Ingram, Ibid. 838. Reed *v.* Blades, 5 Ibid. 212. Hoffman *v.* Pitt, 5 Esp. N. P. Rep. 22. Armstrong *v.* Baldock, Gow's N. P. Rep. 33. Storer *v.* Hunter, 3 Barn. & Cress. 368. Martindale *v.* Booth, 3 Barn. & Adolph. 498. On the other hand, where goods were seized on *fi. fa.* and not sold by direction of the plaintiff, but left under the control of the defendant from March to November, the execution and levy were deemed fraudulent, and the goods were held to be liable to a subsequent *fi. fa.* Lovick *v.* Crowder, 8 Barn. & Cress. 132.

(*b*) Warren *v.* Magdalen College, 1 Rol. 169. Martindale *v.* Booth, 3 Barn. & Adolph. 505. Jones *v.* Yates, 9 Barn. & Cress. 532. Doe, dem. Roberts *v.* Roberts, 2 Barn. & Ald. 369. A deed constructively fraudulent as to creditors, may be good to every other intent and purpose, and stand both in law and equity. 1 Story's Eq. 364, 365, 371.

(*c*) Hamilton *v.* Russel, 1 Cranch's Rep. 310.

ciple in federal jurisprudence.[1] In pursuance of the rule, if property be abroad, and incapable of actual delivery at the time, as in the case of a ship at sea, the possession must be assumed as soon as possible on the arrival of the vessel in port. (*a*)

In Virginia, the same principle has been directly and repeatedly adjudged to be well settled; and it is declared, that an absolute bill of sale of personal property, with possession continuing in the vendor, is fraudulent *per se* as to creditors, without other evidence of fraud, or being connected with other circumstances. (*b*)[2] In * South Carolina, the same doctrine was alluded to as being founded on the better author-

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(*a*) United States *v.* Conyngham, 4 Dall. Rep. 358. S. C. Wallace, C. C. R. 178. Meeker *v.* Wilson, 1 Gall. Rep. 419. Mair *v.* Glennie, 4 Maule & Selw. 240.

(*b*) Alexander *v.* Deneale, 2 Munf. Rep. 341. Robertson *v.* Ewell, 3 Ibid. 1. In Land *v.* Jeffries, 5 Randolph's Rep. 211, the rule was somewhat qualified; and it was held, that when the grantor of personal property remains in possession after an absolute conveyance, the conveyance is *primâ facie* fraudulent; but such possession is not conclusive evidence of fraud, barring every explanation. It will lie with the purchaser to explain and rebut the presumption of fraud; as if a slave be purchased, and not taken away in several months, it may be shown that he was too sick to be removed; or if a horse be purchased, and to be sent for the next day, a levy upon him in the intermediate time upon execution against the seller, it was supposed, would hardly be sustained.[3] In Claytor *v.* Anthony, 6 Randolph's Rep. 285, Judge Green elaborately investigates the doctrine, and ably sustains the rule established by the previous authorities. Again, in Sydnor *v.* Gee, 4 Leigh's Rep. 535, the Court of Appeals held, that in case of an absolute sale and delivery of chattels, and an immediate redelivery to the vendor, upon bailment, for a limited time, on valuable consideration, and when the sale and redelivery were fair transactions, the bailment was not inconsistent with the sale, and good within the rule of Edwards *v.* Harben. It was also deemed within the rule, and good, if, on an absolute and fair sale of chattels, possession be not immediately passed to the vendee, but is taken before the rights of any creditor of vendor attaches. This is the Massachusetts doctrine in Bartlett *v.* Williams, 1 Pick. Rep. 288. So the statute of executions in Virginia authorizes the sheriff to take forthcoming bonds, for delivery, at the day and place of sale, of property taken in execution.

[1] And in the case of The Romp, Olcott, Adm. 196, it was held, that the *bona fides* of the transaction between the parties, and the fact that the possession remained with the seller for justifiable purposes, would not vary the rule.

[2] If the sale is *bonâ fide*, and the vendee gets possession before execution against the vendor, the title is good. Berry *v.* Ensell, 2 Gratt. R. 333.

[3] See, also, Forkner *v.* Stuart, 6 Gratt. 197; Curd *v.* Miller, 7 Ib. 185.

ity; (*a*) and in one case in equity (*b*) it was decided, that if possession did not accompany a bill of sale of chattels which was not recorded, it was void as to the creditors, though there was no doubt of the fairness of the transaction. Afterwards, in the constitutional court, the doctrine of the English law, in *Edwards* v. *Harben*, was declared by all the judges to be a settled rule. (*c*) In Tennessee, also, the doctrine of the English law, as stated in *Edwards* v. *Harben*, is clearly asserted. (*d*) In Kentucky, the same principle, under the modifications it has subsequently undergone in England, seems to have been adopted; for after an absolute bill of sale, if the property remains in the possession of the vendor, it is held to be fraudulent;[1] and yet,

(*a*) Croft *v.* Arthur, 3 Desauss. 229.

(*b*) De Bardeleben *v.* Beekman, 1 Ibid. 346.

(*c*) Kennedy *v.* Ross, 2 Const. Rep. S. C. 125. Hudnal *v.* Wilder, 4 M'Cord's Rep. 294, S. P. But in Terry *v.* Belcher, and Howard *v.* Williams, 1 Bailey's S. C. Rep. 568, 575, and Smith *v.* Henry, 2 Ibid. 118, the Court of Appeals in South Carolina recurred to and adopted the more modern and prevalent, and less stern doctrine of the cases, that a vendor's or donor's retaining possession after an absolute and unconditional sale or gift of chattels, was not conclusive, but only *primâ face* evidence of fraud, for it was susceptible of explanation. See *infra*, p. 529, note *a*. But in Anderson *v.* Fuller, 1 M'Mullan, Eq. 27, the case of Smith *v.* Henry, in 1 Hill, 22, was cited as warranting the principle that if a debtor, in a deed of assignment, secures an advantage to himself, it invalidates the deed, and that leaving the property in the hands of the debtor, raises the presumption of a secret trust between the debtor and the preferred creditor, and the deed is void so far as the rights of creditors are affected. The law in such a case raises the conclusion of fraud, "incapable of being rebutted or explained." But if the case rested only on constructive, *and no actual* fraud, the deed would be permitted to stand as a security for any consideration advanced at the time.[2]

(*d*) Ragan *v.* Kennedy, 1 Overton's Tenn. Rep. 91. Since that decision, it has been declared, in Gallen *v.* Thompson, 3 Yerger, 475, and in Maney *v.* Killough, 7 Yerger, 440, and again in Mitchell *v.* Beal, 8 Ib. 142, that possession remaining with the vendor after an absolute sale, or with the grantor or mortgagor in deeds of trust and mortgages, *after* the time of payment, is *primâ facie* evidence of fraud, but the presumption may be repelled by proof. It was further held, that the retaining of possession by mortgagor of personal property *before* the day of payment, is not *primâ facie* evidence of fraud, because it is understood to be a tacit or presumed agreement that the mortgagor should retain possession. See also *infra*, p. 526, note *a*.

[1] Waller *v.* Cralle, 8 B. Mon. R. 11.

[2] And in Pringle *v.* Rhame, 10 Rich. Law, (S. C.) 72, the Court of Appeals decided, that where a slave is sold, the consideration of which sale is an antecedent indebtedness, and the slave remains in the possession of the vendor, with a stipulation to pay hire, the stipulation takes the case out of the rule of Smith *v.* Henry.

when such possession is not inconsistent with the sale, the fraud becomes a matter of fact for a jury. (*a*) Afterwards, in *Wash* v. *Medley*, (*b*) the milder doctrine was declared, that a transfer of chattels by deed, without any change of possession, was not *per se* fraud, but only a matter of inference for a jury. (*c*)

In Pennsylvania, the English doctrine is adopted and followed in its fullest extent. The general principle is explicitly and emphatically recognized, that on an absolute sale or assignment of chattels, possession must accompany and follow the deed, and vest exclusively in the vendee, or it is fraudulent in law, though there be no fraud in fact. (*d*) As between the vendor and vendee, the property will belong to the vendee; but the sale without delivery is void as to creditors; and if the vendor sells and delivers it to a *bonâ fide* purchaser, without notice, the purchaser will hold against the original vendee. (*e*) As an exception to the

(*a*) Baylor *v.* Smithers, 1 Littell's Rep. 112. Goldsbury *v.* May, 1 Litt. Rep. 256. Hundley *v.* Webb, 3 J. J. Marshall, 643.

(*b*) 1 Dana's Ken. Rep. 269.

(*c*) Again, in Brummel *v.* Stockton, 3 Dana's Ken. Rep. 134, and Laughlin *v.* Ferguson, 6 Ibid. 117, the rule is laid down strictly, that on an absolute sale of movable property, possession must go with the title, or the sale will be *per se* void as to the creditors and subsequent purchasers, notwithstanding any agreement, however fair, that the seller may retain possession. And such seems to be the law in Missouri. Sibly *v.* Hood, 3 Missouri Rep. 290. Foster *v.* Wallace. 2 Ib. 231; and as laid down in Georgia, in Howland *v.* Dews, R. M. Charlton's Rep. 386. The rule in Kentucky applies only to sales by private voluntary contract, and not to sales on execution, where the simple retention of possession by the debtor is not necessarily fraudulent; nor to sales upon a mortgage condition, provided the condition be inserted and the deed recorded. 6 Dana, 120. Vernon *v.* Morton, 8 Ib. 253. Swigert *v.* Thomas, 7 Ib. 222. The rule that possession must go with the deed, does not apply in Kentucky to mortgages and deeds of trust, which are required to be recorded. 5 Littell, 243. 1 J. J. Marshall, 282. 3 Id. 353. 3 Dana, 204. 16 Peters's Rep. 112.

(*d*) Young *v.* M'Clure, 2 Watts & Serg. 147.

(*e*) Dawes *v.* Cope, 4 Binney's Rep. 258. Babb *v.* Clemson, 10 Serg. & Rawle, 419. Shaw *v.* Levy, 17 Ibid. 99. Hower *v.* Geesaman, Ibid. 251. Streeper *v.* Eckart, 2 Wharton, 302. Hoofsmith *v.* Cope, 6 Wharton, 53. A constructive, symbolical, or temporary delivery of personal property, is not sufficient to change the ownership *as to creditors*. There must be actual delivery at the time, and a continuing possession. M'Bride *v.* M'Clelland, 6 Watts & Serg. 94. By statute of Pennsylvania of 14th June, 1836, and the construction given to it, an assignee, under a voluntary deed of assignment for the benefit of creditors, may suffer the goods to remain in possession of the assignor for thirty days, without subjecting them to an execution of a creditor of assignor. This delay is to afford time to comply with the requisitions of the statute.

general rule, it is admitted that goods may, after they have been levied upon, or after a fair purchase of them at a sale *on execution, be safely left in the possession of the defendant, without a necessary inference of fraud; though the exception in the case of a levy merely, was afterwards restricted to household furniture. (a) Delivery of the goods is held to be as requisite in the case of a mortgage of goods, as of an absolute sale of goods under the statutes of 13 and 27 Eliz.; and merely stating on the face of the deed that possession was to be retained, is not sufficient to take the case out of the statute, even in the case of a mortgage of goods; and the transaction has been adjudged to be fraudulent *per se*, and void against a subsequent *bonâ fide* purchaser without notice. (b) The just policy and legal solidity of the rule that holds all such deeds of chattels fraudulent in law, were asserted in the case to which I have last alluded, with distinguished ability and effect. The retention of possession must not only be a part of the contract, but it must appear to be for a purpose, fair, honest, and necessary, or conducive to some fair object in view. Appearances must not only agree with the real state of things, but the real state of things must be honest and consistent with public policy. Such were the cases of *Bucknal* v. *Roiston*, and *Cadogan* v. *Kennett*.[1] Where the motive of the sale is the security of the vendee, and the vendor is permitted to retain the visible ownership for the convenience of the parties, it is a fraud, though the arrangement be inserted in the deed or mortgage. The policy of the law will not permit the owner of personal property to create an interest in another, either by mortgage or absolute sale, and still continue to be the visible owner. The law will not stay to inquire whether there was actual fraud or not, and will infer it at all events; for it is against sound policy to suffer the vendor to remain in possession, whether an agreement to

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(a) Levy *v.* Wallis, 4 Dall. Rep. 167. Waters *v.* McClellan, Ibid. 208. Chancellor *v.* Phillips, Ibid. 213. Myers *v.* Harvey, 2 Penn. Rep. 478.

(b) Clow *v.* Woods, 5 Serg. & Rawle, 275. Welsh *v.* Hayden, 1 Penn. Rep. 57, S. P.

[1] See Hugus *v.* Robinson, 24 Penn. 9.

that effect be or be not expressed in the deed. It necessarily creates a secret incumbrance as to personal property, *524 when, to the world, the vendor *or mortgagor appears to be the owner, and he gains credit as such, and is enabled to practise deceit upon mankind. If the possession be withheld pursuant to the terms of the agreement, some good reason for it, beyond the convenience of the parties, must appear; and the parties must leave nothing unperformed within their power, to secure third persons from the consequences of the apparent ownership of the vendor.[1] If it be the sale or mortgage of articles undergoing a process of manufacture, to be delivered when finished, or of various other goods and chattels, and possession can properly be retained, there ought to be a specific inventory of the articles, so as to apprise creditors of what the conveyance covered, and to prevent the vendor from changing and covering property to any extent by dexterity and fraud.

The Supreme Court of Pennsylvania have regretted, that even in the excepted case of household furniture, the goods seized on execution may be left in the hands of the defendants. This was contrary to the common law, which would not endure the levying on goods only as a security, (*a*) and wisely gave a subsequent execution creditor the preference, if goods levied on by execution were suffered to remain in the hands of the defendant. The exception of household furniture has notoriously occasioned collusion and fraud, and been productive of gross abuse. The levy was a very imperfect notice to third persons.(*b*)

(*a*) Bradley *v.* Wyndham, 1 Wils. Rep. 44.

(*b*) Cowden *v.* Brady, 8 Serg. & Rawle, 510. Dean *v.* Patton, 13 Ibid. 345. In Barnes *v.* Billington, 1 Wash. Cir. Rep. 38, Judge Washington held, that household furniture did not properly form an exception to the general rule; that if the goods be levied on under a *fi. fa.*, and left in the possession of the defendant for any length of time, no lien attached by the levy, as against subsequent executions or purchasers. The rule, as it was afterwards declared in Berry *v.* Smith, 3 Ibid. 60, does not require the officer to remove the goods or sell them *immediately*, provided he does it in a reasonable time, and does not leave the debtor in the mean time with the power to deal with the property as owner. So in Wood *v.* Vanarsdale, 3 Rawle's Rep. 401, it was held, that the sheriff was only bound to take possession of goods levied on execution,

[1] Born *v.* Shaw, 29 Penn. State R. 288.

*The same doctrine has been declared to be the law in *525 Illinois, New Jersey, Connecticut, and Vermont. Delivery of possession, in the case of a sale or mortgage of chattels, is held to be necessary whenever it be practicable; and to permit the goods to remain in the hands of the vendor is declared to be an extraordinary exception to the usual course of dealing, and requires a satisfactory explanation. There must be an actual and not a colorable change of possession. The leading decisions, in England and in this country, in favor of the legal inference of fraud in such cases, are referred to, and the conclusion adopted, that on a sale or mortgage of goods, an agreement, either in or out of the deed, that the vendor may keep possession, is, except in special cases, fraudulent and void, equally against creditors and *bonâ fide* purchasers. (*a*)

within a reasonable time; but if on a levy he be directed by the plaintiff to stay further proceedings until further order, and the object be security for the debt, the lien created by the levy is discharged. Commonwealth *v.* Stremback, 3 Rawle's Rep. 341. In North Carolina the same general doctrine prevails; and the sheriff who seizes goods and chattels on execution must take possession, or by some notorious act divest the debtor's possession and use of them, or he will lose his preference over a subsequent seizure, unless the leaving the goods in the debtor's possession be accounted for, as in the case of a growing crop, or an article in the course of being manufactured, or the like. Roberts *v.* Scales, 1 Iredell's Law Rep. 88. In South Carolina the courts do not follow the rule in most of the other states, that a senior execution creditor will lose his lien as against a junior creditor, by inactivity. Local considerations have led to this policy. Adair *v.* M'Daniel & Cornwell, 1 Bailey's Rep. 158.

(*a*) Thornton *v.* Davenport, 1 Scammon's Rep. 296. In this Illinois case the true doctrine is laid down with precision. All conveyances, it is held, of goods and chattels, where the possession is permitted to remain with the donor or vendor, are fraudulent *per se*, and void as to creditors and purchasers, unless the retaining of possession be consistent with the deed: where the transaction is *bonâ fide*, and from the nature and provisions of the deed, the possession is to remain with the vendor, that possession being consistent with the deed, does not avoid it; and therefore mortgages, marriage settlements, and limitations over of chattels, are valid without transfer of possession, if the transfer be *bonâ fide*, and the possession remain with the person according to the deed. But an *absolute* sale of personal property, and the possession remaining with the vendor, is void as to creditors and purchasers, *even though authorized by the terms of the bill of sale.*[1] The opinion of one of the judges in that case went to the whole length of the salutary doctrine, that the mortgagee or vendee taking a bill of sale for security, must take possession, even though the arrangement in the deed or mortgage be different, because the policy of the law will not permit the owner of personal property to create an interest in another, either by mortgage or absolute

[1] Rhines *v.* Phelps, 3 Gilm. R. 455.

*526 * In these American decisions, the stern conclusions of the doctrine, that fraud in the given case is an inference

sale, and still continue to be the visible owner. And see Davis v. Ransom, 18 Ill. 396; Chumar v. Wood, 1 Halsted's Rep. 155; Patten v. Smith, 5 Conn. Rep. 196; Swift v. Thompson, 9 Ibid. 63; Toby v. Reed, 9 Ibid. 216; Mills v. Camp, 14 Ibid. 219; Osborne v. Tuller, Id. 529. But in New Jersey, the subject has been since fully discussed, and a rule of a more qualified character declared. In Sterling v. Van Cleve, 7 Halsted's Rep. 285, it was held, after an elaborate view of the subject, that a mere agreement by the creditor to delay the sale of a debtor's goods, levied on by execution, was not, of itself, evidence of fraud. There must be some proof of actual fraud to subject a prior execution to postponement. If the plaintiff suffers the goods levied on by execution to remain with the debtor for a specific time, on his agreeing to pay a rent therefor, equivalent to keeping the goods of the same value and in good order, it is not a fraud upon a subsequent execution creditor, and will not postpone the prior execution. See, also, in Bank of New Brunswick v. Hassert, Saxton's N. J. Chan. Rep. 1, Cumberland Bank v. Hann, 4 Harrison's N. J. Rep. 166, a more relaxed indulgence in leaving goods seized on execution with the defendant, if done in good faith. In Vermont it was held, that in ordinary cases of sales of personal property, if the vendor retains possession, the sale is fraudulent and void as to creditors. *Bonâ fide* sales by sheriffs were an exception. Boardman v. Keeler, 1 Aiken's Vt. Rep. 158. Mott v. McNiel, 1 Ibid. 162. In Weeks v. Wead, 2 Ibid. 64, the same conclusion was adopted, after a full review of the authorities on each side of the question; and it was declared, that in the sale of chattels, if the conveyance be absolute, the want of a change of possession was not merely *primâ facie* evidence of fraud, but a circumstance *per se* which rendered the transaction fraudulent and void; and no stipulation in the contract, that the vendor should retain possession, would take the case out of the rule, if *from the nature of the transaction*, the sale was absolute, and possession could accompany it. So again, in Fletcher v. Howard, 2 Aiken's Vt. Rep. 115, it was decided to be essential to a pledge, as well as to a sale of personal chattels, that it be accompanied with delivery of possession as against third persons; and that if the pawnee takes a delivery, and yet immediately redelivers the thing pledged to the former owner, or permits it to go back into his possession, the special property created by the bailment is determined and gone.[1] The same doctrine was followed out in Beattie v. Robin, 2 Vermont Rep. 181; and it was declared, that unless a purchase be followed by a visible charge of possession, the property will continue liable to the creditors of the vendor. Judd & Harris v. Langdon, 5 Vermont Rep. 231. Baylies, J., Ibid. 531, S. P. In Farnsworth v. Shepard, 6 Vermont Rep. 521, the Supreme Court of Vermont adhered to their former decisions with great resolution, and declared that a sale of personal property, unaccompanied with a change of

[1] If the vendor pays to the first vendee the money received for the second sale, and afterwards takes the money and buys a similar article for the first vendee, and retains possession, there is no fraud in law. Ridout v. Benton, 1 Wms. 383. The possession of the vendor, in order to raise the presumption of fraud, must be actual. If it is only constructive, his right of possession passes in the first sale without moving the property. Hutchins v. Gilchrist, 23 Vt. 82. The courts of Connecticut continue to support the old rule. Kirtland v. Snow, 20 Conn. 23, 30.

of law, are asserted not only in a tone equally explicit and decided as in the English cases in the age of Mansfield and Buller, but with much greater precision and more powerful and convincing argument. There is another series of decisions, however, which have, under sanction, established a more lax and popular doctrine.

In North Carolina, it is held, that whether a deed be fraudulent or otherwise, from the want of possession in the vendee, or within the operation of the statute of 13 Eliz. ch. 5, was a question of fact, and not of law. (*a*) The Supreme Court of that state, in a more recent case, (*b*) carried the relaxation of the English rule to a great extent. A bill of sale of a horse was absolute on its face, but taken as a security for a debt, and possession was left with the vendor. The property, after being kept by the debtor for six years, was seized on execution by another creditor; and the court decided that such a transaction was only presumptive evidence of fraud for a jury; and as they had found no fraud in the fact, the verdict was sustained. (*c*)[1]

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possession, was *per se* fraudulent as against the creditors of the vendor. "This still remains," said Mattock, J., "the settled law of the land; and although some learned gentlemen of the law have supposed that the court would eventually retrace their steps, as the courts in some of the neighboring states have done, that is, leave that as a badge of fraud to a jury, yet we are not disposed to recede a jot, nor to advance a whit, but to remain stationary upon this, in other governments, vexed question, so as to give this branch of the law, at least, the *quality* of uniformity." I think this decision reflects the highest honor upon the firmness of the court, and it is a consoling example of the triumph of the conservative principle in our jurisprudence. How long the court will be able to stand on that ground is another question.[2] Wilson *v.* Hooper, 12 Vermont Rep. 653, S. P.

(*a*) Vick *v.* Kegs, 2 Haywood's Rep. 126. Falkner *v.* Perkins, Ibid. 224. Smith *v.* Niel, 1 Hawk's Rep. 341. Trotter *v.* Howard, Ibid. 320.

(*b*) Howell *v.* Elliott, 1826, 1 Dev. 76.

(*c*) In 1830, provision was made by law, in North Carolina, for the registry of deeds of trust or mortgage of chattels; and they were not to be valid in law, as

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[1] In Mississippi and Arkansas, possession of personal property by the vendor is *primâ facie* evidence of fraud only. Comstock *v.* Rayford, 12 S. & M. R. 369. Field *v.* Simco,

[2] The courts manifest no disposition to recede from their position. Mills *v.* Warner, 19 Vt. R. 609. And the change of possession required must be such that any one, on reasonable inquiry, would learn such facts that he would be bound to know the vendee's or mortgagee's lien and control of the property. Parker *v.* Kendrick, 3 Wms. (29 Vt.) 388.

In New York, the current language of the court originally was, (a) that the non-delivery of goods at the time of the sale

against creditors or purchasers for a valuable consideration, without such registry. This will prevent the inconvenience of the antecedent doctrine. There were also statutes in 1784, 1801, and 1820, providing for the registry of bills of sale of chattels. In Gregory v. Perkins, 4 Dev. N. C. Rep. 50, it was decided that a deed absolute on its face, but executed upon a parol agreement for redemption, is, in law, fraudulent and void, as against the creditors of the vendor; and the registry of it under the statute did not add to its validity. The object of the Registry Act was to give notice of the existence and extent of incumbrances, as *mortgages, deeds or conveyances in trust*, and the true character of the deed must appear on the record, to give it protection. In that case, Ch. J. Ruffin observed, that fraud was matter of law, and a question for the court, but the actual intent was generally concealed, and was within the province of a jury, and in that sense, fraud is a mixed question. But when the facts are ascertained, the conclusion is exclusively matter of law. The English rule prevailed for some time in North Carolina, that possession retained by the vendor, was *per se* fraudulent.[1] But it admitted of so many exceptions proper for the jury, as to the intents, that the rule itself hardly remained; and the court finally resorted, as has been done in New York, to the plain rule of leaving to the jury the possession, as a fact and ground of presumption, under all the circumstances, whether or not there was a secret trust and a fraudulent intent, without, however, intending to leave it to the jury to follow their own uncertain judgment, when the ascertained facts would, in judgment of law, amount to a fraudulent intent. Decisions so guardedly and firmly expressed, are exceedingly consoling and valuable. The case of Leadman v. Harris, 3 Dev. Rep. 146, contained the same sound doctrine. So in Wilson v. Hensley, 4 Iredell's N. C. Rep. 66, where a levy had been made on execution of personal property, and possession immediately restored to the defendant, a levy by another officer on a subsequent execution was preferred. The doctrine in Tennessee and Alabama is, that on a sale of goods by deed, absolute on its face, without possession accompanying the deed, it is only *primâ facie* evidence of fraud, and not fraudulent *per se*.[2] Callen v. Thompson, 3 Yerger's Rep. 475. Darwin v. Handley, Ibid. 502. See, also, the case of Maney v. Killough, *supra*, p. 522, note d; Blocker v. Burness, 2 Ala. Rep. N. S. 354. This seems also to be the rule in Mississippi, Carter v. Graves, 6 Howard, R. I. And in Kentucky the courts go so far as to hold, that possession of goods by a mortgagor is not only not fraudulent *per se*, but in many, and perhaps in most cases, not even evidence of fraud in fact. 2 Dana's Ken. Rep. 204. In Missouri, on the other hand, the principle which seems to be declared in the case of King v. Bailey, 6 Missouri Rep. 575, is, that possession of personal property by the vendor, after a sale, either absolute or conditional, is fraudulent and void in law, as against creditors prior or subsequent.

(a) Barrow v. Paxton, 5 Johns. Rep. 258. Beals v. Guernsey, 8 Ibid. 452.

2 Eng. R. 269. Cocke v. Chapman, Id. 197. So in Georgia. Peck v. Land, 2 Kelly, 1. And the presumption of fraud is rebutted by proof of payment of a valuable consideration. Scott v. Winship, 20 Geo. 429. Goodwyn v. Goodwyn, Ib. 600. And in Texas,

[1] If the sale be fraudulent, it is still *absolutely void*. Flynn v. Williams, 7 Ire. R. 32.

[2] Continuance in possession of chattels after a sale at *public auction* is not *primâ facie* fraudulent. Abney v. Kingsland, 10 Ala. R. 355.

or mortgage, was only *primâ facie* evidence of fraud, and a circumstance which admitted of explanation. But in *Sturtevant* v. *Ballard*, (a) the subject received a more *full *527 and deliberate consideration, and the English and American authorities were extensively reviewed; and it was decided, that on a bill of sale of goods, partly for cash and partly to satisfy a debt, with an agreement in the instrument that the vendor was to retain the use and occupation of the goods for the term of three months, the goods were liable to the intervening execution of a judgment creditor. It was considered to be a settled principle of law, that if the vendor be permitted to retain possession in the case of an absolute bill of sale of chattels, it was an act of fraud in law as against creditors; and that though the agreement appear on the face of the deed, it would be equally so, unless some good motive was at the same time shown. The rule applied equally to conditional as well as absolute sales, unless the intent of the parties in creating the condition was sound and legal. Fraud was the judgment of law on facts and intents, and it was a question of law when there was no dispute about the facts. (b) The result of the investigation was, that a voluntary sale of chattels, with an agreement, in or out of the deed, that the vendor may keep possession, is, except in special cases and for special reasons, to be shown to and approved of by the court, fraudulent and void as against creditors.

This decision we supposed to have established, on sound foundations, the rule of law in New York, so far as that rule

(a) 9 Johns. Rep. 337.

(b) Fraud is a question of law on facts and intents. Lord Coke, 2 Bulst. 226. Lord Mansfield, 1 Burr. 474. Buller, J., 2 Term, 596. Lord Ellenborough, 9 East, 64.

McQuinney *v.* Hitchcock, 8 Tex. 33. Converse *v.* McKee, 14 Texas, 20. Earle *v.* Thomas, Ib. 583. And so in Wisconsin. Whitney *v.* Brunette, 3 Wisc. 621. Cotton *v.* Marsh, 3 Wisc. 221. By the statute of frauds of California, if a sale be not accompanied by immediate delivery and followed by an actual and continued change of possession, it is conclusive evidence of fraud; and the courts of California show no disposition to relax the vigor of the statute. See Fitzgerald *v.* Gorham, 4 Cal. 289, and Cheney *v.* Palmer, 6 Cal. 119. In Florida, the rule of Edwards *v.* Harbin seems to be adopted. Gibson *v.* Love, 4 Flor. 217. Sanders *v.* Pepoon, Ib. 465. But it is otherwise in Louisiana by the Code. Jorda *v.* Lewis, 1 La. Ann. R. 59.

depended upon the judgment of the Supreme Court. But though the decision has been cited and approved of in other states, (a) it was doomed to have a very transient influence on its own tribunal. In *Ludlow* v. *Hurd*, (b) the chief justice left it as a debatable point, whether the retaining possession of chattels by the vendor, after an absolute sale of them, was *ipso facto* fraudulent, or only a badge of fraud for the consideration *528 of a jury; and in *Bissell* v. *Hopkins*, (c) *the doctrine of the case of *Sturtevant* v. *Ballard* was entirely subverted, and it was adjudged that possession continuing in the vendor was only *primâ facie* evidence of fraud, and might be explained. But in *Divver* v. *M'Laughlin*, (d) it was held, that a mortgage of goods, in a case in which the mortgagor was suffered to continue in possession, and to act as owner for two years and a half after the mortgage had become absolute, was fraudulent in law, and void as to creditors, however honest the intention of the parties might have been. This was, in some degree, reinstating the earlier doctrine, and a recognition of the principle *529 declared in *Sturtevant* v. *Ballard;* *and the decision is deemed to be sound and salutary. (e)

(a) 5 Serg. & Rawle, 285. 5 Conn. Rep. 200. 1 Aiken, 158, 162. 6 Vermont Rep. 521.

(b) 19 Johns. Rep. 221.

(c) 3 Cowen's Rep. 166.

(d) 2 Wendell's Rep. 596. Collins *v.* Brush, 9 Wendell's Rep. 198, S. P.

(e) The New York Revised Statutes have put this vexatious question at rest in this state, as to the effect of the non-delivery of goods on sale or assignment, by way of mortgage, or upon condition, by declaring that unless the sale or assignment be accompanied by an immediate delivery, and be followed by an actual and continued change of possession, it shall be *presumed to be fraudulent and void* as against the creditors of the vendor, or person making the assignment, and against subsequent purchasers in good faith; and shall be *conclusive evidence of fraud,* unless it shall be made to appear, on the part of the persons claiming under such sale or assignment, that the same was made in *good faith and without any intent to defraud.* All persons who shall be creditors, while the goods remain in the possession or under the control of the vendor or assignor, are embraced in the provision; but it does not apply to contracts of bottomry or respondentia, nor to assignments or hypothecations of vessels or goods at sea, or in foreign ports. N. Y. Revised Statutes, vol. ii. p. 136, secs. 5, 6, 7. It is further declared, that the question of fraudulent intent, in all cases of fraudulent conveyances and contracts relative to real and personal property, shall be deemed a *question of fact and not of law;* and no conveyance or charge is to be adjudged fraudulent, as against creditors or purchasers, *solely* on the ground that it was *not founded on a*

The Supreme Court of Massachusetts has, in several cases, (a) laid down and established the doctrine, that possession of chat-

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valuable consideration. The title of a purchaser for a valuable consideration is not to be affected or impaired by any of the provisions, unless he had previous notice of the fraudulent intent of the grantor, or of the fraud rendering void the title of such grantor. Ibid. 137, secs. 4, 5. Though fraud in those cases is declared to be a question of fact, and a court of equity is competent to pronounce upon it, yet, if the case be brought to hearing upon bill and answer, and the latter denies the fraudulent intent, the court will require such facts as are *per se* conclusive evidence of fraud. It will overlook the mere *indicia* of fraud, for the complainant should have put the cause at issue, and have given the defendant an opportunity to explain by proof the suspicious circumstances. Cunningham *v.* Freeborn, 11 Wendell's Rep. 240. The doctrine now established is evidently as high-toned as any that the courts of justice in this country can, by a permanent practice, sustain; and it contains this inherent and redeeming energy, that the fact of withholding possession raises the presumption of fraud, and the burden of destroying that presumption is thrown on the vendee or mortgagee, who suffers the possession to remain unchanged.

The courts of New York have since given increased energy to the statute provisions against fraudulent sales. Thus, in Doane *v.* Eddy, 16 Wendell, 523, and Randall *v.* Cook, 17 Ibid 53, it was considered, that under the Revised Statutes, the distinction between an *absolute sale* and a *mortgage of goods* was abolished, and that on a sale or mortgage of goods, actual and continued change of possession was indispensable, unless the contrary be satisfactorily explained by some good and sufficient reason, even though the conveyance was made in good faith, and without any intent to defraud. So, in Butler *v.* Stoddard, 7 Paige, 163, the Chancellor held, that if an insolvent debtor assigns his property in trust for the benefit of creditors, and without any actual change of possession, and the assignee leaves the goods in store, in the possession of the assignor as his agent, to be sold in the ordinary course by retail, instead of disposing of them at once without any unreasonable delay, and fairly by auction, and distributing the proceeds, the assignment becomes fraudulent and void as to creditors. The assignment ought to be accompanied with an actual and continued change of possession, and not merely a nominal and constructive change, for the latter is not a change within the meaning of the statute on the subject. This decree was affirmed on appeal, 20 Wendell, 507. So again, in Stevens *v.* Fisher, 19 Wendell's Rep. 181, the Supreme Court set aside a verdict, and awarded a new trial, when the jury disregarded the charge of the judge, and supported a sale of goods unaccompanied by an immediate delivery, and not followed by any actual and continued change of possession, and when *no satisfactory explanation was given why the requirements of the statute were not complied with.* It was held to be a verdict against both the law and the fact. These were infallible and legal *indicia* of fraud on the face of the transaction. It was nakedly fraudulent, and the court very properly held, that they could

(a) Brooks *v.* Powers, 15 Mass. Rep. 244. Bartlett *v.* Williams, 1 Pick. Rep. 288. Homes *v.* Crane, 2 Ibid. 607. Wheeler *v.* Train, 3 Ibid. 255. Ward *v.* Sumner, 5 Ibid. 59. Shumway *v.* Rutter, 7 Ibid. 56. 8 Ibid. 443, S. C. Adams *v.* Wheeler, 10 Ibid. 199. Marden *v.* Babcock, 2 Metcalf's Rep. 99. Briggs *v.* Parkman, Ibid. 258.

tels by the vendor or mortgagor, after a sale or mortgage of the same, is not, as it regards creditors, fraud *per se*, but only

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not permit the law to be so disregarded. But see Smith & Hoe *v.* Acker, 23 Wend. 653, a great relaxation of the preceding doctrine; and it was held by a majority of the Court of Errors, in accordance with the received doctrine in the Revised Statutes of N. Y., that a mortgage of chattels, unaccompanied by an immediate delivery, and not followed by an actual and continued change of possession, was not void, provided it was made to appear affirmatively on the part of the mortgagor that the same was made in good faith, and without any intent to defraud purchasers or creditors—and that the question of intent was a matter of fact for a jury.

In White *v.* Cole, 24 Wendell's Rep. 116, this very vexatious subject of the sale or mortgage of chattels without delivery, was again extensively discussed, and the most conservative and wholesome principles of law applicable to the case, enforced in the opinion of the court, delivered by Mr. Justice Cowen. A vessel on Lake Ontario was mortgaged for a precedent debt, while absent on a voyage up the lakes. When she returned into port, possession was not forthwith taken, as it might have been, by the mortgagee; and after her return, and before delivery, an execution was levied upon the vessel, under a judgment in favor of a third party. The court held, that as against the purchaser under the execution, the mortgage was void, within the fifth section of the statute mentioned in the beginning of this note. The absence of the vessel excused the non-delivery in the first instance, and until her return in port, and no longer. The exceptions in the 7th section of the statute, relative to bottomry and respondentia, contracts and hypothecations of vessels or goods at sea, or in foreign ports, were of a nautical character, and did not apply to mortgages of personal property, in their ordinary sense, as applicable to commerce on land or on the lakes. Though the purchaser, at the sheriff's sale, knew of the mortgage, it was no objection to his title. Though the debt was fair, the mortgage *bonâ fide*, and the mortgagor kept possession with the mortgagee's consent, and to facilitate his business, it did not help the case. It was a case tending to fraud and deceit; and the mortgagee, in order to preserve his preference, was bound to take possession of the vessel as soon as possible after her arrival in port. The rule requiring a change of possession would be impaired and frustrated by multiplying exceptions and evasive excuses. No excuse is valid not founded on real necessity. There is no question for a jury when no satisfactory explanation is offered in proof why delivery was not made. The evidence as to the *bona fides* of the case must be *pertinent*, or the court is bound to reject it, as it is bound to reject all irrelevant testimony. Evidence of general moral character of the parties would not be relevant. A good consideration, or particular convenience, is no excuse. Charity, domestic affection, business or religious purposes, are not pertinent or legal proof to overturn the presumption of fraud, when possession is retained. This decision, I should think, was well calculated, in its diffusible influences, to protect the rights of creditors from a thousand machinations and schemes to cover property from lawful executions. The doctrine of this case is in harmony with the principles of the decision in the case of Sturtevant *v.* Ballard, in 1812. But, alas! how fluctuating and precarious have been the decisions on this vexed question! The Supreme Court of New York, in Butler *v.* Van Wyck, 1 Hill's Rep. 438, decided, that if a mortgage of chattels was given for a true debt, the question of fraud, as to creditors, arising from continued possession in the mortgagor, must be submitted to a jury, whether

primâ facie evidence of fraud, and which *may be explained by proof. A debtor may mortgage or make an *530

such possession be satisfactorily explained or not. The rule was deemed to be the same where a like question is raised upon a bill of sale, absolute on its face. The court, in the opinion delivered by Mr. Justice Cowen, abandoned all the former adjudged doctrines on the subject, on the authority of the case of Smith *v.* Acker, decided in the Court of Errors. Judge Bronson dissented from the judgment of the court, and sustained the former doctrines of the court, and was for confining the decision in Smith *v.* Acker to the parties in that case; and held that it was not to be followed as a precedent in the destruction of the statute and common law of the land, as declared and settled for centuries past. And as the senator who gave the opinion of the court in Smith *v.* Acker, admitted, that his vote "would directly conflict with the whole course of decisions of the Supreme Court upon the principal question," Judge Bronson did not consider it as entitled to any weight as a precedent. In Prentiss *v.* Slack, 1 Hill's Rep. 467, the court went even further, and held that the jury might "allow almost any excuse for the vendor continuing in possession," and the court had no power to set aside the verdict, because of the insufficiency of the excuse. And lastly, in Cole *v.* White, 26 Wendell, 511, the judgment of the Supreme Court, in White *v.* Cole, was reversed in the Court of Errors, and the doctrine of the case of Smith *v.* Acker reinstated. Mr. Verplanck, as a member of the Court of Errors, gave a learned and powerful opinion in support of the directions in the N. Y. Revised Statutes on this subject. So again, in Hanford *v.* Artcher, 4 Hill's Rep. 271, the same question was elaborately and animatedly discussed in the New York Court of Errors, and the decision in Smith & Hoe *v.* Acker reëstablished; and it may now be considered as finally settled in the jurisprudence of New York, and as the true doctrine of the Revised Statutes, that leaving the possession of chattels on sale, or mortgage, or assignment, in the hands of the vendor, or mortgagor, or assignor, is only presumptive evidence of fraud; and it rests with the defendant to rebut that presumption as a matter of fact, by showing proof of good faith, and an honest debt, and an absence of an intent to defraud.[1] The doctrine of the Supreme Court was, that there must appear to have been good and sufficient reasons, or some satisfactory excuse, for non-delivery at the time, and that the presumption of fraud cannot be rebutted merely by proving good faith and absence of a fraudulent intent. The old doctrine was, that non-delivery, except in special cases, was fraudulent, and an inference of law for the court. The doctrine now finally settled in the senate is, that the whole is a question of fact for a jury. The Chancellor (Walworth) and the Supreme Court have struggled nobly to maintain what I believe to be the only safe and salutary principle requisite to protect creditors and bar fraud. The senate have established, upon the letter of the Revised Statutes, the more lax and latitudinary doctrine, which places the most common and most complex dispositions of *property*, as between debtor and creditor, at the variable disposition of a jury. It has been since decided, in Vance *v.* Phillips, 6 Hill, 433, that the question of fraud, however clear, must be submitted to the jury; yet if the jury find against the evidence, the court will set aside the verdict and grant a new trial, as in other cases.

[1] See Randall *v.* Parker, 3 Sandf. 69.

absolute sale of goods *bonâ fide*, and for a valuable consideration, but under an agreement to retain possession for a given time; and it would only be presumptive evidence of fraud, susceptible of explanation, and good, except as against an intervening attachment or sale before any actual delivery takes place. The Supreme Court of New Hampshire has also established the same rules of law on this subject as those recently declared in Massachusetts and New York, and has vindicated its opinion in an able manner. (a) It insists that the principal cases in England and this country, on the other side, are borne down by the current of opposite authority. The position that devolves the question of fraud upon the court, requires the opinion to be formed on a single circumstance, and admits no explanation. The other position, which refers the question of fraud to a jury, looks to the whole transaction, and admits of every honest apology and explanation. If the vendor or mortgagor retains possession, no person suffers, unless a new credit be given, or an old one be extended, under the mistaken belief that the property remained unsold. The few cases of that kind which may happen, ought not to introduce so stern a rule as to make such conveyances void against every description of creditors. In *Coburn* v. *Pickering*, (b) and which is held to be a leading case in New Hampshire, the subject was again thoroughly discussed; and it was held, that if the vendor of chattels retained possession after an absolute sale, it was always *primâ facie*, and if unexplained by the vendee, conclusive evidence of a secret trust, which was fraudulent in respect to creditors. Whether there was such a trust was deemed a question of fact; but if admitted or proved, the fraud was an inference of law. This was recurring back, in a great degree, to the

(a) Haven *v.* Low, 2 N. H. Rep. 13.

(b) 3 N. H. Rep. 415. But in Ash *v.* Savage, 5 N. H. Rep. 545, it was adjudged, that possession was not essential to the validity of a *mortgage of goods*, and that retaining possession by the mortgagor was not, of itself, evidence of fraud. In Clark *v.* Morse, 10 N. H. Rep. 239, the court adhered to the rule established in Coburn *v.* Pickering.[1]

[1] See also Kendall *v.* Fitts, 2 Fost. 1.

simplicity and energy of the old rule, requiring delivery of possession in cases of sales of goods and mortgages of goods, as the natural order of dealing in such cases, and the only * effectual security against secret and fraudulent trusts. (*a*) *531

(*a*) In 1832, the legislatures of Massachusetts and New Hampshire passed acts, declaring that no mortgage or personal property thereafter made, should be valid, except as to the parties, unless possession be delivered to, and retained by the mortgagee, or unless the mortgage be recorded in the clerk's office of the town where the mortgagor resides. See, also, Massachusetts Revised Statutes, part 2, tit. 6, ch. 74, sec. 5, and Smith *v.* Moore, 11 N. H. Rep. 55. Id. 285. It is held, that the recording of the mortgage is equivalent to an actual delivery of the property. Forbes *v.* Parker, 16 Pick. 462. Bullock *v.* Williams, Ib. 33? See also *supra*, p. 494, S. P. The continuance of the mortgagor's possession, even after the mortgage has become absolute, is not *per se* a fraud, and only evidence of it. Shurtleff *v.* Willard, 19 Pick. Rep. 202. In New York, also, in 1833, (Laws N. Y. sess. 56, ch. 279,) provision was made by law for filing in the town-clerk's office, as matter of public record, mortgages of chattels; and every such mortgage, unless the same or a true copy thereof be filed, or be accompanied by immediate delivery, and followed by an actual and continued change of possession, was declared to be void as against subsequent purchasers and mortgagees in good faith.[1] In Lee *v.* Huntoon, 1 Hoffman's Ch. Rep. 448, the assistant vice-chancellor was of opinion that, under the New York Act of 1833, ch. 279, if a mortgage of personal property be duly recorded, a change of possession need not be made. But if the mortgage be not filed, there must be an actual change of possession. Camp *v.* Camp, 2 Hill's Rep. 628. There was a statute of a general assembly of the colony of New York, of April 3, 1775, requiring the like registry of bills of sales of chattels, not exceeding in value 100*l.*, and given by way of mortgage; and it is a little singular that such an ordinary and pacific provision should have been one of the last acts ever passed by the colonial legislature of New York. It was passed in the midst of the tumult of arms, for the general assembly adjourned *on that same third day of April, never to meet again*, as the Revolution had then commenced. In Kentucky, by statute, December 13, 1820, Feb. 22, 1837, and Feb. 1, 1839, no mortgage or deed of trust of real or personal estate is good against a *purchaser*, for valuable consideration, or against a creditor, unless it be duly deposited for recording in the county-clerk's office. In Georgia, Tennessee, Indiana, and Virginia, mortgages

[1] By an Act of New York, passed March 1, 1849, (Laws 1849, p. 105,) clerks are required to register mortgages of chattels. This statute does not repeal the statute against fraudulent conveyances; it superadds an additional requisite. Otis *v.* Sill, 8 Barb. R. 102. This case further decides that a mortgage or grant of property not in existence, and to be acquired *in futuro*, is void; or, at most, is merely a contract to assign, to be enforced in equity when the property shall be acquired.

The Act of New York provides, that if a copy of a mortgage is not filed with the clerk within the last month of the first year after the original filing of the mortgage, it shall cease to be valid as against creditors: Held, nevertheless, that a filing of a copy, after the expiration of the year, protected the mortgagee against a subsequent execution creditor. Swift *v.* Hart, 12 Barb. R. 580.

In the state of Maine, on the other hand, the Massachusetts doctrine is adopted and followed. (*a*)

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of personal property are to be proved and recorded like mortgages of land, in order to make them secure against *bonâ fide* creditors and purchasers. Statutes of Georgia, December 26, 1827. Statutes of Virginia, December, 1792, and February, 1819; and of Indiana, Revised Statutes, 1838, p. 70. Statutes of Tennessee, 1831. The statute of Tennessee applies to all bills of sale as well as mortgages and deeds of trust of real and personal property; all deeds of gift; all powers of attorney concerning the conveyance of real or personal property. In Mississippi, by statute in 1822, deeds respecting the title to personal property are to be recorded in the county where the property is; and if it be removed to a different county, to be recorded within twelve months; and if not recorded, they are void as to purchasers for a valuable consideration without notice, and as to creditors. 1 Smedes & Marshall, 112. So, in Alabama, deeds of trust, including mortgages of personal property, are to be recorded within thirty days, otherwise they are void as against creditors and subsequent purchasers without notice. But the statute does not apply to *choses in action*. Aikin's Dig. 208, § 5. 4 Alabama, R. N. S. 263, 469. In Connecticut, there may be a mortgage of manufacturing machinery, without the real estate to which it is attached; and the mortgage is of course effectual, though the mortgagor retain possession of the machinery. Such machinery may also be attached, without being removed and sold on execution. Statutes of Connecticut, 1838, pp. 72, 73. The Vermont statute is more stringent and wholesome, for it declares that no mortgage of any machinery, used in a factory, shop, or mill, is good except between the parties, unless possession be delivered to and retained by the mortgagee. Revised Statutes of Vermont, 1839, p. 317.

In the case of Watson *v.* Williams, 4 Blackf. Ind. Rep. 26, the court, after a clear and succinct review of the conflicting decisions in England and America, came to the conclusion, now so generally prevalent, that the mortgagor's possession of goods was not conclusive evidence of fraud as to creditors, though the mortgage was silent as to the point of possession. His possession may be explained by parol proof, and shown to be fair and consistent with the contract. The subsequent decision in that court, in Case *v.* Winship, Ib. 425, rather controls the other, for it declared that the mortgagee of goods was entitled to immediate possession, when there was nothing in the instrument to gainsay it, and that the silence of the mortgage on that point could not be supplied by parol proof.[1]

(*a*) Reed *v.* Jewett, 5 Greenleaf's Rep. 96. Holbrook *v.* Baker, 5 Ibid. 309. Brinley *v.* Spring, 7 Ibid. 241. Ulmer *v.* Hills, 8 Ibid. 326. In Cutter *v.* Copeland, 18 Maine Rep. 127, the courts go still further, and hold that the mortgagor may, by an arrangement with the mortgagee, become the agent of the mortgagee, and retain the possession, without affording even a *primâ facie* evidence of fraud. Veazie *v.* Holmes, 40 Maine, 69.

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[1] But see Blystone *v.* Burgett, 10 Ind. 28. In Ohio, if the mortgagor of personal property retains possession with a power of sale, the mortgage is void against subsequent purchasers and execution creditors. Collins *v.* Myers, 16 Ohio R. 547. Freeman *v.* Rawson, 5 Ohio, (N. S.) 1. Harman *v.* Abbey, 7 Ohio, (N. S.) 218. A mortgage of chattels, by its terms permitting the mortgagor to retain possession, and permitting him to sell and dis-

It is greatly to be regretted that the rules of law on so material a point, and one of such constant application, are so various and so fluctuating in this country. Since the remedy against the property of the debtor is now almost entirely deprived of the auxiliary coercion intended by the arrest and imprisonment of his person, the creditor's naked claim against the property ought to receive the most effective support, and every rule calculated to prevent the debtor from secreting or masking property, to be sustained with fortitude and vigor. There is the same reason for the inflexible stability of the rule of law, that a vendor of chattels should not, at the expense of his creditors, sell them, and yet retain the use of them, as there is for that greatly admired rule of equity, that a trustee shall not be permitted to buy or speculate in the trust fund on his own account; or for that other salutary and fixed principle, that the voluntary settlement of property shall be void against existing creditors. Such rules are made to destroy the very temptation to fraud, in cases and modes that are calculated to invite it, and because such transactions may be grossly fraudulent, and the aggrieved party not able to show it from the character of private agreements, and the infirmity of human testimony. However innocent such transactions may be in the given case, they are dangerous as precedents, and poisonous in their consequences; and the wise policy of the law connects disability with the temptation, and thus endeavors to prevent impositions, which might be inaccessible to the eye of the court. If a debtor can sell his personal property, and yet, by agreement with the vendee, continue to enjoy it for six years, as in one state, or for sixteen months, as in another, in defiance of his creditors, who can set bounds to the term of * enjoyment, or know *532 when and where to bestow credit, or how he is to make out a case of actual fraud? Fraud, in fact, is reluctantly drawn by a jury, and their sympathies must be overcome by

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pose of them as his own, is fraudulent and void in law The case of Hoe & Acker was again the subject of discussion by the court Griswold v Sheldon, 4 Comst R. 580. Edgell v Hart, 13 Barb R 880 S C 5 Seld 213 Ford v Williams, 3 Kern 575. A mortgagee of chattels may assign, for a valuable consideration, his mortgage by delivery of the deed without writing. Crain v. Paine, 4 Cush R 453.

strong and positive proof, before they will readily assent to the existence of a fraudulent intent, which is so difficult to ascertain, and frequently so painful to infer. (*a*)

(2.) The validity of voluntary assignments of their property by insolvent traders and others, has been another and a fruitful topic of discussion. Under a code of bankrupt law, such assignments giving preferences, are held to be fraudulent, for they interfere with its regulations and policy. (*b*) But where there is no bankrupt system, these assignments are a substitute for a commission in bankruptcy, and become like that, of the nature of an execution for the creditors. A conveyance in trust to pay debts is valid, and founded on a valuable consideration. (*c*)

(*a*) In 1 Peters's U. S. Rep. 449, the Supreme Court of the United States waive the question, whether the want of possession of the thing sold constitutes *per se* a badge of fraud, or is only *primâ facie* a presumption of fraud; but in the case of Phettiplace *v.* Sayles, 4 Mason's Rep. 321, 322, the general doctrine, that non-delivery in the sale of chattels, and a continuation of possession in the seller, renders the sale void, is explicitly asserted, as having its foundations in a great public policy. On the other hand, it has been declared by the same court, in D'Wolf *v.* Harris, 4 Mason's Rep. 515, that a bill of sale of a ship and cargo in port is valid, though possession be not taken, provided it appear to have been given by way of mortgage. The notes added to Twyne's case, in Smith's Selection of Leading Cases in the American edition of the Law Library, (xix.,) N. S. vol. xxvii., contain a full view of the decisions, and especially of the American cases in the federal and state courts, on the great doctrine in Twyne's case, which is perhaps the most celebrated case in the English law, and has given rise to the most protracted and animated discussions. I have endeavored, in the preceding pages, from p. 515, to give as full a note of the progress of these discussions as the plan of this work would allow.

(*b*) As the Congress of the United States, since the 4th edition of these Commentaries, enacted a bankrupt law, a wide field of inquiry was opened, as to the question of conveyances fraudulent under that new system. The subject is well discussed, on the basis of English authorities, in the American Jurist for January, 1843. But the subject ceases to be important, inasmuch as the Bankrupt Act was repealed March 3, 1843.

(*c*) Stephenson *v.* Hayward, Prec. in Ch. 310. Dey *v.* Dunham, 2 Johnson's Ch. Rep. 188. Shaw, Ch. J., in Russell *v.* Woodward, 10 Pick. Rep. 413. State of Maryland *v.* Bank of Maryland, 6 Gill & Johnson, 205. In making assignments of property, the owner cannot assign *part* only of one entire debt, without the consent of the debtor; for that would subject him to distinct demands on one single contract. Gibson *v.* Cooke, 20 Pick. 15. Nor does the assignee of a voluntary assignment for the benefit of creditors, stand in a better situation than the assignor. Neither he nor the creditors whom he represents are purchasers for a valuable consideration, without notice, as against prior equitable liens. Haggerty *v.* Palmer, 6 Johnson's Ch. Rep. 437. Knowles *v.* Lord, 4 Wharton, 500. As between different assignees of a chose

A debtor, pending a suit, may assign to trustees all his effects for the benefit of all his creditors, and deliver possession, and it will be valid (*a*)[1] A debtor in failing circumstances, by assignment of his estate in trust, and made in good faith, may prefer one creditor to another, when no bankrupt or other law prohibiting such preference, and no legal lien binding on the property assigned, exist. This is a well-settled principle in the English and American law, and admitted by numerous authorities. (*b*)

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in action, the one prior in point of time is preferred, though no notice be given either to the subsequent assignee or the debtor; but notice is requisite to the debtor, as between him and the first assignee, in order to protect the latter from payment by the debtor. Muir *v.* Schenck, 3 Hill, 228. Wood *v.* Partridge, 11 Mass. Rep. 488. Notice is, however, requisite under the Scotch law, (which is there termed an *intimation*,) to the debtor, in order to render the assignment a complete preference as against a subsequent assignee. Redfearn *v.* Ferrier, 1 Dow's R. 50. So, in Connecticut, an assignment of debts or choses in action is not valid as against subsequent purchasers and attaching creditors, without notice of such assignment given to the debtor within a reasonable time. The rule in New York is different, and an assignment made in New York of a debt due in Connecticut, will be held valid without such notice, on the principle of the *lex loci*. 14 Conn. Rep. 141, 583.

(*a*) Pickstock *v.* Lyster, 3 M. & Selw 371. So a conveyance or transfer of goods, if made by a party in insolvent circumstances, to a creditor, in pursuance of a *bonâ fide* demand by the creditor, is not voluntary within the English Insolvent Act of 7 Geo. IV. Mogg *v.* Baker, 4 Meeson & W. 348.

(*b*) Pickstock *v.* Lyster, 3 Maule & Selw. 371. The King *v.* Watson, 3 Price's Exch. Rep. 6. Wilt *v.* Franklin, 1 Binney's Rep. 502. Hendricks *v.* Robinson, 2 Johns. Ch. Rep. 307, 308. Stevens *v.* Bell, 6 Mass. Rep. 339. Nicoll *v.* Mumford, 4 Johns Ch. Rep. 529. Brown *v.* Minturn, 2 Gall. Rep. 557. Moore *v.* Collins, 3 Dev. N. C. Rep. 126. Moffat *v.* M'Dowall, 1 M'Cord's Ch. Rep. 434. Buffum *v.* Green, 5 N. H. Rep. 71. Haven *v.* Richardson, Ibid. 113. Marbury *v.* Brooks, 7 Wheaton, 556. Brashear *v.* West, 7 Peters's U. S. Rep. 608. Sutherland, J., in Grover *v.* Wakeman, 11 Wendell's Rep. 194, 195. State of Maryland *v.* Bank of

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[1] Under the N. Y. R. S. (p. 195, § 5, p. 196, § 9, 3d ed.) every assignment of goods and chattels, "unless the same be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things sold," &c., is to be presumed "fraudulent and void" against creditors and subsequent purchasers in good faith. Connah *v.* Sedgwick, 1 Barb. S. C. Rep. 210. Randall *v.* Parker, 3 Sandf. S. C. R. 69.

The true question in determining whether an assignment is fraudulent, has been declared to be, not whether fraud *may* be committed by the *assignee*, but whether the provisions of the instrument, executed according to their reasonable intent, will be fraudulent *in their operation*. Ward & Heath *v.* Tingley, 4 Sandf. Ch. R. 476; and see Webb *v.* Daggett, 2 Barb. S. C. Rep. 9. And, in general, the character of the assignment will not be affected by subsequent events. Browning *v.* Hart, 6 Barb. S. C. Rep. 91. Averill *v.* Loucks, Id. 470.

The assent of the creditors to be benefited by the assignment, has been held, under the New England attachment and trustee

Maryland, 6 Gill & Johnson, 205. Marshall v. Hutchison, 5 B. Monroe, 305. The directors of an insolvent corporation may, equally with individuals, give preferences by assignment of their effects. Catlin v Eagle Bank, 6 Conn. Rep. 233. State of Maryland v. Bank of Maryland, 6 Gill & Johnson, 205, S. P. Conway, *ex parte*, 4 Arkansas Rep. 302. See also *supra*, p. 315. The law in New Jersey is an exception to the rule in the text. It is made essential there, by statute, (Elmer's Dig. p. 16,) to the validity of an insolvent's assignment, that it create no preferences, and that it be for the equal benefit of the creditors.[1] An assignment of real and personal property in trust, to pay a favored creditor, and then to divide the residue ratably among the other creditors, and the surplus, if any, to return, though good in New York, where it was made, was consequently adjudged void as to property, personal as well as real, in New Jersey Varnum v. Camp, 1 Green's N. J. Rep. 326.[2] So, in Georgia, by statute of 19th December, 1818, all assignments and transfers of property by insolvent debtors, giving preferences, are declared to be fraudulent and void. Prince's Dig 164.[3] The Insolvent Act of Massachusetts, of 1838 ch 163, establishes the principle, that when a debtor is unable to pay his debts, his property is to be equally divided among his creditors; and that if the insolvent debtor has not been guilty of fraud or gross misconduct, he is to be discharged from liability, upon surrendering all his property for the benefit of his creditors The discharge goes to all debts actually proved against his estate, and to all debts founded on contracts made after the statute, if made within the state, and to be performed therein, and provable under the act, or due to persons resident within the state at the first publication of notice of the proceeding by warrant, and to all demands for goods wrongfully obtained, taken or withheld by the debtor. The statute destroys all voluntary payments, assignments, and preferences made in contemplation of insolvency. It is a simple and well-digested system of bankrupt law. The proceedings under this law may be commenced on the voluntary application of the debtor himself; or, if he omits to do it, then on the application, under certain circumstances, of a portion of the creditors, to compel an assignment of his property for the general benefit of the creditors.

The statute of Ohio, of 1838, prohibits assignments in trust, in contemplation of insolvency, with the design to prefer one creditor to another; and such assignments are made to enure ratably to all. So, the Connecticut Act of 1828, declares all assignments of lands, chattels, or choses in action, with a view to insolvency, to any person

1 But voluntary preferences, made in contemplation of an assignment, so that they be not fraudulent, are valid. Garretson v. Brown, 2 Dutch. (N. J.) 425.

2 See Garr v. Hill, 1 Stockt. 210. Brown v. Holcomb, Ib. 297. Holcomb v. Bridge Co. Ib. 457. So in Missouri, preferences render an assignment void. But it has been held, that an assignment made in Minnesota with preferences, and valid there, will pass the title in Missouri, but the provision for preferences will be disregarded. Bryan v. Brisbin, 26 Missouri, (5 Jones,) 423.

3 Brown v. Lee, 7 Geo. R. 267. So in Maine, by a statute of 1844, preferences make an assignment void. And preferences given in the act of assignment, though they do not appear on the face of it, and are shown by proof aliunde, render the assignment void. Berry v. Cutts, 42 Maine, 445.

process, to be essential to its validity, so far as that the intervening attachment of another creditor who is no party to the assignment, issued before *such assent be given, *533 has been preferred. (a) But, subject to this qualification, the assent of the creditors need not be given at the time of the assignment; and a subsequent assent in terms, or by actually receiving the benefit of the assignment, will be sufficient. (b)

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in trust for his creditors, or any of them, to be void as to creditors, unless made in writing for the benefit of all the creditors, in proportion to their claims, and be lodged for record in the probate office of the district; and the duty of such trustee is specially regulated. Statutes of Connecticut, 1838, p. 300. In Pennsylvania, by statute of 24th March, 1818, voluntary assignments, for the benefit of creditors, must be recorded within thirty days, or they are void as against any of the creditors of the assignor, without as well as within the assignment.[1] It is settled in New York, that a voluntary assignment by an insolvent debtor must declare the uses and settle the rights of creditors under the assignment, and not leave it to the assignees, or reserve to himself the right of subsequently doing it That would be arbitrary, and liable to uncertainty and abuse, and such an assignment is fraudulent and void. The debtor must, in the assignment, declare preferences, if any, among his creditors, and he cannot transfer that power to his assignee.[2] Wakeman v Grover, 4 Paige, 41. Barnum v. Hempstead, 7 Id. 568. Boardman v. Halliday, 10 Id. 223. The right of allowing preferences to be given at all by the insolvent debtor, has been strongly condemned by judges in various parts of the United States, as inequitable and unjust. 10 Paige, 229.

(a) Widgery v. Haskell, 5 Mass. Rep. 144. Stevens v. Bell, 6 Ibid. 339. Ward v. Lamson, 6 Pick. Rep. 358. Jewett v. Barnard, 6 Greenleaf's Rep. 381. In Boyden v. Moore, 11 Pick. Rep. 362, it was held, that an assignment in trust, to pay the assignee and other creditors who were parties, and assenting, was valid. But if not parties, and assenting, an intervening attachment prior to the assent will have preference.[3] So, a voluntary assignment, in contemplation of insolvency, and giving preferences, made in Pennsylvania, is not good in Delaware against a subsequent attachment by a citizen there, of the insolvent's effects in Delaware. Maberry v. Shisler, 1 Harrington's Rep. 349.

(b) Marbury v. Brooks, 7 Wheaton, 556. Brooks v. Marbury, 11 Ibid. 78. Bra-

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[1] A recent statute of New York, (Laws of 1860, ch. 348,) requires assignments for the benefit of creditors to be acknowledged, and recorded, but fixes no time within which the record must be made, and prescribes no penalty for not recording. The statute further requires the debtor to file an inventory of all his property within twenty days after the date of the assignment, and the assignee to file a bond to the people of the state in an amount to be directed by the county judge.

[2] Strong v. Skinner, 4 Barb. S. C. Rep. 546. Nor can the assignor retain such right himself. Averill v. Loucks, 6 Barb. S. C. Rep. 470.

[3] Such an instrument is a revocable power, and not an assignment. Smith v. Keating, 6 M. G. & Scott R. 136.

But in Alabama, it is held not to be a *mere* power. And the assent of the creditors will be presumed, so that the assignment cannot be defeated by an attachment by one of them prior to an *actual* assent. Kinnard v. Thompson, 12 Ala. R. 487.

The assignment has been held to be good against a subsequent attachment, if the creditors had assented to the assignment prior to the attachment; (*a*) and the assignment has been supposed to be valid, even without such intervening assent, in the case of an assignment to trustees, for the benefit of the preferred creditors. The legal estate passes and vests in the trustees; and a court of equity will compel the execution of the trust for the benefit of the creditors, though they be not, at the time, assenting, and parties to the conveyance. (*b*) The assent of absent persons to an assignment will be presumed, unless their dissent be expressed, if it be made for a valuable consideration, and be beneficial to them. (*c*) [1]

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shear *v.* West, 7 Peters's U. S. Rep. 608. Ellison *v.* Ellison, 6 Vesey, 656. Cunningham *v.* Freeborn, 1 Edw. Ch. Rep. 262.

(*a*) Brown *v.* Minturn, 2 Gall. Rep. 557. Halsey *v.* Whitney, 4 Mason's Rep. 217. Hastings *v.* Baldwin, 17 Mass. Rep. 552.

(*b*) Small *v.* Oudley, 2 P. Wms. 427. Nicoll *v.* Mumford, 4 Johns. Ch. Rep. 529. Brooks *v.* Marbury, 11 Wheaton, 97. Gray *v.* Hill, 10 Serg. & Rawle, 436. Halsey *v.* Whitney, 4 Mason's Rep. 206. Ward *v.* Lewis, 4 Pick. Rep. 518. This rule in the English chancery seems to have been made subject to some embarrassing qualifications. If the creditors are not parties or privies to a conveyance by a debtor to trustees, to pay scheduled creditors, and do not conform to its provisions, and the trustees have not dealt with the creditors in pursuance of the deed, they cannot in chancery enforce performance, and have no lien on the property conveyed. The deed is regarded as a mere disposition between the debtor and his trustee for his own accommodation; and the property is not deemed to be withdrawn from the debtor's absolute control. If, however, there can be an *actual settlement made* for vesting an estate or stock in trustees for volunteers, the case is different, and the trustees having the legal estate, become such for the volunteers, who, as *cestui que trusts*, may claim against the trustees in the deed. Ellison *v.* Ellison, 6 Vesey, 662. Wallwyn *v.* Coutts, 3 Merivale's Rep. 707. Garrard *v.* Lord Lauderdale, 3 Simon's Rep. 1. Acton *v.* Woodgate, 2 Mylne & Keen, 492. In Marston *v.* Coburn, 17 Mass. Rep. 454, a conveyance to trustees for the benefit of creditors, was said to be void without the assent of the creditor, though assented to by the trustees; but in that case the deed was held to be incomplete, according to the intention of the parties, when an attachment intervened and prevailed. Though assignments of possibilities, contingent interest, and of rights or *choses in action*, may not be valid at law unless the creditor assents, yet no difficulty of this kind exists in equity, where the assignment is considered as amounting to a declaration of trust. See the numerous cases referred to in the notes to 2 Story's Equity Jurisprudence, p. 305.

(*c*) North *v.* Turner, 9 Serg. & Rawle, 244. De Forest *v.* Bacon, 2 Conn. Rep.

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[1] Adams *v.* Blodgett, 2 Wood. & M. R. 233. Mr. Justice Woodbury has examined the authorities on this subject with much care, and his opinion is eminently perspicuous and instructive.

It is admitted in some of the cases that the debtor may indirectly exert a coercion over the creditors through the influence of hope and fear, by the insertion of a condition to the assignment, that the creditors shall not be entitled to their order of preference, unless, within a given and reasonable time, (for if no time, or an unreasonable time be prescribed, the deed is fraudulent,) (*a*) they execute a release of their debts, by *becoming parties to the instrument of assignment, *534 containing such a release, or by the execution of a separate deed to that effect. (*b*) In *Jackson* v. *Lomas*, (*c*) there

633. If the assignment be directly to the *creditors*, their assent must be shown; but if to *trustees*, for their benefit, the legal title passes to the trustees without their assent, but it must be made with the knowledge and privity of the trustees or the creditors. The assent of the trustees is presumed, until the contrary be shown; and if the assignment be made without their knowledge, they may, when it comes to their knowledge, affirm it, and it will be binding. Galt *v.* Dibrell, 10 Yerger, 146. Nicoll *v.* Mumford, 4 Johns. Ch. Rep. 529. Brown *v.* Minturn, 2 Gall. Rep. 557. Small *v.* Marwood, 9 B. & Cress. 300. Smith *v.* Wheeler, 1 Vent. 128. Marbury *v.* Brooks, 7 Wheaton, 556. Weston *v.* Barker, 12 Johnson, 276. Under the New York Revised Statutes such an assignment to trustees operates as a grant, and does not require any express consideration; nor is it necessary to its validity that a creditor should be a party to the conveyance, or signify his assent thereto. Cunningham *v.* Freeborn, 11 Wendell's Rep. 240. But equity may require the creditors to come in within a reasonable time and signify their assent, or be excluded from all benefit of the trust. Dunch *v.* Kent, 1 Vern. 260, 319. The assent of trustees would seem to be requisite to the validity of the assignment; for it is assumed to be so in Gordon *v.* Coolidge, 1 Sumner's Rep. 537, where it was held, that if the assignment in trust for creditors be made to two persons, and one of them accepts the trust, and the other repudiates it, the assignment is operative as to the assenting trustee, unless it contains some condition rendering the assent of both requisite. The assent of both was, however, to be presumed, unless one of them, upon notice, refuses to accept the trust, and notifies his refusal to the debtor. See also the cases *supra*, in this note, and Neilson *v.* Blight, 1 Johnson's Cases, 205. Moses *v.* Murgatroyd, 1 Johns. Ch. Rep. 129.

(*a*) Wharton's Dig. tit. Debtor & Creditor, E. Pearpont & Lord *v.* Graham, 4 Wash. C. C. Rep. 232.[1] In Halsey *v.* Whitney, 4 Mason's Rep. 206, six months was held not to be an unreasonable time. The reasonableness of the period of limitations for the creditors to come in, will depend on circumstances.

(*b*) The King *v.* Watson, 3 Price's Rep. 6. Lippincott *v.* Barker, 2 Binney's Rep. 174. Cheever *v.* Clark, 7 Serg. & Rawle, 510. Scott *v.* Morris, 9 Ibid. 123. Wilson *v.* Kneppley, 10 Ibid. 439. Halsey *v.* Whitney, 4 Mason's Rep. 206. De Caters *v.* Le Ray De Chaumont, 2 Paige's Rep. 492. The Canal Bank *v.* Cox, 6 Greenleaf's Rep. 395.

(*c*) 4 Term Rep. 166.

[1] Owen *v.* Arvis, 2 Dutch, (N. J.) 23.

was a proviso to the assignment, that in case any creditor should not execute the trust deed, which contained, among other things, a release of the debts by a given day, he should not be entitled to the benefit of the trust deed,[1] *and his share was to be paid back to the debtor.* It seems to have been assumed throughout that case, that such a provision would not affect the validity of the assignment. Whatever might have been the understanding in that case, such a conclusion is not well warranted by the language of many of the American cases; and a deed with such a reservation would, under them, be invalid. The debtor may deprive the creditor, who refuses to accede to his terms, of his preference, and postpone him to all other creditors; but then he will be entitled to be paid out of the residue of the property, if there should be any, after all the other creditors who released and complied with the condition of the assignment are satisfied. If the condition of the assignment be, that the share which would otherwise belong to the creditor who should come in and accede to the terms and release, shall, on his refusal or default, be paid back to the debtor, or placed at his disposal by the trustees, it is deemed to be oppressive and fraudulent, and destroys the validity of the assignment, at least against the dissenting creditors. (*a*)[2]

(*a*) M'Allister *v.* Marshall, 6 Binney's Rep. 338. Hyslop *v.* Clarke, 14 Johns. Rep. 458 Seaving *v.* Brinkerhoff, 5 Johns. Ch. Rep. 329. Austin *v.* Bell, 20 Johns. Rep 442. Borden *v.* Sumner, 4 Pick. Rep. 265. Ingraham *v.* Wheeler, 6 Conn. Rep. 277. Atkinson *v.* Jordan, 5 Hammond's Ohio Rep. 294. Lentilhon *v.* Moffat, 1 Edw. Ch. Rep. 451. Ames *v.* Blunt, 5 Paige, 16, 18. Graves *v.* Roy, 13 Louisiana Rep. 457. The brig Watchman, in the District Court of Maine, Ware's Rep. 232. In Brashear *v.* West, 7 Peters's U. S. Rep. 608, the Supreme Court of the United States were far from being satisfied that a deed of assignment of all a debtor's property, and excluding from the benefit of its provisions those creditors who should not, within a given time, execute a release of their demands, ought to be sustained. At any rate,

[1] Such a condition renders the assignment fraudulent and void as against all who are not parties, or do not assent. Ramsdell *v.* Sigerson, 2 Gilm. R. 78. Stewart *v.* Spenser, 1 Curtis, R. 157. See McCall *v.* Hinkley, 4 Gill, R. 128. Ingraham *v.* Grigg, 13 S. & M. 22. Conkling *v.* Carson, 11 Ill. R. 503.

[2] If an assignment be made by a creditor of his estate to trustees, to pay *a portion* of his creditors only, and the surplus is to be returned to the assignor, the assignment has been held in New York to be fraudulent and *void on its face.* Goodrich *v.* Downs, 6 Hill's

*Nor can the debtor in such an assignment make a *535 reservation, at the expense of his creditors, of any part

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a court of chancery, after the preferred creditors were satisfied, would decree the surplus (if any) to those creditors who had not acceded to the deed. In Brown v. Knox, 6 Missouri Rep. 302, (1840), the Supreme Court, after an able review of the American authorities, considered the point not to be authoritatively settled; and they decided that an assignment by a debtor, of all his property to trustees, for the benefit of such creditors as should, within a given time, *execute a release*, was void. But in Andrews v. Ludlow, 5 Pick. Rep. 28, such a reservation was held not to render the assignment fraudulent, because it did not appear, in point of fact, to have been inserted with an intention to make a provision for the debtor. And in Halsey v. Whitney, 4 Mason's Rep. 206, the learned judge, under the influence of some of the American authorities, gave effect to the condition annexed to the assignment requiring a release, though the assignment did not purport to convey all the debtor's property; but his own judgment was not satisfied with the authorities under which he acted, and partial assignments with such a condition ought not to be tolerated. In the case of The Watchman, Ware's Rep. 232, the court carries out the general principle, so forcibly illustrated in Halsey v. Whitney, and in opposition to what may be considered, after the decision in Borden v. Sumner, 4 Pick. 265, as quite a doubtful point, under the local usages of Massachusetts. In Johnson v. Whitwell, 7 Pick. Rep 71, it was held, that if a debtor made a partial assignment to select creditors, even for a valuable consideration, it was fraudulent and void, if made with a view to prevent an attachment by other

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R. 438. Barney v. Griffin, 4 Sandf. Ch. R. 552. S. C. 2 Comst. R. 365. Hooper v. Tuckerman, 3 Sandf. S. C. R. 311. Leitch v. Hollister, 4 Comst. R. 211. *Alter*, when the assignment is to the creditors themselves. It is then, in effect, a mortgage.

The rule appears, however, to be different in some of the states, and such assignment is not *void*, unless it also contains a condition of release, or some other provision which delays creditors. Hindman v. Dill, 11 Ala. R. 689. Grimshaw v. Walker, 12 Id. 101. Austin v. Johnson, 7 Humph. R. 191. Ely v. Hair, 16 B. Mon. (Ky.) 230.

In 2 Comst. 365, *supra*, it is declared by Bronson, J., that a provision in a deed of assignment, authorizing the assignees to sell the property *on credit*, renders the assignment void. See also 9 Paige's R. 405–6.

In Nicholson v. Leavitt, 4 Sandf. S. C. R. 252, it is said that the case of Barny v. Griffin does not decide that an authority to sell on credit vitiates an assignment. It is also held, in that, a mere intent to delay or hinder creditors, if not *fraudulent*, does not avoid an assignment. But the case of Nicholson v. Leavitt was reversed in the Court of Appeals. S. C. 2 Selden, 510. And in Porter v. Williams, 5 Selden, 142, the principle was again affirmed; and it may now be considered settled in New York, that a provision in a deed of assignment authorizing the assignee to sell on credit, renders the assignment void.

And in D'Ivernois v. Leavitt, 23 Barbour (N. Y.) 63, it was held, that a provision in an assignment, that the assignee may, at his discretion, withhold the distribution of the assets, as long as he may think proper, renders the assignment void as against creditors.

A conveyance made to secure property from attachment, the assignee knowing the purpose of the deed, is void against creditors even though the debtor intended to benefit them. Kimball v. Thompson, 4 Cush. 441.

of his property or income, for his own benefit.[1] It has been supposed that such a reservation, if not made intentionally to delay, hinder, and defraud creditors, would not affect the validity of the residue, or main purpose of the assignment; and that if the part of the estate assigned to the creditors should prove insufficient, they might resort to the fund so reserved by the aid of a court of equity. The case of *Estwick* v. *Caillaud*, (*a*) and the language of other cases, were in favor of this opinion. (*b*)[2] But later authorities have given to such reservations the more decided effect of rendering fraudulent and void the whole assignment; and no favored creditor or grantee can be permitted to avail himself of any advantage over other creditors, under an assignment, which, by means of such a reservation, is fraudulent on its face. (*c*) These latter decisions contain a just and salutary check of the abuse of the debtor's power of assignment and distribution; for, as was observed in the case of *Riggs* v. *Murray*, (*d*) "if an insolvent debtor may make sweeping dispositions of his property to select and favor-
536 * ite creditors, yet loaded * with durable and beneficial provisions for the debtor himself, and incumbered with

creditors. The case of Haven *v.* Richardson, 5 N. H. Rep. 113, is on the lax side of the question; for where an insolvent assigned all his property to pay the debts of one or more specified creditors, neither the want of a schedule, or of an estimate of the value of the property assigned, nor a stipulation in the assignment for a release of the debts of those who became parties, nor a reservation of the surplus after payment of the debts of those who assent to the assignment, was considered to be conclusive evidence of fraud. The reservation would now generally, and it ought to be everywhere, fatal to the instrument.

(*a*) 5 Term Rep. 420.

(*b*) Riggs *v.* Murray, 2 Johns. Ch. Rep. 580. S. C. Murray *v.* Riggs, 15 Johns. Rep. 571. Austin *v.* Bell, 20 Johns. Rep. 442. Sutherland, J., and Woodworth, J., 5 Cowen's Rep. 547.

(*c*) Mackie *v.* Cairns, 1 Hopkins's Rep. 373. 5 Cowen's Rep. 547. Harris *v.* Sumner, 2 Pick. Rep. 129. Chartres *v.* Cairns, decided in Louisiana, 1825, and cited in 5 Cowen's Rep. 578, n. Passmore *v.* Eldridge, 12 Serg. & Rawle, 198. Galt *v.* Dibrell, 10 Yerger, 146. The Act of Pennsylvania, of 1818, requires voluntary assignments for the benefit of creditors, to be recorded within thirty days.

(*d*) 2 Johns. Ch. Rep. 582.

1 Strong *v.* Skinner, 4 Barb. S. C. Rep. 546.

2 See Dance *v.* Seaman, 11 Gratt. 778.

onerous and arbitrary conditions and penalties, it would be impossible for courts of justice to uphold credit, or to exact the punctual performance of contracts." (a) [1]

(a) In the case of Murray v. Riggs, 15 Johns. Rep. 571, the New York Court of Errors held a debtor's assignment to be valid, though it *in the first place reserved to the use of the grantors, until one year after they should be discharged by law from their debts, two thousand dollars a year*, and then gave preferences, and a power in the assignees to settle with the creditors on certain terms; and that the creditors who did not accept the conditions in one year, *or should knowingly embarrass the objects of the deed*, should be forever debarred from any share under the assignment. Such a deed was held good, and the decree in chancery setting it aside was reversed! The Court of Chancery afterwards, in Mackie v. Cairns, 1 Hopkins's Rep. 373, very properly held a deed much less obnoxious than that in Murray v. Riggs, absolutely and *in toto* fraudulent and void The last decision appears to have been guided by sound policy and enlightened justice. 5 Cowen, 584, S C. See also Mead v. Phillips, 1 Sandford's Ch. Rep. 83, a reservation in a voluntary assignment giving preferences, and providing previously for the payment of all *costs and expenses necessarily incurred by him in defending suits*, was held to be fraudulent. The decision of the Court of Errors, in Murray v. Riggs, may be considered as justly exploded.

But the case of Grover v. Wakeman, (11 Wendell's Rep 187. 4 Paige, 23, S. C.,) on appeal from chancery, goes still further. The case was ably and elaborately discussed in the New York Court of Errors, and it was held, in affirmance of the decree in chancery, that a debtor in failing circumstances might, by assignment of his property in trust, prefer one creditor or set of creditors to another, *provided* he devoted the whole of his property assigned to the payment of his just debts, and the assignment be absolutely and unconditionally, without any reservation or condition for his benefit, and without extorting from the fears or apprehension of his creditors, or any of them; an absolute discharge, as a consideration for a partial dividend, or making the preferences, or any of them, to depend upon the execution of a release, by such preferred creditors, to him of all claims against him. An assignment giving preferences upon such a condition is void; and the assignment being void in part as against creditors and the provision of the statute, is void *in toto*, though there be no fraud in fact intended. This appears to be the most stern decision that exists, either in England or this country, on this subject. See Ames v. Blunt, 5 Paige, 22, and Goodrich v. Downs, 6 Hill's N. Y. Rep. 438, to S. P. The weight of general authority, both

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[1] In the application of this rule, it has been held that the creditor cannot stipulate for the use of the property after the assignment. Lockhart v. Wyatt, 10 Ala. R. 231. Id. 271.

As to the effect generally of stipulations for the benefit of the assignor, which render the assignment *void* or *voidable*, see Bodley v. Goodrich, 7 How. U. S. 276; Rollins v. Mooers, 25 Maine R. 192; Webster v. Whitey, Id. 326; Hart v. Crane, 7 Paige's R. 37; Woodburn v. Mosher, 9 Barb. R. 255; Montgomery v. Kirksey, 26 Ala. 172; Bryant v. Young, 21 Ala. 264; Wiley v. Knight, 27 Ala. 336; Smith v. Hurst, 15 E. L. & Eq. 520; Nesbitt v. Digby, 13 Ill. 387; Collomb v. Caldwell, 16 N. Y. (2 Smith) 484; Dow v. Platner, Ib. 562. It is held, in Bond v. Seymour, 1 Chandl. 40, that property exempt from execution cannot be fraudulently conveyed as to creditors. See, however, Sugg v. Tillman, 2 Swan, 208.

X. *Of sales at auction.*

An auctioneer has not only possession of the goods which he is employed to sell, but he has an interest coupled with that

English and American, is, that an assignment by a debtor of all his property for the payment of his debts, and at the same time giving preferences, and requiring an absolute release from each creditor who accedes, is not *per se* fraudulent and void. The circumstances of the debtor assigning over to trustees all his property, without any reservation to himself, and giving the surplus, if any, to those creditors, if any, who do not come in and agree to release, on taking their preferred share, is deemed to disarm the transaction of all illegality and unfairness. See the cases collected in Mr. Angell's Laws of Assignments in Trusts for Creditors, Boston, 1835, pp. 96–108, which is a neat and valuable little manual of the law of voluntary assignments by insolvent debtors.[1] A provision in the assignment that the surplus, after all debts are paid, should revert to the debtor, is not improper, for such a resulting trust would follow of course without any stipulation. In Pennsylvania, the judicial decisions were for a time quite lax in favor of voluntary assignments, but their influence was counteracted by statute provisions requiring the assignee to give security, and giving to the court power to remove him, and substitute another, and requiring him to file an inventory. The debtor may still give preferences, and require the creditors who acceded to execute a general release. The commissioners, in their Report of the Civil Code of Pennsylvania, in January, 1835, suggest that this stipulation for a release be placed under some restrictions. Report, pp. 50–52. But since that report, and in June, 1836, the legislature of Pennsylvania regulated the voluntary assignments by debtors of their estates, real or personal, *or of any part thereof*, in trust for their creditors, *or some of them*, and so far have given those assignments sanction. Purdon's Digest, 74. In the case of Thomas *v.* Jenks, decided in the Supreme Court of Pennsylvania, in March, 1835, the court held the *whole* assignment fraudulent and void, it being an assignment by a partnership firm of a *part* of their property for the benefit of their creditors, with a stipulation for a release as an equivalent for the assignment. It was such an exercise of the right of preference as to impose upon the creditors, indirectly, the necessity of resorting to a part of the debtor's property in exclusion of the rest. So, in M'Culloch *v.* Hutchinson, 7 Watts, 434, a voluntary assignment by an insolvent debtor, absolute on its face, to a particular creditor, to pay him and return the surplus to the debtor, was held to be fraudulent and void. The trust was secret and the deed deceptive. The judicial decisions on this subject seem at last to have taken a firm and vigorous stand in favor of the rights of creditors and the claims of justice. The case of Van Nest *v.* Yoe, before the Assistant V. Ch. in New York, (1 Sandf. Ch. Rep. 4,) contains a stringent and sound application of principles against the delay of creditors, by a voluntary assignment of his property

[1] The profession have since become indebted to Mr. Alexander M. Burrill of New York, for a very thorough and systematic treatise on the Law and Practice of Voluntary Assignments for the Benefit of Creditors, published in 1853. The learned author has collected and digested all the cases in the United States courts, down to the date of his work. The subject has spread itself over so vast a field since the publication of Mr. Angell, that his treatise is quite superseded by Mr. Burrill's work.

possession. He has a special property in the goods, and a lien upon them for the charges of the sale, and his commission, and the auction duty. He may sue the buyer for the purchase-money; and if he gives credit to the vendee, and makes delivery without payment, it is at his own risk. (*a*) If the auctioneer has notice that the property he is about to sell does not belong to his principal, and he sells notwithstanding the notice, he will be held responsible to the owner for the amount of the sale. (*b*) So, if the auctioneer does not disclose the name of his principal at the time of the sale, the purchaser is entitled to look to him personally for the completion of the contract, and for damages on its non-performance. (*c*)[1]

* In the sale of real property at auction, care should *537 be taken that the description of it be accurate, or the purchaser will not be held to a performance of the contract. But if the subscription be substantially true, and be defective or inaccurate in a slight degree only, the purchaser will be required to perform the contract if the sale be fair and the title good. Some care and diligence must be exacted of the purchaser. If every nice and critical objection be admissible, and sufficient to defeat the sale, it would greatly impair the efficacy and value of public judicial sales; and, therefore, if the purchaser gets substantially the thing for which he bargained, he may generally be held to abide by the purchase, with the allowance of some deduction from the price, by way of compensation for any small deficiency in the value by reason of the variation. (*d*)

by a debtor, to retain and hinder the *operation of executions at law*. Though the law allows of voluntary assignments, and permits the insolvent debtor to select his own assignees, yet when he selected his own relatives of very apparent incapacity for the trust, it was held to be evidence of fraud, and the assignment was set aside. Cram *v.* Mitchell, 1 Sandford's Ch. Rep. 251, S. P.

(*a*) Williams *v.* Millington, 1 H. Blacks. Rep. 81.

(*b*) Hardacre *v.* Stewart, 5 Esp. N. P. Rep. 103.

(*c*) Hanson *v.* Roberdeau, Peake's Cas. 120.

(*d*) Calcraft *v.* Roebuck, 1 Vesey, Jr. 221. Dyer *v.* Hargrave, 10 Vesey, 505. King *v.* Bardeau, 6 Johns. Ch. Rep. 38.

[1] And an auctioneer may, in New York, when he does not disclose the name of his principal, bring an action on the contract of sale in his own name. Bogart *v.* O'Regan, 1 E. D. Smith, (N. Y.) 590.

A bidding at an auction may be retracted before the hammer is down. Every bidding is nothing more than an offer on one side, which is not binding on either side until it is assented to, and that assent is signified on the part of the seller by knocking down the hammer. (a) [1]

If the owner employs puffers to bid for him at an auction, it has been held to be a fraud upon the real bidders. He must not enhance the price by a person privately employed by him for that purpose. It would be contrary to good faith, as persons resort to an auction under a confidence that the articles set up for sale will be disposed of to the highest real bidder. A secret puffer employed by the owner is not fair bidding, and is a fraud upon the public; nor can the owner privately bid upon his own goods. All secret dealing on the part of the seller is deemed fraudulent. If he be unwilling that his goods shall be sold at an under price, he may order them to be set up at his own price, and not lower, or he may previously declare, as a condition of the sale, that he reserves a bid for himself. *538 *This was the doctrine declared by Lord Mansfield in *Bexwell* v. *Christie*, (b) and again, by Lord Kenyon, in *Howard* v. *Castle*, (c) and in each case with the approbation of the court of K. B. The governing principle was, that the buyer should not be deceived by any secret manœuvre of the seller. But the doctrine of those cases has since been considered as laid down rather too broadly. Lord Rosslyn and Sir William Grant have each questioned the soundness of the doctrine. (d) The latter seemed to think, that if bidders were employed by the owner merely for the purpose of taking advantage of the eagerness of

(a) Payne v. Cave, 3 Term Rep. 148.
(b) Cowp. Rep. 395.
(c) 6 Term Rep. 642. Thornett v Haines, 15 M. & W. 367.
(d) Conolly v. Parsons, 3 Vesey, 625, n. Smith v. Clarke, 12 Ibid. 477.

[1] The authority of an auctioneer is confined to the making of the sale, and he cannot rescind the sale even before the payment of the purchase-money. Boinest v. Leignez, 2 Rich. R. 464.

See, as to puffers at auction, Flint v. Wooden, 13 E. L. & Eq. 278. Doolubdas v. Ramloll, 3 E. L. & Eq. 39. McDowell v. Simms, 6 Ired. Eq. R. 278. Tomlinson v. Savage, 6 Ired. Eq. R. 430.

them to screw up and enhance the price, it would be a fraud; but that he might lawfully, even without making the fact publicly known, employ a person to bid for defensive precaution and with a view to prevent a sale at an under value. This relaxation of the former rule was also approved of in *Steele* v. *Ellmaker*; (a) and the chief justice, in that case, suggested that the tone of Lord Mansfield's morality was, perhaps, too lofty for the common transactions of business. He held, that the owner might lawfully instruct the auctioneer to bid in the goods for him at a limited price, to prevent a sacrifice. In *Bramley* v. *Alt*, (b) it was held, that a sale was not fraudulent because a puffer had been employed, if there were real bidders who bid after the puffers had ceased; and in *Smith* v. *Clarke*, a specific performance was decreed against a vendee, though the person who bid immediately before him was employed to bid, under the private direction of the vendor, for the purpose of preventing a sale under a specified sum. (c)

It would seem to be the conclusion, from the latter cases, that the employment of a bidder by the owner would or * would not be a fraud, according to circumstances tending to show innocence of intention, or a fraudulent design. * 539 If he was employed *bonâ fide* to prevent a sacrifice of the property under a given price, it would be a lawful transaction, and would not vitiate the sale. But if a number of bidders were employed by the owner, to enhance the price by a pretended competition, and the bidding by them was not real and sincere, but a mere artifice in combination with the owner, to mislead the judgment and inflame the zeal of others, it would be a fraudulent and void sale. (d) [1] So, it will be a void sale, if the

(a) 11 Serg. & Rawle, 86. (b) 3 Vesey, 620.

(c) Woodward *v.* Miller, 2 Collyer's Rep. 279, S. P.

(d) Hazel *v.* Dunham, N. Y. Mayor's Court, 1 Hall, 655. Morehead *v.* Hunt, 1

[1] The effect of fictitious bidding has been much discussed in a late case in the *Supreme Court of the United States.* It was held that false pretensions and sham bidding, made with a view to enhance the price, and which had that effect, would furnish a ground of relief in equity. And the opinion was expressed that the rule would apply to bids made by the auctioneer himself. Veazie *v.* Williams, 8 How. U. S. 134. It seems the rule would be otherwise if the bids of the auctioneer are not authorized by the principal. Veazie *v.* Williams, 3 Story, R. 611.

purchaser prevails on the persons attending the sale to desist from bidding, by reason of suggestions, by way of appeal, to the sympathies of the company. (*a*)

The original doctrine of the K. B. is the more just and salutary doctrine.[1] In sound policy, no person ought, in any case, to be employed secretly to bid for the owner against the *bonâ fide* bidder at a public auction. It is a fraud in law on the very face of the transaction; and the owner's interference and right to bid, in order to be admissible, ought to be intimated in the conditions of sale; and such a doctrine has been recently declared at Westminster Hall. (*b*)[2]

It has been made a question, how far auction sales were within the provisions of the statute of frauds; but it is now understood to be settled that they are within the statute, and that the auctioneer is the agent of both parties, and lawfully authorized by the purchaser, either of lands or goods, to sign the contract

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Dev. Eq. Rep. N. C. 35. Woods *v.* Hall, Ibid. 411. Wolfe *v.* Luyster, 1 Hall's N. Y. Rep. 146. An association of bidders, with a design to stifle competition, is a fraud upon the vendor. Smith *v.* Greenlee, 2 Dev. N. C. Rep. 126. The case of Phippen *v.* Stickney, 3 Metcalf, 384, seems to place the validity of private agreements, between bidders at auction sales, on the *quo animo*, and to be good or void according to the purpose with which they are made.[3]

(*a*) Fuller *v.* Abrahams, 6 Moore's Rep. 316. 3 Brod. & Bing. 116, S. C. Mr. Justice Story, in Veazie *v.* Williams, 3 Story's Rep. 623, approves of the conclusion I have drawn from the cases.

(*b*) Crowder *v.* Austin, 3 Bing. Rep. 368. The language of the Supreme Court of Louisiana is strongly in favor of the doctrine of Lord Mansfield. Baham *v.* Bach, 13 Louisiana Rep. 287. Mr. Justice Ware, in his dissenting and very learned opinion in the above case of Veazie *v.* Williams, pp. 637, 638, approves of the original doctrine of the K. B.

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[1] This doctrine was followed by the Supreme Court of New Hampshire, in Towle *v.* Leavitt, 3 Fost. 360; and in Pennock's Appeal, 14 Penn. 446, the court overruled Steele *v.* Ellmaker, and declared both principle and authority to be in favor of the rule as laid down by Lord Mansfield.

[2] If the sale be advertised as being "without reserve," and a puffer be employed by the vendor, the sale will be void. Thornett *v.* Haines, 15 M. & W. Rep. 367. Where property is offered for sale on sealed proposals, a bid, offering five hundred dollars more than the highest bid, but not specifying any sum, was held not valid. Webster *v.* French, 11 Ill. R. 254.

[3] Hence an agreement among several who had made improvements upon land offered for sale, that one should bid for all, will not void the sale. Switzer *v.* Skiles, 3 Gilm. R. 529. National Fire Insurance Co. *v.* Loomis, 11 Paige, R. 431.

of sale for him as the highest bidder. (*a*) The writing his name as the highest bidder in the *memorandum* of the sale by the auctioneer, immediately on receiving his bid, and knocking down the hammer, * is a sufficient signing of the contract *540 within the statute of frauds, so as to bind the purchaser. Entering the name of the buyer by the auctioneer, in his book, is just the same thing as if the buyer had written his own name. The purchaser who bids, and announces his bid to the auctioneer, gives the auctioneer authority to write down his name, and the authority to the agent need not be in writing. There is no difference in the construction of the fourth and seventeenth sections of the statute of frauds of 29 Car. II. c. 2, (*b*) as to what is a sufficient signing of the contract by the party to be charged.[1] The English law, as originally suggested in the case of *Simon* v. *Motivos*, (*c*) has been repeatedly recognized and considered as the established doctrine in respect to auction sales of lands and chattels by the English and American courts. (*d*)

(*a*) Whether the auctioneer be the agent of both parties, depends upon the facts of the particular case, and he is not so, as of course, in all cases. Bartlett *v.* Punnell, 4 Adolph. & Ellis, 792.

(*b*) Reënacted, N. Y. Revised Statutes, vol. ii. p. 135, sec. 2. Ibid. vol. ii. p. 136, sec. 3.

(*c*) 3 Burr. Rep. 1921. S. C. 1 Blacks. Rep. 599.

(*d*) Hinde *v.* Whitehouse, 7 East's Rep. 558. Heath, J., in 1 H. Blacks. Rep. 85. Emmerson *v.* Heelis, 2 Taunt. Rep. 38. White *v.* Proctor, 4 Ibid. 209. Kemeys *v.* Proctor, 3 Ves. & Bea. 57. Kenworthy *v.* Schofield, 2 Barnew. & Cress. 945. M'Comb *v.* Wright, 4 Johns. Ch. Rep. 659. Cleaves *v.* Foss, 4 Greenleaf's Rep. 1. Alna *v.* Plummer, 4 Ibid. 258. First Baptist Church of Ithaca *v.* Bigelow, 16 Wendell, 28. The N. Y. Revised Statutes, vol. i. 3d edit. 649, requires, that when goods are struck off at auction, and there be not an immediate payment of the price, or delivery of the goods, it shall be the duty of the auctioneer to enter in a sale-book a memorandum of the sale, specifying the nature, quantity, and price of the goods, the terms of sale, the names of the purchasers, and of the person on whose account the sale is made. And by the R. S. 3d edit. vol. ii. 195, an entry in the auctioneer's sale-book, specifying the nature and price of the property sold, the terms of the sale, and the names of the parties, is a memorandum or note within the statute of frauds. The memorandum in the auctioneer's sale-book must be made at the *time and place* of sale, and the entry of the name of the agent or consignee who has lawful author-

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[1] Under the New York statute of frauds, (2 R. S. p. 135, secs. 8, 9,) it is necessary, on a sale of land by an auctioneer, that he should *subscribe* the contract as agent for his principal. Champlin *v.* Parish, 11 Paige, R. 405. Id. 431. Pinckney *v.* Hagadorn, 1 Duer, R. 89. Morton *v.* Dean, 13 Met. R. 385.

XI. *Of the vendor's right of stoppage in transitu.*

This right, which has already been alluded to, requires a more particular discussion. It is the right which the vendor, when he sells goods on credit to another, has of resuming the possession of the goods, while they are in the hands of a carrier or middleman, in their transit to the consignee or vendee, and before they arrive into his actual possession, or to the destination which he has appointed for them, on his becoming bankrupt or insolvent.[1] The right exists only as between the vendor and vendee; and as the property is vested in the vendee by the contract of *541 sale, it * can be revested in the vendor during its *transitus* to the vendee, under the existence of the above circumstances. (*a*)

The right is very analogous to the common-law right of lien. The latter right enables the vendor to detain goods before he has relinquished the possession of them; and this right of stoppage enables him to resume them before the vendee has acquired possession, and to retain them until the price be paid or tendered. If the price be paid or tendered, he cannot stop or retain the goods for money due on other accounts. The right of stoppage does not proceed upon the ground of rescinding the contract, but as a case of equitable lien. (*b*) It assumes its existence and continuance; and, as a consequence of that principle, the ven-

ity to sell, is entering the name of the person on whose account the sale is made, within the statute Hicks *v.* Whitmore, 12 Wendell's Rep. 548.

(*a*) Mason *v.* Lickbarrow, 1 H. Blacks. Rep. 357. Hodgson *v.* Loy, 7 Term Rep. 440. Bohtlingk *v.* Inglis, 3 East's Rep. 381. Burghall *v.* Howard, 1 H. Blacks. Rep. 365, n. Oppenheim *v.* Russell, 3 Bos. & Pull. 44.

(*b*) Lord Kenyon, in Hodgson *v.* Loy, 7 Term Rep. 445. It is said to be a question still undecided, whether the effect of stoppage *in transitu* be to rescind the contract of sale, or only to replace the vendor in the position he occupied before parting with the possession, and to hold the goods till the price be paid. See Wentworth *v.* Outhwaite, 10 Meeson & Welsby, 436.[2]

[1] It seems it is not confined to cases of the insolvency of the vendee. The discovery of the falseness of representations has been held sufficient. Fitzsimmons *v.* Joslin, 21 Verm. R. 129. And in Secomb *v.* Nutt, 14 B. Mon. (Ky.) 324, it was held sufficient to show that the vendee is embarrassed, and probably not able to pay his debts.

[2] The latter view is taken in Rowley *v.* Bigelow, 12 Pick. 307. Jordan *v.* James, 5 Ohio, 88. Newhall *v.* Vargas, 15 Me. 314. Rogers *v.* Thomas, 20 Conn. 66. Chandler *v.* Fulton, 10 Tex. 2.

dee, or his assignees, may recover the goods, on payment of the price; and the vendor may sue for and recover the price, notwithstanding he had actually stopped the goods *in transitu*, provided he be ready to deliver them upon payment. (*a*) If he has been paid in part, he may stop the goods for the balance due him, and the part-payment only diminishes the lien *pro tanto* on the goods detained. (*b*) There must be actual payment of the whole price, before the right to stop *in transitu*, in case of failure of the vendee, ceases. Though a bill of exchange has been received by the vendor for the price, and indorsed over by him to a third person, even that will not take away the right; and if the bill be proved under a commission of bankruptcy against the vendee, it will only be considered a payment to the extent of the dividend. (*c*) The right to stop *in transitu* is paramount to any lien of the carrier for a general balance between him and the consignee; but the lien of the carrier or wharfinger in the particular case is preferred. (*d*) * The right came from * 542 the courts of equity, and was first established in *Wiseman* v. *Vandeputt*,(*e*) and its apparent equity recommended the adoption of it in the courts of law as a legal right. It would be very unreasonable to allow the goods of the vendor to be appropriated to the payment of other creditors of the vendee, who fails before payment, and before the goods have actually reached him. The right has accordingly been greatly favored and encouraged, and many distinctions made relative to its continuance and termination; and yet it is now declared, that a court of equity, from whence the right originated, has no jurisdiction to interfere and support it by process of injunction. Lord Eldon said, there was no instance of stopping *in transitu* by a bill in equity. (*f*) The English law on the subject of this right, and the class of

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(*a*) Kymer *v.* Suwercropp, 1 Campb. Rep. 109.

(*b*) Hodgson *v.* Loy, 7 Term Rep. 440. Feise *v.* Wray, 3 East's Rep. 93. Newhall *v.* Vargas, 13 Maine Rep. 93.

(*c*) Feise *v.* Wray, 3 East's Rep. 93.

(*d*) Oppenheim *v.* Russell, 3 B. & Puller, 42. Morley *v.* Hay, 3 M. & Ryland, 396.

(*e*) 2 Vern. Rep. 203. See, also, Snee *v.* Prescott, 1 Atk. Rep. 245; D'Aquila *v.* Lambert, Amb. Rep. 399, to the same point, of the early establishment of the doctrine in equity.

(*f*) Goodhart *v.* Lowe, 2 Jac. & Walk. 349.

cases by which it is asserted and established, have been very generally recognized and adopted in our American courts. (*a*)

(1.) *Of the persons entitled to exercise this right.*

The right extends to every case in which the consignor is substantially the vendor; and it does not extend to a mere surety for the price, nor to any person who does not stand in the character of vendor or consignor, and rest his claim on a proprietor's right. (*b*) As between principal and factor the right does not exist; but a factor or agent who purchases goods for his principal, and makes himself liable to the original vendor, is so far considered in the light of a vendor, as *to be entitled to stop the goods. (*c*) So a principal who consigns goods to his factor upon credit, is entitled to stop them if the factor becomes insolvent; and a person who consigns goods to another, to be sold on joint account, is likewise to be considered in the character of a vendor, entitled to exercise this right. (*d*) [1] The vendor's right is so strongly maintained, that while the goods are on the transit, and the insolvency of the vendee occurs, the vendor may take them by any means not criminal. (*e*) The validity of the right depends entirely on the bankruptcy or insolvency of the vendee. (*f*) [2] It is not requisite that he should

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(*a*) Ludlows *v.* Bowne & Eddy, 1 Johns. Rep. 16. Parker *v.* M'Iver, 1 Desauss. 281. Stubbs *v.* Lund, 7 Mass Rep. 453. The St. Joze Indiano, 1 Wheaton, 212. Wood *v.* Roach, 2 Dall. Rep. 180. Walter *v.* Ross, 2 Wash. Cir. Rep. 283. Howatt *v.* Davis, 5 Munf. Rep. 34.

(*b*) Siffken *v.* Wray, 6 East's Rep. 371.

(*c*) D'Aquila *v.* Lambert, Amb. Rep. 399. Feise *v.* Wray, 3 East's Rep. 93.

(*d*) Kinloch *v.* Craig, 3 Term Rep. 119. Newsom *v.* Thornton, 6 East's Rep. 17. Fenton *v.* Pearson, 15 Ibid. 419.

(*e*) Lord Hardwicke, in Snee *v.* Prescott, 1 Atk. Rep. 245.

(*f*) The Constantia, 6 Rob. Adm. Rep. 321. The consignor having made the consignment, has no right to vary it, except in the sole case of insolvency. S. C. Abbott on Shipping, 5th Am. edit., Boston, 1846, pp. 621, 622.

[1] If a demand of the goods be made by an unauthorized person, though otherwise it be sufficient, and before the act is ratified by the vendor, the goods come to the possession of the vendee, a ratification by the vendor will not give the demand validity as a stoppage *in transitu.* Bird *v.* Brown, Law Journ. Rep. Ex. p. 154, April, 1850.

[2] But see Fitzsimmons *v.* Joslin, 21 Verm. R. 129, *supra*, p. 540, note. In Rogers *v.* Thomas, 20 Conn. 53, it was held, that the insolvency must take place *after* the sale, in

obtain actual possession of the goods before they come to the hands of the vendee; nor is there any specific form requisite for the stoppage of goods *in transitu;* though it is well settled that the bankruptcy of the buyer is not of itself tantamount to a stoppage *in transitu.* (*a*) But a demand of the goods of the carrier, or notice to him to stop the goods, or an assertion of the vendor's right by an entry of the goods at the custom-house, or a claim and endeavors to get possession, is equivalent to an actual stoppage of the goods. (*b*) [1]

(2.) *Of matters which allow or defeat the right.*

The *transitus* of the goods, and consequently the right of stoppage, is determined by actual delivery to the vendee, or by circumstances which are equivalent to actual delivery.

* There are cases in which a constructive delivery will, *544 and others in which it will not, destroy the right. The delivery to a carrier or packer, to and for the use of the vendee, or to a wharfinger, is a constructive delivery to the vendee; but it is not sufficient to defeat this right, even though the carrier be appointed by the vendee. It will continue until the place of delivery be, in fact, the end of the journey of the

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(*a*) Haswell *v.* Hunt, cited in 5 Term Rep. 231. Ellis *v.* Hunt, 3 Ibid. 464. Scott *v.* Pettit, 3 Bos. & Pull. 471.

(*b*) Walker *v.* Woodbridge, Cooke's B. L. 494. Northey & Lewis *v.* Field, 2 Esp. Rep. 613. Mills *v.* Ball, 2 Bos. & Pull. 457. Litt *v.* Cowley, 7 Taunt. Rep. 169. Newhall *v.* Vargas, 13 Maine Rep. 93. Notice to the carrier on the part of the vendor or his authorized agent is sufficient, unless the goods have in the mean time arrived to the actual or constructive possession of the vendee. The notice is to be given to the person who has the immediate custody of the goods; and if a servant has the custody of the goods, and notice be given to his principal, it must be in time to enable him, with reasonable diligence, to prevent a delivery to the consignee; for if the vendee takes the goods from the carrier before they have arrived at their destination, with or without his consent, the transit is at an end.[2] Whitehead *v.* Anderson, 9 Meeson & Welsby, 519.

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order to give the right of stoppage *in transitu.* It was also held that the insolvency must be evinced by some overt act, and not consist merely in a general inability to pay one's debts. See, however, on this last point, Chandler *v.* Fulton, 10 Tex. 2. Secomb *v.* Nute, 14 B. Mon. 326. Lee *v.* Kilburn, 3 Gray, 594.

[1] Bird *v.* Brown, *supra.*

[2] *It seems* that a demand of the vendee, before the right of stoppage is determined, is not sufficient; it should be of the carrier or middle-man. Mottram *v.* Heyer, 5 Denio's R. 629.

goods, and they have arrived to the possession, or under the direction of the vendee himself. (a) If they have arrived at the warehouse of the packer, used by the buyer as his own, or they are landed at the wharf where the goods of the vendee were usually landed and kept, the *transitus* is at an end, and the right of the vendor extinguished. (b) [1] The delivery to the master of a general ship, or of one chartered by the consignee, is, as we have already observed, a delivery to the vendee or consignee, but still subject to this right of stoppage, which has been termed a species of *jus postliminii*. (c) And yet, if *545 the consignee had hired the ship for a term *of years, and the goods were put on board to be sent by him on a mercantile adventure, the delivery would be absolute, as much as a delivery into a warehouse belonging to him, and it would bar the right of stoppage. (d) [2] The idea that the goods

(a) The *transitus* is not at an end until the goods have reached the place of destination named by the vendee; Coates v. Railton, 6 Barnew. & Cress. 422; and have come to the actual possession of the vendee, or under circumstances equivalent thereto. Buckley v. Furniss, 15 Wendell, 137. Covell v. Hitchcock, 23 Wendell, 611. Edwards v. Brewer, 2 Meeson & Welsby, 375.

(b) Snee v. Prescott, 1 Atk. Rep. 248. Stokes v. La Riviere, cited in 3 Term Rep. 466, and 3 East's Rep. 397. Ellis v. Hunt, 3 Term Rep. 464. Richardson v. Goss, 3 Bos. & Pull. 119. Scott v. Pettit, 3 Ibid. 469. Smith v. Goss, 1 Campb. Rep. 282. Lord Alvanley, in 3 Bos. & Pull. 48. Dutton v. Solomonson, 3 Ibid. 582. Rowe v. Pickford, 8 Taunt. Rep. 83. Tucker v. Humphrey, 4 Bingham's Rep. 516.

(c) Bohtlingk v. Inglis, 3 East's Rep. 381. Cox v. Harden, 4 Ibid. 211. Newhall v. Vargas, 13 Maine Rep. 93. The master gave a receipt for the goods on delivery on board by the consignor, and afterwards signed a bill of lading to the consignee. That circumstance did not take away the right of stoppage. Thompson v. Trail, 2 Carr. & Payne, 334. But in Bolin v. Huffnagle, 1 Rawle's Rep. 1, there was a delivery of goods at a foreign port, to the master of the consignee's own ship, for him; and it was held that the *transitus* was at an end. This last decision may perhaps be questioned, inasmuch as the delivery in that case, to the master of the consignee's ship, was for the purpose of conveyance to him, and not like the case of Fowler v. Kymer, cited in the next note, for the purpose of disposal in a foreign market.

(d) Fowler v. Kymer, cited in 3 East's Rep. 396. Wright v. Lawes, 4 Esp. Rep. 82. Stubbs v. Lund, 7 Mass. Rep. 457, S. P.

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[1] Sawyer v. Joslin, 20 Vt. R. 172. Frazer v. Hilliard, 2 Strobh. R. 309.

[2] See Van Casteel v. Booker, 2 Wels. Hurls. & Gor. Rep. 691. This case contains a valuable discussion as to the effect of a delivery of goods on board a vessel, as determining

must come to the corporal touch of the vendee is exploded; and it is settled that the *transitus* is at an end, if the goods have arrived at an intermediate place, where they are placed under the orders of the vendee, and are to remain stationary until they receive his directions to put them again in motion for some new and ulterior destination. (*a*) In many of the cases, where the vendor's right of stopping *in transitu* has been defeated, the delivery was constructive only; and there has been much subtlety and refinement on the question, as to the facts and circumstances which would amount to a delivery sufficient to take away the right. The point for inquiry is, whether the property is to be considered as still in its transit; for if it has once fairly arrived at its destination, so as to give the vendee the actual exercise of dominion and ownership over it, the right is gone. (*b*) The cases in general upon the subject of constructive delivery may be reconciled by the distinction, that if the delivery to a carrier or agent of the vendee be *for the purpose of conveyance to the vendee*, the right of stoppage continues, notwithstanding such a constructive delivery to the vendee; but if the goods be delivered to the carrier or agent for *safe custody, or for disposal on the part of the vendee*, and the middle-man is by the agreement converted into a special agent for the buyer, the transit or passage of the goods terminates, and with it the right of stoppage. (*c*)[1] So, a complete delivery of

(*a*) Dixon *v*. Baldwen, 5 East's Rep. 175. Foster *v*. Frampton, 6 Barn. & Cress. 107. Dodson *v*. Wentworth, 4 Man. & Gr. 1080.

(*b*) Wright *v*. Lawes. 4 Esp. Rep. 82.

(*c*) James *v*. Griffin, 1 Mees. & Wels. 29, 30.

the right of stoppage. Per Parke, B. Where the goods were delivered on the vendee's own ship, and the captain signed a bill of lading "to the order or assigns" of the vendor, it was held that the vendor's right to stop *in transitu* remained. Turner *v*. Trustees of Liverpool Docks, 6 Eng. L. & Eq. 507. 6 Exch. 543. Ellershaw *v*. Magniac, 6 Exch. 570.

[1] Where goods were sold to be shipped to an ultimate destination, of which the vendor had knowledge, but were first to go into the hands of an agent of the purchaser, and then to remain until the purchaser or his consignee should order them forwarded, the court were of opinion that the right of *stoppage in transitu* was determined by the goods coming to the hands of the agent first mentioned. Valpy *v*. Gibson, 4 M. G. & Scott R. 837. Biggs *v*. Barry, 2 Cur. C. C. 259. See, however, Aguirre *v*. Parmelee, 22 Conn. 473; Chandler *v*. Fulton, 10 Tex. 2; Hays *v*. Mouille, 14 Penn. 48; Harris *v*. Pratt, 17 N. Y. (3 Smith,) 249; Cabeen *v*. Campbell, 30 Penn. State R. 254.

part of an entire parcel or cargo, with intention to take *546 the whole, terminates *the *transitus*, and the vendor cannot stop the remainder. (*a*)

A delivery of the key of the vendor's warehouse to the purchaser; (*b*) or paying the vendor rent for the goods left in his warehouse; (*c*) or lodging an order from the vendor for delivery with the keeper of the warehouse; (*d*) or the delivering to the vendee a bill of parcels, with an order on the storekeeper for the delivery of the goods; (*e*) or demanding and marking the goods by the agent of the vendee, at the inn where they had arrived at the end of the journey; (*f*) or suffering the goods to be marked and resold, and marked again by the under purchaser, (*g*) have all been held to amount to acts of delivery, sufficient to take away the vendor's lien, or right of stoppage *in transitu*. On the other hand, if the delivery be not complete, and some other act remains to be done by the consignor, the right of stoppage is not gone. (*h*) So, while a vessel is performing quarantine at the port of delivery, and the voyage not

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(*a*) Slubey *v.* Heyward, 2 H. Blacks. Rep. 504. Hammond *v.* Anderson, 1 Bos. & Pull. 69. Lord Ellenborough, 6 East's Rep. 627. Jones *v.* Jones, 8 Meeson & Welsby, 431. In these cases there was an unequivocal act of possession and ownership. In other cases, where only a portion of the goods were delivered, and the intention of the vendee was only to take part of the goods, the right of stoppage as to the residue has been maintained. Hanson *v.* Meyer, 6 East, 614. Buckley *v.* Furniss, 17 Wendell, 504. Tanner *v.* Scovell, 14 Mees. & Wels. 28.

(*b*) Lord Kenyon, 3 Term Rep. 468.

(*c*) Hurry *v.* Mangles, 1 Campb. Rep. 452. Suffering the goods, by agreement, to lie *free of rent*, in the vendor's warehouse, for a time, is still a complete delivery, and destroys the lien. Barrett *v.* Goddard, 3 Mason's Rep. 107. But as between vendor and vendee, the lien is not divested by an order of vendor, that he *holds to the order of vendee the goods specified free of rent*, while the goods remain in the same warehouse, unpaid for. Townley *v.* Crump, 4 Adolph. & Ellis, 58.

(*d*) Harman *v.* Anderson, 2 Campb. Rep. 243.

(*e*) Hollingsworth *v.* Napier, 3 Caines's Rep. 182. In Akerman *v.* Humphrey, 1 Carr. & Payne, 53, it was held that the delivery of a shipping note by the consignee to a third person, with an order to the wharfinger to deliver the goods to such third person, did not pass the property so as to prevent a stoppage *in transitu* by the consignor; and that decision was adopted as sound law in Tucker *v.* Humphrey, 4 Bing. Rep 516.

(*f*) Ellis *v.* Hunt, 3 Term Rep. 464.

(*g*) Stoveld *v.* Hughes, 14 East's Rep. 308.

(*h*) Withers *v.* Lyss, 4 Campb. R. 237. Busk *v.* Davis, 2 Maule & Selw. 397. Coates *v.* Railton, 6 Barn. & Cress. 422. Naylor *v.* Dennie, 8 Pick. R. 198.

at an end, the consignor's right of stoppage has been held not to be divested, even by a premature *possession on behalf of the consignee. (*a*) That doctrine has, however, been since contradicted and overruled by Lord Alvanley, in *Mills* v. *Ball*, (*b*) and by Mr. J. Chambre, in *Oppenheim* v. *Russell*; (*c*) and the better opinion now is, that if the vendee intercepts the goods on their passage to him, and takes possession as owner, the delivery is complete, and the right of stoppage is gone.[1] But if the goods have arrived at the port of delivery, and are lodged in a public warehouse, for default of payment of the duties, they are not deemed to have come to the possession of the vendee, so as to deprive the consignor of his right. (*d*)[2]

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(*a*) Holst *v.* Pownal, 1 Esp. R. 240.

(*b*) 2 Bos. & Pull. 461.

(*c*) 3 Ibid. 54.

(*d*) Northey *v.* Field, 2 Esp. R. 613. Nix *v.* Olive, cited in Abbott on Shipping, 426. The English system of warehousing goods was proposed by Sir Robert Walpole, in 1733, in his Excise Scheme, but not adopted. Its advantages were pointed out by Dean Tucker, in 1750. The scheme was revived and recommended by Mr. Pitt, and digested in a practical shape under the administration of Mr. Addington. The statute of 43 Geo. III. ch. 132, laid the foundation of this wise and politic system, and the successive statutes on the subject were consolidated by the Act of 4 Geo. IV. in 1823, and the whole amended and reënacted by the statute of 6 Geo. IV. ch. 94, and lastly, by the statute of 3 and 4 William IV. ch. 57, and the Consolidated Act of 8 and 9 Victoria, ch. 91, which comprehends the system as now in operation. The object of the warehousing system is to lodge imported articles in public warehouses of special security, at a reasonable rent, without payment of the duties on importation, till they are withdrawn for home consumption, and if reëxported, no duty is ever paid. It secures the duties on goods lawfully imported for use and sale in England, and relieves the trader from immediate payment in cash, and until the goods are withdrawn for home consumption. It allows the storage even of prohibited goods in British warehouses on special security for reëxportation; and permits the transfer of goods in the warehouse, without requiring payment of the duties, until they are withdrawn for use. If the goods are destroyed by inevitable accident before they are withdrawn, although the government does not stand insurer for their safety, the duties are uniformly remitted. A clear analysis of the warehousing provisions is given in 1 Bell's Com. 187–190, 5th edit., and in McCulloch's Dictionary of Commerce, 2d edit. art.

[1] Secomb *v.* Nutt, 14 B. Mon. (Ky.) 324.

[2] If the goods remain in the custom-house, the right is not defeated, though the vendee has paid the freight. Donath *v.* Broomhead, 7 Barr's R. 301.

But where the goods have been placed in a public store under the warehousing system the *transitus* is at an end. Mottram *v.* Heyer, 5 Denio's R. 629.

(3.) *Of acts of the vendee affecting the right.*

A resale of the goods by the vendee does not, of itself, and without other circumstances, destroy the vendor's right of stoppage *in transitu.* (*a*) But if the vendor has given to the vendee documents sufficient to transfer the property, and the * 548 vendee, upon the strength of them, sells the goods * to a *bonâ fide* purchaser without notice, the vendor would be divested of his right. A bill of lading usually has the word assigns: the goods are to be delivered to the consignee *or his assigns*, he or they paying freight; and a great question has accordingly arisen, and been very elaborately discussed and litigated in the English courts, whether the bill of lading could be negotiated by the consignee like a bill of exchange, and what legal rights were vested in the assignee. In the case of *Lickbarrow* v. *Mason*, (*b*) it was decided by the K. B., that a

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Warehousing System, where the statute of 3 and 4 William IV. is given at large, with its numerous and detailed provisions.

The New York Chamber of Commerce, in November, 1842, prepared and sent a memorial to Congress in favor of establishing the warehousing system in the United States; and in addition to powerful considerations in favor of it, the memorial suggested that the *warehouse*, or dock *warrants*, or *storage receipts*, were in England transferable paper, and the holder was regarded as owner of the goods. A flexible and desirable security, representing actual property, was thus thrown into commercial circulation.

See Phillips *v.* Huth, 6 Meeson & Welsby, 572, on the construction of the Factors' Act of 6 Geo. IV. The Congress of the United States, in August, 1846, ch. 84, established for the first time a warehouse system. The Act declares that duties on all imported goods shall be paid in cash; but it provides that if duties are not paid, or if the importer or consignee shall make an entry in writing for warehousing the same, the goods shall be deposited in the public stores, or other stores agreed on, at the charge and risk of the importer or consignee, subject to their order, on paying the duties and expenses, to be secured, by bonds with sureties, but not to be withdrawn except in specified parcels; and if satisfactory security be given that the goods shall be landed out of the jurisdiction of the United States, or on entry for reëxportation, and the payment of the expenses, &c., the goods may be shipped without payment of duties. That if any goods so deposited shall remain beyond one year, without payment of the duties and expenses as aforesaid, they shall be appraised and sold at auction, and the surplus proceeds, after payment as aforesaid, shall be paid over to the owner or consignee. Goods deposited may also be withdrawn and transported to any other port of entry in the United States, with the benefit of drawback under specified regulations.

(*a*) Craven *v.* Ryder, 6 Taunt. R. 433. Lord Alvanley, 3 Bos. & Pull. 47. Whitehouse *v.* Frost, 12 East's Rep. 614. Stoveld *v.* Hughes, 14 Ib. 308.

(*b*) 2 Term Rep. 63.

bonâ fide indorsement, for a valuable consideration, of a bill of lading, by the consignee to an assignee, who had no notice that the goods were not paid for, was an absolute transfer of the property, so as to divest the consignor of his right of stoppage *in transitu*, in case of the vendee's insolvency, as against such assignee. There is no case in mercantile law which has afforded a greater display of acute investigation. The judgment of the K. B. was reversed in the Exchequer Chamber; and Lord Loughborough took a masterly view of the whole subject, and completely overthrew the doctrine of the negotiability of bills of lading. (*a*) The case then went to the House of Lords, where Mr. Justice Buller most ably supported the decision of the K. B. (*b*) A new trial was awarded, (*c*) and a special verdict taken, and judgment given thereon without discussion; the judges of the K. B. declaring, that notwithstanding the decision in the Exchequer Chamber, they retained their former opinions. (*d*) The question, therefore, remains, to a certain * degree, still floating and unsettled; though *549 it seems now to be considered as the law at Westminster Hall, that if a bill of lading be assigned, *bonâ fide*, and for a valuable consideration, it is a transfer of the property; and in the case of the consignee, if it be made without notice of the insolvency of the consignee, the property is absolutely vested in the assignee of the consignee, and the consignor has in that case lost his right to stop. (*e*) [1] It is likewise considered to be

(*a*) Mason *v.* Lickbarrow, 1 H. Blacks. R. 357.

(*b*) 6 East's Rep. 17, *in notis.*

(*c*) 2 H. Blacks. R. 211. 5 Term Rep. 367.

(*d*) Lickbarrow *v.* Mason, 5 Term Rep. 683. In France, the debatable nature of the subject has been strikingly displayed; for the question of the negotiability of bills of lading was discussed by such masters of commercial law as Valin and Emerigon, and they came to directly opposite conclusions. The first maintained that bills of lading were negotiable instruments, and the latter denied it. Valin's Com. tom. i. pp. 606, 607. Emerigon, des Ass. tom. i. 318, 319. By the Code of Commerce, (art. 281,) bills of lading may be to order, or to bearer. This settles the question in favor of their negotiability.

(*e*) Coxe *v.* Harding, 4 East's R. 211. Cuming *v.* Brown, 9 Ibid. 506. Morison

[1] But the New York Court of Appeals, in Dows *v.* Perrin, 16 N. Y. (2 Smith,) 325, held that the consignor's right to stop in such case was not gone, if the bill of lading had been

the law in this country, that the delivery of the bill of lading transfers the property to the consignee; and it seems to be conceded that the assignment of it by the consignee, by way of sale or mortgage, will pass the property, though no actual delivery of the goods be made, provided they were then at sea.[1] The rule is founded on sound principles of mercantile policy, and is necessary to render the consignee safe in the acceptance of the drafts of his correspondent abroad, and to afford him the means of prompt reimbursement or indemnity. (*a*)

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v. Gray, 2 Bing. Rep. 260. Walter *v.* Ross, 2 Wash. Cir. R. 283. Wharton's Dig. tit. Vendor, B. b. Haille *v.* Smith, 1 Bos. & Pull. 563. In Morison *v.* Gray, 9 Moore's [illegible]B. R 484, it was held, that the *bonâ fide* assignee of a bill of lading had a sufficient property to stop the goods while *in transitu*, on the insolvency of the vendee, and to sue in his own name the wharfinger who refused to deliver up the goods. But though a bill of lading be negotiable, it seems in a late case to be doubted whether a bill of lading was conclusive as between the shipowner and a *bonâ fide* indorsee for value. Berkley *v.* Watling, 7 Adolph. & Ellis, 29. In Birckhead *v.* Brown, 5 Hill, N. Y. R. 634, it was declared that *letters of credit* and *commercial guaranties* were not negotiable instruments, and that no special contracts, other than bills of exchange and promissory notes, were negotiable instruments, and no one could sue in his own name but an original party to the contract. Lamourieux *v* Hewit, 5 Wendell, 307. Watson *v.* McLaren, 19 Id 557. 26 Id 425 Miller *v.* Gaston, 2 Hill, N Y. R. 188.[2]

In Thompson *v.* Dominy, 14 Meeson & Welsby, 403, it was adjudged that a bill of lading was not negotiable like a bill of exchange, so as to enable the indorsee to sue *in his own name.* The indorsement transfers the *right of property* in the goods, but not the *contract itself.* The court said that there was no case that went so far.[3]

(*a*) Wright *v.* Campbell, 4 Burr. R. 2051. Griffith *v.* Ingledew, 6 Serg. & Rawle,

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obtained from the owner of the goods by a fraud. The effect of a consignment of goods generally is to vest the property in the consignee: but if the bill of lading is special, to deliver the goods to A., for the use of B., the property vests in B., and the action must be brought in his name. Grove *v.* Brien, 8 How. U. S. 429. As a general rule, a suit, founded on the express contract of the bill of lading, must be brought in the shipper's or owner's name; an indorsement of the bill will transfer the property in the goods, but not the contract in the bill of lading. Dows *v.* Cobb, 12 Barb. R. 310.

[1] It has been decided, that where the master signed bills of lading in the usual form, but for goods which were never received on board, the shipowner was not responsible, though the bill had been transferred to a *bonâ fide* indorsee for value. Grant *v.* Norway, English Law Journal Rep., May, 1851, C. P. p. 93.

[2] *It seems* that the *contract* with the carrier cannot be assigned so as to give the assignee a right of action on the contract, or for a breach of it. Howard *v.* Shepard, Law Journal Rep. Q. B. p. 249, Sept. 1850.

[3] In Gurney *v.* Behrend, 25 E. L. & Eq. 128, the court of Q. B. held that a bill of lading did not pass the property to a *bonâ fide* indorsee so as to divest the right of stoppage *in transitu*, unless the indorsement was made with the authority of the vendor.

* But it must not be understood that the consignee can, *550 in all cases, by his indorsement of the bill of lading to a third person, even for a valuable consideration, and without collusion, defeat the right of the consignor to stop the goods. It will depend upon the nature and object of the consignment, and the character of the consignee. As a general rule, no agreement made between the consignee and his assignee, can defeat or affect this right of the consignor; and the consignor's right to stop *in transitu*, is prior and paramount to the carrier's right to retain as against the consignee. (a) A factor, having only authority to sell, and not to pledge the goods of his principal, cannot divest the consignor of the right to stop the goods *in transitu*, by indorsing or delivering over the bill of lading as a pledge, any more than he could by delivery of the goods themselves by way

429. Peters *v.* Ballistier, 3 Pick. R. 495. Walter *v.* Ross, *supra.* In Conard *v.* The Atlantic Insurance Company, 1 Peters's U. S. Rep. 386, it was decided that the consignee, being the authorized agent of the owner to receive the goods, his indorsement of the bill of lading to a *bonâ fide* purchaser, for a valuable consideration, without notice of any adverse interest, passed the property as against all the world. This is the result of the principle, that bills of lading are transferable by indorsement, and pass the property. Strictly speaking, no person but such consignee can, by *indorsement* of the bill of lading, pass the legal title to the goods; but if the shipper be the owner, and the shipment be on his account and risk, he can pass the legal title by *assignment* of the bill of lading, or otherwise; and it will be good against all persons, except the purchaser, for a valuable consideration, by an *indorsement* of the bill of lading itself. The same principle was declared in Nathan *v.* Giles, 5 Taunt. Rep. 558. A *deposit* of the bill of lading, without indorsement, will create a lien on the cargo to the amount of the money advanced on the strength of the deposit, which would be superior to the consignor's right of stoppage. That right came from the courts of equity, and is founded upon equitable considerations; and it consequently must yield to a still higher equity in a third person. In Louisiana it has been held that goods shipped could not be attached by the creditors of the shipper, after the bill of lading had come into the hands of the consignee; but they might be attached by the creditors of the consignee. M'Neill *v.* Glass, 13 Martin's La. Rep. 261.

(*a*) Oppenheim *v.* Russell, 3 Bos. & Pull. 42. The right of stoppage is held not to be divested, though the goods be levied on by execution, at the suit of a creditor of the purchaser, provided it be exercised before the *transitus* is at an end. The vendor's lien has preference; it is the elder lien, and cannot be superseded by the attachment of a creditor. Smith *v.* Goss, 1 Campb. N. P. Rep. 282. Buckley *v.* Furniss, 15 Wendell, 137. Marshall, J., in Hause *v.* Judson, 4 Dana's Ken. R. 11.[1]

[1] Aguirre *v.* Parmelee, 22 Conn. 478. Wood *v.* Yeatman, 15 B. Mon. 270. *Contra*, Boyd *v.* Mosely, 2 Swan, 661.

of pledge; and it is the same thing whether the indorsee was or was not ignorant that he acted as factor. (*a*) If the assignee of the bill of lading has notice of such circumstances as render the bill of lading not fairly and honestly assignable, the right of stoppage as against the assignee is not gone; and any collusion or fraud between the consignee and his assignee will, of course, enable the consignor to assert his right. But the mere *551 fact that the assignee has notice that *the consignor is not paid, does not seem to be of itself absolutely sufficient to render the assignment defeasible by the stopping of the cargo in its transit, if the case be otherwise clear of all circumstances of fraud; though if the assignee be aware that the consignee is unable to pay, then the assignment will be deemed fraudulent as against the rights of the consignor. (*b*)

The buyer, if he finds himself unable to pay for the goods, may, before delivery, rescind the contract, with the assent of the seller.[1] But this right of the buyer of rejecting the goods, subsists only while the goods are *in transitu.* After actual delivery, the goods become identified with his property, and cannot, in contemplation of bankruptcy, be restored to the seller; nor can he interfere and reject the goods, though in their transit, after an act of bankruptcy committed; for this would be to give a preference among creditors. (*c*)

Sir William Scott observed, (*d*) that this privilege of stoppage was a proprietary right, recognized by the general mercantile

(*a*) Newsom *v.* Thornton, 6 East's Rep. 17.

(*b*) Cuming *v.* Brown, 9 East's Rep. 506. As long as the vendor of goods delivered for exportation retains the receipt given to the cartman, the shipment is not complete, and the right of stoppage not gone. Bradner *v.* Jones, N. Y. Legal Observer for March, 1847.

(*c*) Smith *v.* Field, 5 Term R. 402. Barnes *v.* Freeland, 6 Ibid. 80. Richardson *v.* Goss, 3 B. & Pull. 119. Bartram *v.* Farebrother, 1 Danson & Lloyd, 42. Independent of the question under statutes of bankruptcy, it seems to be settled, that the vendee's consent to restore goods, and the vendor's consent to receive them, revests the property in the vendor, and amounts to a rescission of the sale, so as to prevent a seizure at the suit of creditors. Atkin *v.* Barwick, Str. 165. Salte *v.* Field, 5 Term, 211. Ash *v.* Putnam, 1 Hill's N. Y. R. 303, 310.

(*d*) 6 Rob. Rep. 498.

1 See Grout *v.* Hill, 4 Gray, (Mass.) 361.

law of Europe, as well as by that of England. It was recognized in Scotland in 1790; and the French law has gone very far towards the admission of the right, to the full extent of the English rule. It allows the vendor to stop the goods in their transit to the consignee, in case of his non-payment or failure, provided the goods have not been in the mean time sold *bonâ fide*, according to the invoices and bills of lading, or altered in their nature or quantity, and the estate of the insolvent vendee be indemnified against all necessary expenses and advances on account of the goods; and the assignees of the vendee will be entitled to the goods on payment of the price. (*a*) The civil law, and the laws of those European nations which have *adopted the civil law, contain a great impediment to the absolute negotiability of bills of lading; for they do not consider the transfer of property to be complete, even by sale and delivery, without payment or security for the price, unless credit be given. In case of insolvency, the seller may reclaim the goods, as being his own property, even from the possession of the buyer, provided they remain unchanged in form, and distinguishable from his other goods. (*b*) This was also the law of France, until the commercial code adopted the law of stopping *in transitu*, and rejected the old law of revendication, as tending to litigation and fraud. (*c*) * 552

XII. *Of the interpretation of contracts.*

The rules which have been established for the better interpretation of contracts, are the conclusions of good sense and sound logic, applied to the agreement of the parties. Their object is to ascertain with precision the mutual understanding of the contract in the given case; and, like other deductions of right reason, they have been quite uniform in every age of cultivated jurisprudence. The title *De Diversis Regulis*, in the Pan-

(*a*) Code de Commerce, Nos. 576-580, 582.

(*b*) See Lord Abinger's sketch of the progress of the doctrine of stoppage *in transitu*. Gibson *v.* Carruthers, 8 Meeson & Welsby, 336.

(*c*) Dig. 18, 1, 19. Domat, b. 4, tit. 5, sec. 2, art. 3. Van Leeuwen's Com. on the Roman Dutch Law, b. 4, ch. 17, sec. 3. Case at St. Petersburg, in Russia, cited in Bohtlingk *v.* Inglis, 3 East's Rep. 386. Case at Amsterdam, cited in the note to 1 Bell's Com. 217, 218. See *supra*, 498.

dects, (*a*) as well as the sententious rules and principles which pervade the whole body of the civil law, show how largely the common law of England is indebted to the Roman law for the code of proverbial wisdom. There are scarcely any maxims in the English law but what were derived from the Romans; and it has been affirmed, by a very competent judge, that if the fame of the Roman law rested solely on the single book of the Pandects, which contains the *regulæ juris*, it would endure *553 * forever on that foundation. (*b*) Besides the authoritative collection of maxims already referred to, there is a still larger collection of principles in the same condensed shape, drawn by one of the modern civilians from every part of the civil law, and digested with great diligence and study. It is contained in some of the editions of the Corpus Juris Civilis; and in them it immediately precedes the code. (*c*)

Among the common-law writers who have made compilations of this kind, Lord Bacon stands preëminent. In his treatise *De Augmentis Scientiarum*, there are nearly one hundred aphorisms, containing principles which lie at the foundation of universal justice, and the sources of municipal law. He defines his collection to be *Exemplum tractatus de justitia universali, sive de fontibus juris;* and it is a code proper for the study of statesmen, as well as lawyers; for it abounds in principles of legislation, as well as of distributive justice. (*d*) Another work of Lord Bacon consists of his maxims, or elements of the common law, being some of those conclusions of reason, or condensations of truth, dispersed throughout the body of the law, and worthily and aptly called by a great civilian, *legum*

(*a*) Dig. 50, 17.

(*b*) In Wood's Institutes of the Civil Law, b. 3, ch. 1, p. 207, there is a collection of the most useful and practical rules of the civil law to be observed in the interpretation of contracts.

(*c*) It is entitled, Regulæ et Sententiæ Juris, ex universo corpore Juris Civilis sparsim collectæ, et in ordinem alphabeticum digestæ; and it is the production of J. Henequinis, a learned doctor of the civil law.

(*d*) Bacon's Works, vol. vii. p. 439. The aphorisms relate specially to the dignity of the law; to defective and omitted provisions; to the obscurity and uncertainty of law; to retrospective and cumulative laws; to the new digests of the laws; to the force and value of precedents; to the influence of commentaries and forensic opinions, &c.

leges. Ancient wisdom and science were frequently embodied and delivered in this form. And Lord Bacon does not content himself with merely setting down his axioms, like ambiguous oracles, obscure by their brevity, and affording little light or direction; he accompanies each of his maxims with a clear and ample *exposition, "breaking them into cases, and *554 opening them with distinctions, and sometimes showing the reasons whereon they depend, and the affinity they have with other rules." (*a*) There are other collections of law maxims of great value. "The Grounds and Maxims of the English Laws," by William Noy, attorney-general in the reign of Charles I., is a collection of reputation and authority, applicable to every general head of the law. In imitation of Lord Bacon, Noy has accompanied each of his maxims with cases and precedents, affording a copious illustration of his principles. The collection by T. Branch, is much more extensive and complete. It is an admirable *vade mecum*, for the use of the bench and the bar. It draws so copiously from the common-law reports and writers of the age of Elizabeth, and since that time, that it may be regarded as the accumulated spirit and wisdom of the great body of the English law. The only difficulty is, that the maxims require study and profound reflection in the application of them, especially as they are unassisted by any commentary, and stand naked in all the brevity and severity of their original abstraction. (*b*)

The space allowed to the subject will only permit me to refer, by way of sample, to a few of the more leading rules of construction applicable to contracts. (*c*)

(*a*) See the Preface to Lord Bacon's "Maxims of the Law." Bacon's Works, vol. iv. p. 10.

(*b*) This work was originally a small duodecimo volume, printed at London, in 1753, entitled, Principia Legis et Equitatis, being an alphabetical collection of Maxims, Principles, or Rules, Definitions, and Memorable Sayings, in Law and Equity. It adds very much to the utility and interest of the compilation, that it gives, in almost every instance, the original author, and book, and case, from whence the maxims were drawn. The third American edition, taken from the ninth London edition of Noy's Maxims, edited by Mr. Hening, was published at Philadelphia, in 1845, by T. & J. W. Johnson; to which was added Francis's Maxims of Equity; and Branch's Principia Legis, forming a very valuable collection of legal principles, and with which every lawyer should be familiar.

(*c*) There is, in the American Jurist for July and October, 1840, (vol. xxiii. and

It may be observed, in the first place, that the rules of construction of contracts are the same in courts of law and of equity, and whether the contract be under seal or not under seal. (a) The mutual intention of the parties to the instrument is the great, and sometimes the difficult object of inquiry, when the terms of it are not free from ambiguity. To reach and carry that intention into effect, the law, when it becomes necessary, will control even the liberal terms of the contract, if they manifestly contravene the purpose; and many *555 cases * are given in the books, in which the plain intent has prevailed over the strict letter of the contract. (b) The rule is embodied in these common-law maxims: *Verba ita sunt intelligenda ut res magis valeat quam pereat — Verba debent intentioni inservire;* — and in these in the civil law: *In conventibus contrahentium voluntatem potius, quam verba, spectari placuit — Quoties in stipulationibus ambigua oratio est commodissimum est id accipi quo res de qua agitur in tuto sit.* (c) In furtherance of the rule that the intention of the parties is to be ascertained, it is another principle, that plain, unambiguous words need no interpretation, and subtlety and refinement upon terms would defeat the sense. The bulk of mankind act and deal with great simplicity; and on this is founded the rule that *benignæ faciendæ interpretationes cartarum propter simplicitatem laicorum.* Words are to be taken in their popular and ordinary meaning, unless some good reason be assigned to show that they should be understood in a different sense. *Quotius in ver-*

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xxiv.) a useful collection of the most prominent rules of construction of contracts, accompanied with practical illustrations, and a large reference to the authorities sustaining them. It is understood to be a production of a learned and accurate common-law jurist. "A Selection of Legal Maxims, classified and illustrated," by Herbert Broom, Esq., London, 1845, is also a valuable compilation of the more important legal maxims of practical use, and they are accompanied with the exposition of them in the leading cases, and with a commentary upon them which is exceedingly instructive, and may be safely recommended to the profession.

(a) The Master of the Rolls, 3 Vesey, 692. Lord Ellenborough, 13 East's Rep. 74.

(b) Co. Litt. 45 a, 301, 1. Lord Hardwicke, in 2 Atk. Rep. 32. Lord Ch. J. Willes, in Parkhurst v. Smith, Willes's Rep. 332. Bache v. Proctor, Doug. 380. Dormer v. Knight, 1 Taunt. 417. Hotham, B., and Thompson, B., 1 H. Blacks. Rep. 585, 586, 595. Lord Kenyon, in Tatlock v. Harris, 3 Term Rep. 181. Pothier, Traité des Oblig. No. 91.

(c) Dig. 45, 1, 80. Ibid. 50, 16, 219.

bis nulla est ambiguitas ibi nulla expositio contra verba fienda est. Si nulla sit conjectura quæ ducat alio, verba intelligenda sunt ex proprietate, non grammatica sed populari ex usu. (a) But if the intention be doubtful, it is to be sought after by a reference to the context, and to the nature of the contract. It must be a reasonable construction, and according to the subject-matter and motive. (b) *Sensus verborum ex causa dicentis accipiendus est, et secundum subjectam materiam.* The whole instrument is to be viewed and compared in all its parts, so that every part of it may be made consistent and effectual. *Ex antecedentibus et consequentibus optima fit interpretatio.* So, also, *ad proximum antecedens fiat relatio, nisi impediatur sententia.* The relative *same* refers to the next antecedent, (c) though the word *said* does only when the plain meaning of the writing requires it. The sense of the instrument is to be sought, also, by a reference to the usage of the place, or the *lex loci*, according to another of the maxims of interpretation in the civil law. *Si non appareat quid actum est, in contractibus veniunt ea quæ sunt moris et consuetudinis in regione in qua actum est.* (d) If it be a mercantile case, and the instrument be * not clear and unequivocal, evidence of the usage or course of trade at the place where the contract is to be carried into effect, is admissible to explain the meaning and remove the doubt. (e) * 556

The law places more reliance upon written than oral testimony; and it is an inflexible rule, that parol evidence is not admissible to supply or contradict, enlarge or vary, the words of a contract in writing.[1] That would be the substitution of

(a) Grotius de Jure, B. et P. 2, 16, 2.

(b) Ashhurst, J., 1 Term Rep. 703. Best, Ch. J., 2 Bing. Rep. 522.

(c) Co. Litt. 20 b, 385 b.

(d) Dig. 50, 17, 34. Mr. Justice Story, in his Com. on the Conflict of Laws, pp. 225–233, has enforced the numerous authorities, and by illustrations, the general rule, that, in the interpretation of contracts, the law and custom of the place of the contract are to govern.

(e) Webb v. Plummer, 2 Barn. & Ald. 746. Coit v. Com. Ins. Co. 7 Johns. Rep.

[1] But the situation of the parties, the acts to be performed, and the time, place, and manner of performance, may be considered in aid of the interpretation. Merrill v. Gore, 29 Maine R. 346.

parol to written evidence under the hand of the party, and it would lead to uncertainty, error, and fraud. (*a*) Parol evidence is received, when it goes, not to contradict the terms of the writing, but to overthrow the whole contract, as being fraudulent or illegal; for it then shows that the instrument never had any valid operation; and this rule is supported on grounds of policy and necessity. So, when a contract is reduced to writing, all matters of negotiation and discussion on the subject, antecedent to, and *dehors* the writing, are excluded as being merged in the instrument. (*b*) In the case, however, of a latent ambiguity, or one not appearing on the face of the instrument, but arising entirely in the application of it — as when the person or object in view is not designated with precision — the maxim fitly applies, that *ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum verificatione facti tollitur.* (*c*)

The rule that the language of a deed or contract is to be taken most strongly against the party using it, (*verba ambigua fortius accipiuntur contra proferentem,*) though it be a rule, according to Lord Bacon, "drawn out of the depth of reason," applies only to cases of ambiguity in the words, or where the

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385. Gibbon *v.* Young, 8 Taunt. Rep. 261. Bottomley *v.* Forbes, 5 Bingham, N. C. 121. If technical terms are employed, they are to be taken in a technical sense—*verba artis ex arte.*

(*a*) Piersons *v.* Hooker, 3 Johns Rep. 68. Jackson *v.* Foster, 12 Ibid. 488.

(*b*) Abbott, Ch. J., in Kain *v.* Old, 2 Barn. & Cress. 627. Parkhurst *v.* Van Cortlandt, 1 Johns. Ch. Rep. 273. Dean *v.* Mason, 4 Conn. Rep. 428.

(*c*) Lord Bacon's Maxims, Regula, 23. Cole *v.* Wendel, 8 Johns. R. 116. It is a well-settled rule, and one which has been acknowledged in all the cases on the subject, from Cheyney's case, 5 Co. 68, down to this day, that parol evidence is inadmissible to supply or contradict, enlarge or vary, the words of a will, or explain the intention of the testator, except in a case of a latent ambiguity arising *dehors* the will, as to the person or subject meant to be described, or to rebut a resulting trust. Mann *v.* Executors of Mann, 1 Johns. Ch. R. 234. Doe *v.* Chichester, 4 Dow's R. 65, 96. Hand *v.* Hoffman, 3 Halsted's R. 71. The rule as to the ambiguity applies equally to deeds and to all written instruments. Ibid. Meres *v.* Ansell, 3 Wils. Rep. 275. The maxim of Lord Bacon, that *ambiguitas patens* is never helped by averment, is too general. It is subject to qualifications, and this is sufficiently shown in the learned decision in Fish *v.* Hubbard's Administrators, 21 Wendell, 651. In extrinsic cases, parol evidence is often admitted to explain a patent ambiguity. Duer on Insurance, vol. i. lect. 2, part 1, § 16. At the end of the Treatise of Mr. Wigram on the Adoption of Extrinsic Evidence, there are observations on the cases relative to Lord Bacon's rule concerning latent and patent ambiguities.

exposition is requisite to give them lawful effect. It is a rule of strictness and rigor, and not to be resorted to but where other rules of exposition fail. (*a*) The *modern *557 and more reasonable practice is, to give to the language its just sense, and to search for the precise meaning, and one requisite to give fair effect to the contract, without adopting either the rule of a rigid or of an indulgent construction. The Roman law maxims of interpretation in such cases were that *in dubiis benigniora præferenda sunt. In obscuris quod minimum est, sequimur — secundum promissorem interpretamur.* (*b*) The true principle of sound ethics is, to give the contract the sense in which the person making the promise believed the other party to have accepted it, if he in fact did so understand and accept it. (*c*)

If the object of the contract be present, an error in the name does not vitiate it; as if A. gives a horse to C., (D. being present,) says to him, (C.) "D., take this horse," the gift is good, notwithstanding a mistake in the name; for the presence of the grantee gives a higher degree of certainty to the identity of the person than the mention of his name. So, if the error consists in the demonstration or reference, and not in the name of the thing — as if A. grant to B. his lot of land called Dale, in the parish of B., in the county of D., and the lot lies in the county of H., yet the falsity of the addition does not affect the efficacy of the contract. Many other cases to the like effect are put by Lord Bacon, and given by way of illustration of the rule, that *præsentia corporis tollit errorem nominis, et veritas nominis tollit errorem demonstrationis.* (*d*)

(*a*) Bacon's Maxims of Law, No. 3.

(*b*) Dig. 45, 1, 99. Ibid. 50, 17, 9, 56. However, if the deed from its ambiguity creates a doubt, the construction is to be favorable to the grantee, and there is no distinction, in this respect, between the language of the grant itself, and that of any exception or reservation contained in it. Ch. J. Parker cites the authorities and enforces the rule in his able decision in Cocheco Man. Co. *v.* Whittier, 10 N. H. Rep. 305.

(*c*) Every treaty, says Vattel, should be interpreted as the parties understood it, when the act was prepared and accepted. Droit des Gens, b. 2, ch. 17, sec. 268. *Vide supra*, vol. i. 460, note.

(*d*) Bacon's Maxims of the Law, Reg. 25. Smith *v.* Smith, 1 Edw. Ch. Rep. 189. Doe *v.* Cranstoun, 7 Mees. & W. 1.

LECTURE XL.

OF BAILMENT.

BAILMENT is a delivery of goods in trust, upon a contract, expressed or implied, that the trust shall be duly executed, and the goods restored by the bailee, as soon as the purpose of the bailment shall be answered. (a)

There are five species of bailment, according to Sir William Jones, in his correction of Lord Holt's enumeration of the different sorts of bailments.

I. *Depositum*, or a naked deposit without reward.

II. *Mandatum*, or commission, which is gratuitous, and by which the mandatary undertakes to do some act about the thing bailed.

III. *Commodatum*, or loan for use without pay, and when the thing is to be restored in specie.

IV. *A pledge*, as when a thing is bailed to a creditor as a security for a debt.

*559 *V. *Locatio*, or hiring for a reward. (b)

(a) 2 Blacks. Com. 451. Pothier, Traité du Contrat de Dépôt, No. 1. Mr. Justice Story, in his Commentaries on the Law of Bailments, speaks of a consignment to a factor, as being a bailment for sale; and he applies the term bailment to cases in which no return or delivery, or redelivery to the owner or his agent, is contemplated. But I apprehend this is extending the definition of the term beyond the ordinary acceptation of it in the English law.

(b) Jones's Essay on the Law of Bailments, 36. Bailments have been reduced, by

I shall examine each of them in their order.

*I. *Of depositum.* *560

This is a bailment of goods to be kept for the bailor, and returned upon demand without a recompense;[1] and as the bailee or depositary derives no benefit from the bailment, he is to keep them with reasonable care; and he is responsible, if there be no special undertaking to the contrary, only for gross neglect, or for a violation of good faith. (*a*) As a general rule, he is not answerable for mere neglect, if the goods be injured or destroyed while in his custody, if he takes no better care of his own goods, of the like value and under the like circumstances, and they be also spoiled or destroyed. (*b*) Mere neglect, in such a case, is not gross neglect, since the latter is tantamount in the mischief it produces to a breach of good faith, and it usually implies it; but whether fraud does or does not, in point of fact, accompany gross neglect in a depositary, he is still responsible for it in law. Gross neglect, as was observed by Ch. J. Parker, (*c*) bears so near a resemblance to fraud, as to be equivalent to it in its effects upon contracts. Gross neglect is the want of that care which every man of common sense, under the circumstances, takes of his own property. (*d*)[2]

a late master-hand, to three kinds: 1. Those in which the trust is for the benefit of the bailor, and which embrace deposits and mandates 2. Those in which the trust is for the benefit of the bailee, as the *commodatum*, or gratuitous loan for use. 3. Those in which the trust is for the benefit of both parties, as pledges or pawns, and hiring and letting to hire. Story's Com. on Bailments, § 3.

(*a*) *Quia nulla utilitas ejus versatur apud quem depositur, merito dolus præstatur solus.* Dig. 13, 6, 5. Foster *v.* The Essex Bank, 17 Mass. Rep. 479. Lafarge *v.* Morgan, 11 Martin's La. R. 462. Doorman *v.* Jenkins, 4 Neville & Manning, 170. In this last case it was held, that what would amount to gross negligence, was a question for a jury. The law raises an assumpsit in all cases, even in that of a gratuitous bailment, that the bailee will keep and deliver, safely and securely, which means due care in all cases, but the degree of care varies according to the nature of the bailment, and becomes stringent in cases of carriers and bailees for hire. Ross *v.* Hill, 2 Man. G. & Scott's R. 877.

(*b*) See Foster *v.* Essex Bank, *infra*, p. 563, n. *d*.

(*c*) 17 Mass. Rep. 500.

(*d*) Jones's Essay, 118. Lord Holt, in Coggs *v.* Bernard, 2 Lord Raym. 913. In

[1] And a bailor must prove a demand and refusal before he can recover. Phelps *v.* Bostwick, 22 Barb. (N. Y.) 314.

[2] The distinction between the different degrees of negligence has met with the disappro-

*561 * The main inquiry in the case is, what is the duty, and what is the responsibility of the bailee. The general measure of diligence requisite in every species of bailment is regulated, in a greater or less degree, by the nature and quality of the thing bailed, and by the understanding and practice of the city or country in which the parties resided or happened to be. Diligence is a relative term; and it is evident that what would amount to the requisite diligence at one time, in one situation, and under one set of circumstances, might not amount to it in another. (*a*) The deposit is to be kept with the ordinary care applicable to the case under its circumstances, and the depositary cannot make use of the thing deposited without the consent of the bailor expressly given or reasonably implied. (*b*)

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the civil law, gross negligence was termed *magna culpa*, or *lata culpa*, and it was in some cases deemed equivalent to fraud or deceit. Lord Ch. J. Tindal, in 2 Manning & Granger, 852, 1 Adol. & Ellis, N. S. 38, say, that it also, in the English law, approximates to and cannot be distinguished from *dolus malus*, or misconduct. But it is not fraud by inference of law, but a matter of fact for a jury. Wilson *v.* Y. & M. R. Road, 11 Gill & Johnson, 58. It was put by Paulus for fraud, and by Ulpian it was held to be plainly assimilated to fraud. *Magna negligentia culpa est, magna culpa dolus est. Lata culpa plane dolo comparabitur.* Dig. 50, 16, 226. Ibid. 11, 6, 1, 1. It was not understood by the civilians to be absolutely fraud, but only the presumptive evidence of fraud, when applied to cases of trust. In many other cases the presumption was not raised. It was not held to be such under the Cornelian law, *ne in hac lege culpa lata pro dolo accipitur.* Dig. 48, 8, 7. Proculus would not admit that *lata culpa* amounted to *dolus;* but Nerva and Celsus insisted that it amounted to the same thing, in effect, when applied to bailment, for though a person had not ordinary care, yet, if he bestowed less care than was ordinary for him on a thing confided to his care, it was evidence of bad faith. Dig. 16, 3, 32. *Culpam tamen dolo proximam contineri quis merito dixerit.* Dig. 43, 26, 8, 3. Deceit (*dolus*) is any subtle contrivance, by words or acts, with a design to circumvent. Fraud imports damage or detriment.

(*a*) Batson *v.* Donovan, 3 Barn & Ald. 21. Story's Com. on Bailments, §§ 11–17.

(*b*) Dig. 16, 3. 29. Pothier, Traité de Dépôt, No. 34. Story's Com. §§ 89–92.

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bation of some recent eminent authorities. See the opinion of the court in Steamboat New World *v.* King, 16 How. U. S. 469, and Mr. Wallace's note to Coggs *v.* Bernard, 1 Smith's L. C. (Am. ed.) 82. Negligence is defined by Baron Alderson to be "either the omitting to do something that a reasonable man would do, or the doing something that a reasonable man would not do; in either case causing mischief to a third party, not intentionally, for then it would not be negligence." Blyth *v.* Waterworks, 36 E. L. & Eq. 506–8. In McNabb *v.* Lockhart, 18 Geo. 495, it was held that a mandatary is liable for gross negligence only, which is *dolo proximus;* that is, omitting that care, which even the most inattentive and thoughtless never fail to take of their own concerns.

In *Bonian's case* (*a*) the depositary had a chest containing plate and jewels deposited with him. The chest was locked, and he was not informed of the contents. In the night his house was broken open and plundered, as well of the chest with its contents as of his own goods. An attempt was made to charge the bailee; but there was no foundation for the charge, since the bailee used ordinary diligence, and the loss was by a burglary; and it was accordingly held that the bailee was not answerable. Such a bailee, who receives goods to keep *gratis*, is under the least responsibility of any species of trustee. If he keeps the goods as he keeps his own, though he keeps his own negligently, he is not answerable * for them; for the keeping them as he keeps his own, is an argument of his honesty. "If," says Lord Holt, "the bailee be an idle, careless, drunken fellow, and comes home drunk, and leaves all his doors open, by reason whereof the goods deposited are stolen, together with his own, he shall not be charged, because it is the bailor's own folly to trust such an idle fellow." (*b*) As he assumes the trust gratuitously, he is bound to good faith. He is only answerable for fraud, or for that gross neglect which is evidence of fraud. Indeed, if such a bailee had undertaken to keep the goods safely, yet, as he hath nothing for keeping them, he would not be responsible for the loss of them by violence. (*c*)

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(*a*) Year Book, 8 Edw. II. Fitz. Abr. tit. Detinue, pl. 59; and cited by Lord Holt, in 2 Lord Raym. 914, and in Jones on Bailment, 28.

(*b*) The civil law did not exact of the depositary any greater diligence than that he was wont to bestow on his own property under the like circumstances; and the civil law has been followed, in this respect, by Bracton, Holt, and Sir William Jones. Dig. 16, 3, 32. Bracton, lib. 3, 99 b. 2 Lord Raym. 914. Jones on Bailment, 90–93. It was considered that there was no just ground to infer bad faith in such a case. If the depositor knew the general character, employment, and situation of the depositary, or was presumed to know them, the rule of the civil law is a sound and just rule. But if the depositor did not know these circumstances, then it has been held, that the depositary is bound to bestow ordinary care on the deposit, though he does not on his own goods; and that such care is to be ascertained *without reference to the character of the depositary*. The William, 6 Rob. Rep. 316. Story's Com. § 64, *et seq.* Great stress is, and ought to be, laid upon the habits, employment, and character of the depositary, and they are to be taken into consideration. In Sodowsky *v.* McFarland, 3 Dana's Ken. R. 205, it was held, that a mere *depositary* or *mandatary* was liable only on account of loss from his *culpable* negligence.

(*c*) Lord Holt, in Coggs *v.* Bernard, 2 Lord Raym. 915. Jones on Bailment, 44.

*563 *The Roman law was the same as to the responsibility of a depositary. He was only answerable under that law for fraud, and not for negligence. He was not answerable if the thing had been stolen from him, even though it had been carelessly kept. He who commits his goods to the care of a negligent friend, must impute the loss not to his friend, but to his own want of prudence; or, as Bracton, (*a*) who copied this rule from the Institutes of Justinian, (*b*) observed, he must set down the loss to the account of his own folly.[1]

Lord Coke (*c*) laid down a different doctrine on the subject of the responsibility of a depositary. It was held, in *Southcote's case*, that where a person received goods to *keep safely*, and they were stolen by one of his servants, he was responsible to the bailor for the loss. The reason of the decision was, that there was a special acceptance to keep safely, and the case afforded an inference that the bailee had not used that ordinary care and diligence which such a special acceptance required, and the goods were stolen by one of his own servants. It is supposed, by Sir William Jones, (*d*) that the case itself may be

Lord Holt followed the language of the civil law, and said that gross negligence in the case of bailment was "looked upon as an evidence of fraud" "Neglect is a deceit to the bailor; for when he intrusts the bailee, upon his undertaking, to be careful, he has put a fraud upon the bailor by being negligent." Sir William Jones expressed himself too strongly, as Mr. Justice Story, in his Commentaries, has, I think, clearly shown, when he laid it down as a rule of the common law, that gross negligence was equivalent to fraud. It may arise from mere thoughtlessness or absence of mind, and consist, in some cases, with honesty of intention; but *it is looked upon as evidence of fraud*, and it would require strong and peculiar circumstances to rebut that presumption. *Latæ culpæ finis est, non intelligere id quod omnes intelligunt.* Dig. 50, 16, 223.

(*a*) Lib. 3, ch 2, 99 b.

(*b*) Inst. 3, 15, 3.

(*c*) Co. Litt. 89 a, b. 4 Co. 83 b.

(*d*) Jones on Bailment, 42, 43. The opinion of the C. B., in Kettle *v.* Bromsall, Wildes's Rep. 118, goes in support of the point in judgment in Southcote's case; but in the case of Foster *v* The Essex Bank, 17 Mass. Rep. 479, the doctrine of that case is held to be exploded. In this last case there was a special deposit of gold coin in a bank, and the cashier embezzled it, with the other property belonging to the bank, but as there was no evidence of gross negligence on the part of the bank, the banking corporation was held not liable to the depositor.

[1] Knowles *v.* A. & St. L. R. R. 38 Me. 55.

good law; but the doctrine which Lord Coke deduced from it was not warranted by the case, nor by reason, or the general principles of law. Lord Coke said there was no difference between a general acceptance to keep, and a special acceptance to keep safely;[1] and he *advised every one *564 who received goods to keep, to accept specially to keep as his own, and then he would not be responsible for the loss by theft. But the judges of the K. B., in *Coggs* v. *Bernard*, (*a*) expressly overruled every such deduction from *Southcote's case;* and they insisted that there was a material distinction between a general bailment and a special acceptance to keep safely. Lord Holt was of opinion that Coke had improved upon *Southcote's case*, by drawing conclusions not warranted by it; and this has been shown more fully, and with equal acuteness and learning, by Sir William Jones; and I would recommend what he says upon that case as a fine specimen of judicial criticism.

If the depositary be an intelligent, sharp, careful man in respect to his own affairs, and the thing intrusted to him be lost by a slight neglect on his part, the better opinion would seem to be, that he then is responsible. Pothier (*b*) says, that this has been a question with the civilians; and he is of opinion the depositary would be liable in that case; for he was bound to that same kind of diligence which he uses in his own affairs, and an omission to bestow it was a breach of fidelity. But he admits that it would not be a very suitable point for forensic discussion to examine into the character of the depositary; and that the inquiry into the comparative difference between the attention that he bestows on his own affairs, and on the interest of others, would be a little difficult. An example is stated by Pothier, (*c*) to test the fidelity of the depositary. His house is on fire, and he removes his own goods, and those of the bailor are burned; is he then responsible? He certainly is, if he had time to remove both. If he had not, Pothier then admits that a breach of faith cannot be imputed to him, for having saved his own effects in preference to those of another intrusted to his

(*a*) 2 Lord Raym. 909. (*b*) Contrat de Dépôt, No. 27. (*c*) Ibid. No. 29.

[1] See on this point, Ross *v.* Hill, 2 Man. G. & Scott's R. 877.

keeping. But if the goods intrusted to him were much *565 *more valuable than his own, and as easily removable, then he ought to rescue the deposited goods, and to look to them for an average indemnity for the loss of his own.

There are several cases in which a naked depositary is answerable beyond the case of gross neglect. He is answerable, 1. When he makes a special acceptance to keep the goods safely. 2. When he spontaneously and officially proposes to keep the goods of another. He is responsible in such a case for ordinary neglect; for he may have prevented the owner from intrusting the goods with a person of more approved vigilance. Both those exceptions to the general rule on the subject are taken from the Digest (*a*) and stated by Pothier and Sir William Jones. (*b*) 3. A third exception is, when the depositary is to receive a compensation for the deposit. It then becomes a lucrative contract, and not a gratuitous deposit, and the depositary is held to ordinary care, and answerable for ordinary neglect; and the same conclusion follows, when the deposit is made for the special accommodation of the depositary. A warehouseman, or depositary of goods for hire, being bound only for ordinary care, is not liable for loss arising from accident, when he is not in default; and he is not in default when he exercises due and common diligence. (*c*) But he is bound to see that the place in which the articles deposited with him are kept, is fit and properly secured for their reception and safety. (*d*) In the case of goods bailed to be kept for *566 hire, *if the hire be intended as a compensation for house-room, and not as a reward for diligence and care,

(*a*) Dig. 16, 3, 1, 35.

(*b*) Pothier, Contrat de Dépôt, Nos. 30, 31, 32. Jones on Bailment, 47, 48. The French Code Civil, art. 1927, 1928 Code of Louisiana, art. 2908, 2909. Mr. Justice Story, in his Commentaries, §§ 81, 82, Ibid. § 215, questions the equity of the rule of the civil law, which exacts more than ordinary diligence from a bailee, who became such by his spontaneous and officious offer. He says it is punishing a friend rather than a stranger, for an act of disinterested kindness.

(*c*) Garside *v.* The Proprietors of The Trent Navigation, 4 Term Rep. 581. Cailiff *v.* Danvers, Peake's Cas 114 Thomas *v.* Day, 4 Esp. N. P. R. 262. He is not responsible, if not chargeable with negligence, though the goods be stolen or embezzled by his storekeeper or servant. Schmidt *v.* Blood, 9 Wendell, 268

(*d*) Leck *v.* Maestaer, 1 Campb. Rep. 138. Clarke *v.* Earnshaw, Gow's Rep. 30. See also to the same point, 1 Bell's Com. 458.

the bailee is only bound to take the same care of the goods as of his own; and if they be stolen by his servants, without gross negligence on his part, he is not liable. This was so ruled by Lord Kenyon, in *Finucane* v. *Small.* (*a*)

While on the examination of this contract of gratuitous bailment, and which in the civil law is termed *depositum,* I have been struck with the learning and sagacity of Sir William Jones. But after studying Lord Holt's masterly view of the doctrine, and especially the copious treatise of Pothier, the admiration which was excited by the perusal of the English treatise, has ceased to be exclusive. Pothier's essay on that particular species of bailment is undoubtedly superior in the extent, precision, and perspicuity of its details, and in the aptitude of the examples by which he explains and enforces his distinctions.

The person who has only a special property in, or a mere naked possession of a personal chattel, may deposit it, and hold the bailee responsible. (*b*) But the rightful owner may follow his property into the hands of the bailee, or of a third person; and, in a case of disputed claim upon goods in the hands of a depositary, he must, for his own indemnity, compel the claimants to interplead. (*c*) The possession of the depositary is, for many purposes, deemed in law to be the possession of the depositor, for the better security of his right, and the enlargement of his remedies.

The depositary is bound to restore the deposit, upon demand, to the bailor, from whom he received it, unless another *person appears to be the right owner.[1] The bailee has *567 a good defence against the bailor, if the bailor had no valid title, and the bailee on demand delivers the goods bailed

(*a*) 1 Esp. N. P. Rep. 315. If a horse be taken from a naked depositary by authority of law, as on *fi. fa.* against the owner, he is not responsible. Shelbury *v.* Scotsford, Yelv. Rep. 23. Edson *v.* Weston, 7 Cowen's Rep. 278.

(*b*) Armory *v.* Delamirie, 1 Str. Rep. 505. Rooth *v.* Wilson, 1 Barn. & Ald. 59.

(*c*) Thorp *v.* Burling, 11 Johns. Rep. 285. Brownell *v.* Manchester, 1 Pick. Rep. 232. Taylor *v.* Plumer, 3 Maule & Selw. 562. Rich *v.* Aldred, 6 Mod. Rep. 216.

[1] And if he deliver to the bailor in good faith, not knowing the claim of the true owner, he is not liable to the latter. Nelson *v.* Jonson, 17 Ala. 216.

to the rightful owner. (*a*)[1] He is to deliver it in the state in which he received it, and with the profits or increase which it has produced; and if he fails in either of these respects, he becomes responsible. (*b*) He is equally so, as we have already seen, if he has been wanting in fidelity, or in that ordinary care applicable to his situation, character, and circumstances, which is evidence of it. It has been made a question, whether the depositary could lawfully restore the article deposited to one out of two or more joint owners, and when the thing was incapable of partition. Sir William Jones (*c*) refers to a case in 12 Hen. IV. 18, abridged in Bro. tit Bailment, pl. 4, where it was held that one joint owner could not alone bring the action of detinue against the bailee; for if they were to sue separately, the court could not know to which of them to deliver the chattel. The Roman law (*d*) states the case of a bailment of a sum of money sealed up in a box, and one of the owners comes to demand it. In that case, it is said, the depositary may open the box, and take out his proportion only, and deliver it. But if the thing deposited cannot be divided, then it is declared that the depositary may deliver the entire article to the one that demands it, on taking security from him for that proportion of the interest in the article which does not belong to him; and if he refuses to give the security, the depositary is to bring the article into court. This implies that it would not be safe to deliver the thing to one alone; and the rule was correctly laid down by Sir William Jones. If the persons claiming as depositors have adverse interests, the deposit is to be delivered to him who is adjudged to have the right; and it cannot be safely delivered until the adverse interests are settled. The claim may be settled at law in the action of detinue, in which,

(*a*) King *v.* Richards, 6 Wharton, 418.

(*b*) Pothier, Contrat de Mandat, n. 58, 59. Prêt a Usage, n. 31, 33, 73, 74. Game *v.* Harvie, Yelv. Rep. 50. Coggs *v.* Bernard, 2 Lord Raym. 909. Civil Code of Louisiana, art. 2919.

(*c*) Essay on Bailment, 52.

(*d*) Dig. 16, 3, 1, 36, 37.

[1] Cheesman *v.* Exall, 4 Eng. L. & Eq. 438. See Bates *v.* Stanton, 1 Duer, 79; Pitt *v.* Albritton, 12 Ired. 74; Beach *v.* Berdell, 2 Duer, 327.

by the process of *garnishment*, the rival claimant is brought into the suit. But a more convenient and extensive remedy is afforded in equity, by a bill of interpleader, which may be applied to all cases in which conflicting claimants of the same debt or duty have *interfered, and apprised the depositary of their demand upon him for their deposit. (*a*) And in the case of a joint bailment, the deposit cannot safely be restored by the bailee, unless all the proprietors are ready to receive it, or one of them demands it with the consent of the rest. (*b*) The depositary has, perhaps, strictly speaking, no property, general or special, in the article deposited. (*c*) He has only the naked custody or possession, and he cannot use, and much less dispose of the subject without the express or presumed permission of the depositor, and whether the case will or will not warrant the presumption of that permission, will depend upon circumstances. (*d*) But his right of possession gives him a right of action, if his possession be unlawfully disturbed, or the property injured. (*e*) If he sells the goods

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(*a*) Mr. Justice Story says, that where the parties claim in absolutely adverse rights, not founded in any privity of title, or any common contract, the bailee must defend himself as well as he may, for he cannot compel mere strangers to interplead. Com. on Bailments, § 110. This, if it be a rule in chancery, is a defect in the equity process and jurisdiction greater than I had apprehended. Interpleader is where the depositary holds as depositary merely, and the claims are made against him in that character only. The plaintiff must not be under any liabilities to either of the defendants, beyond those which arise from the title to the property in contest. Lord Cottenham, in Crawshay *v.* Thornton, 2 Mylne & Craig, 1, 19, and in Hoggart *v.* Cutts, 1 Craig. & Ph. 197.

(*b*) May *v.* Harvey, 13 East's R. 197. The Code Napoleon says, that the depositary must not give up the thing deposited, except to the order of him who deposited it; and if he who made the deposit dies, and there be several heirs, it must be yielded up to them each according to his share and portion; and if the thing deposited cannot be divided, the heirs must agree among themselves as to the receiving it. Art. 1937, 1939. The *Civil Code of Louisiana* has adopted the same provisions; Art. 2920, 2922; and both these codes leave the inference to be drawn, that if the thing be indivisible, it cannot safely be delivered to one or two or more claimants, without their joint agreement or consent. See, also, Story's Comm. §§ 114-116, as to the duty of the depositary in respect to delivery in cases of a joint bailment.

(*c*) Story's Com. on Bailment, § 93.

(*d*) Dig. 16, 3, 29. Pothier, Traité de Dépôt, n. 34. French Code, Civil, art. 1930. Code of Louisiana, art. 2911. Story's Com. §§ 89-92.

(*e*) Dig. 16, 3, 17. 1 Bell's Com. 257. Rooth *v.* Wilson, 1 Barn. & Ald. 59. Hartop *v.* Hoare, 3 Atk. Rep. 44. 1 Wils. Rep. 8. Lord Coke, in Isaack *v.* Clark,

deposited for a particular purpose, in breach of his trust, the *bonâ fide* purchaser, without notice, is not protected against the real owner. (*a*)[1] The same reasonable care is requisite, in the case of goods coming to one's possession by finding, as in the case of a gratuitous deposit. (*b*)

II. *Of Mandatum.*

Mandate is when one undertakes, without recompense, to do some act for another in respect to the thing bailed. In the case of a deposit, says Mr. Justice Story, (*c*) the principal object of the parties is the custody of the thing, and the service and labor accompanying the deposit are merely accessorial. In *569 the case of a mandate, the labor and *service are the

2 Bulst. Rep. 311. Story's Com. § 93. Moore *v.* Robinson, 2 Barn. & Adol. 817. See *infra*, p. 585. The general rule is, that actual and lawful possession of personal property is sufficient to maintain trespass or trover against all persons except the lawful owner. Armory *v.* Delamirie, 1 Str. 505. Fisher *v.* Cobb, 6 Vermont R. 622. Giles *v.* Grover, 6 Bligh's Rep. N. S. 277. Sutton *v.* Buck, 2 Taunton's R. 302. Oughton *v.* Seppings, 1 Barn. & Adol. 251. Story's Com. §§ 93, 94. In Miller *v.* Adsit, 16 Wendell, 335, it was held, after a learned discussion, that replevin would lie by a receiptor of goods taken on execution against a mere wrongdoer. See, in Story on Bailments, §§ 124-135, an instructive digest of the law in the New England states, in respect to the rights of the parties in the case of goods attached by public officers, on mesne process for debts, and bailed to some third person, to be forthcoming upon demand, or in time to respond to the judgment. Though the bailee has no property whatever in the goods, and but a mere naked custody, yet the better opinion would seem to be, that his possession is a sufficient ground for a suit against a wrongdoer. It has been so decided in New Hampshire, in Poole *v.* Symonds, 1 N. H. Rep. 289, and this is the principle in the case from Wendell. Thayer *v.* Hutchinson, 13 Vermont Rep. 504, S. P. The bailee, having a special property, recovers only the value of his special property as against the owner; but the value of the whole property as against a stranger, and the balance beyond the special property, he holds for the general owner. White *v.* Webb, 15 Conn. Rep. 302.

(*a*) See *supra*, p. 325.

(*b*) Doct. & Stu. Dial. 2, ch. 38. Lord Coke, in Isaack *v.* Clark, 2 Bulst. Rep. 312. Story's Com. § 85-87. Mr. Justice Story, in his Com. on Bailments, § 83, 2d edit., considers the case of goods or chattels placed on the land of another, by unavoidable casualty or necessity, as an involuntary deposit, and that the owner of the articles, in a case free from negligence or fault on his part, may enter and take them away, without being chargeable in trespass. See *supra*, p. 339; and also the American Jurist for January, 1839, (vol. xx.) where the subject is learnedly examined.

(*c*) Story's Com. § 140.

[1] See McMahon *v.* Sloan, 12 Penn. 229.

principal objects of the parties, and the thing is merely accessorial.

If the mandatary undertakes to carry the article from one place to another, he is responsible only for gross neglect, or a breach of good faith. But if he undertakes to perform gratuitously some work relating to it, then, in that case, Sir William Jones maintains that the mandatary is bound to use a degree of diligence and attention suitable to the undertaking, and adequate to the performance of it. (*a*)[1] The doctrine declared in *Sheills* v. *Blackburne*, (*b*) is, that the mandatary's responsibility is not greater in the latter case than in the former, unless his employment implies competent skill. Mr. Justice Story (*c*) considers that Sir William Jones has expressed himself inaccurately on this point; and he discusses the merits of the distinction with great force and accurate research. It is admitted by Sir William Jones, that a bailee of this species ought regularly to be answerable only for a violation of good faith; but if he does undertake a business which requires a degree of diligence and attention for its performance, that diligence ought to be required of him, unless he assumed the task at the pressing solicitation of the party interested, and without any pretensions to competency. (*d*)

A distinction exists between nonfeasance and misfeasance, that is, between a total omission to do an act which one gratuitously promises to do, and a culpable negligence in the execution of it. It is conceded in the English, as well as in the Roman law, that if a party makes a gratuitous engagement, and actually enters upon the execution of the business, and does it amiss, through the want of due care, by which dam-

(*a*) Jones on Bailments, 40, 53. In Wilson *v.* Brett, 11 Mee. & W. 113, it was declared, that a gratuitous bailee, when his profession or situation is such as to imply the possession of competent skill, is liable for neglect to use it.

(*b*) 1 H. Blacks. Rep. 158.

(*c*) Story's Com. §§ 174–188.

(*d*) See the opinion of Judge Porter, of Louisiana, referred to in a subsequent page, under this head, in favor of the distinction made by Sir William Jones.

[1] So if he enters upon the performance of the undertaking, he is bound to pursue instructions. Fellowes *v.* Gordon, 8 B. Mon. R. 415.

*570 age ensues to the other party, an action will *lie for this misfeasance. But Sir William Jones contends, that by the English law, as well as by the Roman law, an action will lie for damage occasioned by the non-performance of a promise to become a mandatary, though the promise be merely gratuitous. There is no doubt that is the doctrine of the civil law; but it was shown by the Supreme Court of New York, in *Thorne* v. *Deas*, (a) that Sir William Jones had mistaken some of the ancient English cases on this point, and that the uniform current of the decisions, from the time of Henry VII. to this day, led to the conclusion, that a mandatary, or one who undertakes to do an act for another without reward, is not answerable for omitting to do the act, and is only responsible when he attempts to do it, and does it amiss. In other words, he is responsible for a misfeasance, but not for a nonfeasance, even though special damages be averred.

In the great case of *Coggs* v. *Bernard*, the defendant undertook, *gratis*, to carry several hogsheads of brandy from one cellar and deposit them in another; and he did it so negligently and improvidently, that one of the casks was staved and the brandy lost. The K. B. held, that the defendant was answerable for the damage, on the ground of his neglect and carelessness, though he was not a common carrier, and though he was to have nothing for his trouble. If the mischief had happened by any person who had met the cart in the street, the bailee would not have been chargeable; but the neglect or want of ordinary care in that case was a breach of trust; and a breach of trust, undertaken voluntary, is a good ground of action. Lord Holt admitted, that if the agreement had been executory, or to carry the brandy at a future time, the defendant would not have been bound to carry it; but in the case before him, the defendant had actually entered upon the execution of the *571 trust, and *having done so, he was bound to use a degree of diligence and attention adequate to the performance of his undertaking. (b)

(a) 4 Johns. Rep. 84. Elsee v. Gatward, 5 Term Rep. 143, S. P.

(b) Receiving a letter to deliver, or money to pay, or a note by a bank to collect, and by negligence omitting to perform the trust, the mandatary, though acting gratu-

The case of *Elsee* v. *Gatward* (a) is a decision of the K. B. to the same point. It was decided, upon the doctrine of *Coggs* v. *Bernard*, and of the ancient authorities referred to by the court in that case. The court recognized the justness of the distinction, that if a party undertakes to perform a work, and proceeds to the employment, he makes himself liable for any misfeasance in the course of that work. But if he undertakes without consideration, and does not proceed on the work, no action will lie against him for the nonfeasance, unless it be in special cases, as in the case of a common carrier, porter, ferryman, farrier, or innkeeper, who are bound, from their situations in life, to perform the work tendered to them, or the employment assumed by them.

A bailee, who acts gratuitously, in a case in which neither his situation nor employment necessarily implied any particular knowledge or professional skill, is held to be responsible only for bad faith or gross negligence. (b) Thus, where a general merchant undertook, voluntarily, and without reward, and upon request, to enter a parcel of goods for another, together with a parcel of his own of the same sort, at the custom-house, for exportation, and he made an entry under a wrong denomination, whereby both parcels were seized; it was held that he was not liable for the loss, inasmuch as he took the same care of the goods of his friend as of his own, and had not any reward for his undertaking; and he was not of a profession or employment that necessarily implied skill in what he undertook. (c) The defendant in that case acted with good faith, and that was all that could be required. The case would have been different if a ship-broker, or a clerk in the custom-house, had undertaken

itously, becomes responsible for damages resulting from his negligence. The delivery and receipt of the letter, money, or note, creates a sufficient consideration to support the contract, and is a part execution of it. Durnford *v.* Patterson, 7 Martin's La. Rep. 460. Shillibeer *v.* Glyn, 2 Mees. & Wels. 145. Story on Bailments, §§ 170-172.[1]

(a) 5 Term Rep. 143.

(b) Doorman *v.* Jenkins, 2 Adol. & Ellis, 256. Beardslee *v.* Richardson, 11 Wendell, 25. Story on Bailment, § 174.

(c) Sheills *v.* Blackburne, 1 H. Blacks. Rep. 158.

[1] See also Robinson *v.* Threadgill, 13 Ired. 39.

to enter the goods, because their situation and employment would necessarily imply *572 a competent degree of knowledge in making such entries. So, if a surgeon should undertake, *gratis*, to attend a wounded person, and should treat him improperly, he would be liable for improper treatment, because his profession implied skill in surgery. If, however, the business to be transacted presupposes the exercise of a particular kind of knowledge, and a person accepts the office of mandatary, totally ignorant of the subject, then it has been said that he cannot excuse himself on the ground that he discharged his trust with fidelity and care. A lawyer, who would undertake to perform the duties of a physician; a physician, who would become an agent to carry on a suit at law; a bricklayer, who would propose to repair a ship, or a landsman to navigate a vessel, are cited as examples to illustrate the distinction. But if the agent has the qualifications necessary for the discharge of the ordinary duties of the trust imposed, it is sufficient to exempt him from responsibility for errors into which a man of ordinary prudence might have fallen. (*a*) It is a little difficult to reconcile the opinions on this point of a gratuitous undertaking to do some business for another; but the case of *Sheills* v. *Blackburne* contains the most authoritative declaration of the law, in favor of the more limited responsibility of the bailee. There are, however, a number of instances in which such a mandatary becomes liable for want of due care and attention. (*b*) Thus, it has been held to be an act of negligence sufficient to render a gratuitous bailee responsible, for him to have turned a horse, after dark, into a dangerous pasture to which he was unaccustomed, and by which means the

(*a*) Porter, J., in Percy *v.* Millaudon, 20 Martin's La. Rep. 77. Mr. Justice Porter dissents from the more severe doctrines of Pothier, in his Traité du Mandat, n. 48, on this point, and he is deemed by Mr. Justice Story to have combated, with entire success, the doctrine of Pothier.

(*b*) The best general test, says Mr. Justice Story, (Com. on Bailment, § 186,) is to consider whether the mandatary has omitted that care which bailees, without hire, of common prudence, are accustomed to take of property of that description. The cases put by Sir William Jones and Lord Stowell, Jones on Bailment, 62, the case of Rendsberg, 6 Rob. Rep. 142, 155, and the case of Tracy *v.* Wood, decided before Mr. Justice Story, 3 Mason, 132, are striking illustrations of the nice and difficult line of distinction between what is and what is not sufficient diligence in the bailee under the circumstances.

loss of the horse ensued. (a) So, if a mandatary undertakes specially to do the work, he may, like a depositary, be answerable for casualties; and if he spontaneously and officiously offers to do the act, he may be responsible beyond the case of gross negligence, and be held *to answer for *573 slight neglect. (b) There is reason, however, to believe, that this head of *mandatum*, in the Essay on Bailment, was not examined with perfect accuracy, and especially when the distinguished author undertook to prove from the English law, what he certainly failed to show, that an action lay for the nonfeasance in promising to do a thing gratuitously, and omitting altogether to do it. The civil law did undoubtedly contain such a principle; and Pothier, in his elaborate treatise on the contract of *mandatum*, (c) adopts the powerful reasoning and very sound maxims of the civil law on the subject of the responsibility of the mandatary. (d) But the English law, as has been abundantly shown from the cases already referred to, never carried the liability of the mandatary to the same extent. He is bound to account for the due performance of the trust he assumes, upon the principles already stated; and if the bailor sustains damages by his fraud, or gross negligence, or misuser, he must answer for the same. (e)[1] On the other hand, if the mandatary bestows the requisite care and diligence, he is justly entitled to indemnity against his necessary expenses and necessary incidental contracts; and so if he sustains loss and injury in the execution of the trust, and of which the service was the cause, the bailor ought to indemnify him, upon principles of moral, if not of legal obligation. (f)

(a) Rooth *v.* Wilson, 1 Barn. & Ald. 59.

(b) Jones on Bailment, 41, 48, 54. *Vide supra*, p 565.

(c) Traité du Contrat de Mandat.

(d) See Dig. 17, tit. 1, and Inst. 3, tit. 27, and Code 4, tit. 35, on the contract of *Mandatum*.

(e) Pothier, h. t. n. 61–66.

(f) Pothier, Contrat de Mandat, Nos. 68–82. Story's Com. §§ 197–201.

[1] A mandatary is bound to follow the instructions of his bailor, unless they conflict with some special agreement; and is responsible for injury happening from neglecting to follow them. Ferguson *v.* Porter, 3 Flor. 27.

III. *Of Commodatum.*

This is a bailment or loan of an article for a certain time to be used by the borrower without paying for the use. This loan for use is to be distinguished from a loan for consumption, or the *mutuum* of the Roman law. The latter was the loan of corn, wine, oil, and other things that might be valued by weight or measure, and the property was transferred. The value only was to be returned in property of the same kind, and the borrower was to bear the loss of them, even if destroyed by inevitable accident. (*a*) In the case of the *commodatum*, or loan for use, as a horse, carriage, or book, the same identical article or thing is to be returned, * and in as good a plight as it was when it was first delivered, subject, however, to the deterioration arising from the ordinary and reasonable use of the loan, and which deterioration the lender is to bear. (*b*) The borrower has no special property in the thing loaned, though his possession is sufficient for him to protect it by an action of trespass against a wrongdoer. (*c*) The Roman and the English law coincide in respect to the conclusions on this head. The borrower cannot apply the thing borrowed to any other than the very purpose for which it was borrowed; (*d*) nor permit any other person to use the thing loaned, for such a gratuitous loan is strictly a personal favor; (*e*) nor keep it beyond the time limited; (*f*) nor detain it as a pledge for any demand he may otherwise have against the bailor. (*g*) If the article perish, or be lost or injured by theft, accident or casualties which could not be foreseen and guarded against, or by the wear and tear of the article in the reasonable use of it, without any blame or neglect imputable to the borrower, the owner must abide the

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(*a*) Inst. 3, 15. Dig. 12, 1, 2, 1. Id. 44, 7, 1, 2. Pothier, Prét a Usage, n. 10. Story on Bailment, § 283.

(*b*) Dig. 13, 6, 19, and 23. Pothier, Prét a Usage, n. 39. Story's Com. § 269.

(*c*) Burton *v.* Hughes, 2 Bing. Rep. 173. Hurd *v.* West, 7 Cowen's Rep. 752.

(*d*) Dig. 47, 2, 40. Pothier, Traité du Prét a Usage, Nos. 20–22. Id. n. 58, 60. Lord Holt, in Coggs *v.* Bernard, 2 Ld. Raym. 915. Wheelock *v.* Wheelwright, 5 Mass. Rep. 104. Story's Com. §§ 232, 233.

(*e*) Bringloe *v.* Morrice, 1 Mod. Rep. 210. Story's Com. §§ 234, 235.

(*f*) Story's Com. § 257.

(*g*) Code, 4, 23, 4. Pothier, Prét a Usage, n. 44.

loss. (*a*) The owner cannot require greater care on the part of the borrower than he had a right to presume the borrower was capable of bestowing. If a spirited horse be lent to a raw youth, and the owner knew him to be such, the circumspection of an experienced rider cannot be required; and what would be neglect in the one, would not be so in the other. (*b*)

Pothier says, that the borrower is bound to bestow on the preservation of the thing borrowed, not merely ordinary, * but the greatest care; and that he is responsible, *575 not merely for slight, but for the slightest neglect. This was the doctrine of the civil law. And so the law was also declared by Lord Holt, in *Coggs* v. *Bernard;* and the reason is, that this is a loan made gratuitously for the sole benefit of the borrower. (*c*) What is due diligence or neglect, will depend upon the circumstances of the particular case, and the nature of the article loaned, and the character and employment of the borrower. He is not liable for the loss of a thing from the wrongful act of a third person which he could not foresee or prevent, nor from external and irresistible violence; as if he hires a horse for a journey, and he be robbed of the horse, without any neglect or imprudence on his part. (*d*) If, however, his house should be destroyed by fire, and he saved his own goods, and was not able to save the articles borrowed, without abandoning his own goods; in that case he must pay the loss, because he had less care of the article borrowed than for his own property, and gave the preference to his own. (*e*) But if his own goods

(*a*) Inst. 3, 15, 2. Dig. 13, 6, 20. Id. 44, 7, 1, 4. Pothier, Prêt a Usage, n. 39, 53. Bell's Com. vol. i. p. 255. Noy's Maxims, 91, ch. 43. Jones on Bailment, 64, 65. If the thing be not returned on a loan to use, the burden of proof naturally and justly lies with the borrower to account satisfactorily for the loss, or pay the value. Pothier, Traité du Prét a Usage, No. 40. Ibid. des Oblig. No. 620. If the article, *a slave, for instance*, perish through neglect or imprudent conduct, the borrower must pay the value. Niblett *v.* White, 7 La. Rep. 253.

(*b*) Jones on Bailment, 65. Pothier, Traité du Prêt a Usage, No. 49.

(*c*) Dig. 44, 7, 1, 4. Pothier, Traité du Prét a Usage, Nos. 48–56. 2 Lord Raym. 915. Story's Com. § 238. See, also, Lord Stair's Institutes of the Scotch Law, 1 Inst. p. 1, 11, 9, and which, as Mr. Justice Story observes, includes the substance of the rules concerning the degrees of diligence due from the bailee.

(*d*) Dig. 13, 6, 19. Pothier, Traité du Prét a Usage, Nos. 38, 55, 56.

(*e*) Pothier, Traité du Prét a Usage, No. 56. This is the rule adopted in the Code Napoleon, art. 1882.

were more valuable than the articles borrowed, and both could not be saved, was the borrower bound in that case to prefer the less valuable articles borrowed? Pothier admits this to be a question of some difficulty; but he concludes, that the borrower must answer for the loss, because he was not limited to bestow only the same care of the borrowed articles as of his own; he was bound to bestow the exactest diligence in the preservation of it, and nothing will excuse him but *vis major*, or inevitable accident. (*a*) The borrower is also responsible *576 for the loss of the article even by *vis major*, when the accident has been owing to his own imprudence; as if he borrows a horse to ride, and he quits the ordinary and safe road, or goes at a dangerous hour of the night, and is beset by robbers and loses the horse, he is liable. (*b*) He is liable, also, for inevitable accident, if he had borrowed a horse of his friend in order to save his own, and concealed from his friend that he had one of his own equally proper for the occasion; as if a person borrowed from his friend a cavalry horse, to use in battle, and concealed from him that he had one of his own, and the borrowed horse should be killed, he must pay for it, for this was a deceit practised upon the lender; and nothing would exempt him from this responsibility but the fact that he had previously disclosed to his friend the truth of the case, and his disinclination to hazard his own horse. (*c*) The borrower is also responsible for loss by inevitable accident, if he has detained the article borrowed beyond the time he ought to have returned it; for the loss is then to be presumed to have arisen from his breach of duty. (*d*) If, in the

(*a*) Ibid. No. 56. Mr. Justice Story (Story's Com. §§ 245–251) questions the solidity of Pothier's conclusion in this case, though it be backed by the positive text of the civil law. The reasoning in Pothier is rather refined and artificial, and the plain common sense and justice of the case, and the moral feelings and instincts which arise out of it, would dictate, that the most valuable articles be first snatched from the flames, when a choice was presented. If, however, the difference in value between his own article and the one borrowed be not broadly and distinctly marked, it is safest and most politic to adhere to the rule of the civilians, (which is adopted in the Code Napoleon, art. 1882, and Code of Louisiana, art. 2817,) in order to guard against the neglects and temptations which self-interest might suggest.

(*b*) Pothier, Traité du Prét a Usage, No. 57.

(*c*) Pothier, Ibid. No. 59.

(*d*) Ibid. No. 60. Jones on Bailment, 70. French Code Civil, art. 1881. Code of Louisiana, art. 2870.

mean time, the lender has been put to expense from the want of the article borrowed, there are opinions that the borrower is bound to indemnify him for such expenses. But if the borrower was not in default in retaining the article, the better reason and equal authority would exempt him from that responsibility. (a)

The ordinary expenses attendant on the thing loaned gratuitously are borne by the borrower; but if the expenses * were extraordinary, and arose from the inherent infirmity of the thing, or were requisite for its preservation without any neglect on the part of the borrower, the lender must bear them, and the borrower has a lien on the article for his reimbursement of such extraordinary expenses. (b) *577

I have taken these explanations of the degrees of responsibility, in the case of a borrower for use without reward, principally from Pothier. In *Coggs* v. *Bernard*, (c) Lord Ch. J. Holt lays down the same rule precisely; and he took them from Bracton, who borrowed them from the civil law, the great fountain from whence all the valuable principles on the subject of these various kinds of bailments have been extracted. It was reserved, however, for Pothier to methodize, vindicate, and illustrate those principles by a clearness of analysis and of illustration which is admirable; and to shed light and lustre, by means of his chaste style and elegant taste, upon this branch of the science of jurisprudence.

IV. *Of pledging.*

This was a bailment or delivery of goods by a debtor to his creditor, to be kept till the debt be discharged; or, to use the more comprehensive definition of Mr. Justice Story, (d) it is a bailment of personal property, as security for some debt or engagement.[1] All kinds of personal property that are vested

(a) Pothier, No. 55. Story's Com. § 257.

(b) Dig. 13, 6, 18, 2. Pothier, Traité du Prêt a Usage, Nos. 81, 82, 83. Story's Com. §§ 256, 272, 273.

(c) 2 Lord Raym. 909.

(d) Story's Com. § 286.

[1] It is not easy in every case to determine whether the transaction amounts to a mortgage, or only to a pledge or sale. It would seem, that the question, whether the contract be a pledge or a mortgage, may *generally* be decided by determining whether the *legal title* has

and tangible, and also negotiable paper, may be the subject of pledge; and choses in action, resting on written contract, may be assigned in pledge. (*a*) A pawn or pledge is the *pignori acceptum* of the civil law; and, according to that law, the possession of the pledge (*pignus*) passed to the creditor;[1] *578 but the possession of the thing hypothecated *(*hypotheca*) did not. (*b*)[2] The pawnee is bound to take ordinary care, and is answerable only for ordinary neglect; for the bailment is beneficial to both the debtor and creditor. This is the rule of civil law and of continental Europe, as well as the rule

(*a*) M'Lean *v.* Walker, 10 Johns. Rep. 471. Roberts *v.* Wyatt, 2 Taunt. Rep. 268. Jarvis *v.* Rogers, 13 Mass. Rep. 105. Story's Com. § 290. 2 Bell's Com. 24. The assignment of shares in joint-stock companies, such as banks and railroad corporations, by way of pledge or security for moneys loaned, or advances made, is usually effected by delivery of the certificate of the company for the shares given to the borrower, with a power of attorney to the lender to make the actual transfer on the books of the company. The actual transfer is frequently postponed or omitted, but the transfer, or, at least, notice to the company of the right, is deemed requisite to the complete efficacy of the security, otherwise a transfer of the shares by the borrower, on the books of the company, to a *bonâ fide* purchaser, &c., if permitted, might embarrass, if it did not destroy the security, inasmuch as the original shareholder would appear, on the books, to be the reputed and true owner. In England, the actual transfer, or, in lieu of it, formal *notice* to the company by the lender, of the assignment of the shares to him in pledge, is deemed requisite, under their bankrupt laws, in order to divest the reputed ownership in the debtor, as against his assignees in bankruptcy, in case he should become bankrupt before any actual transfer was made. The point is well considered and discussed in the Law Magazine, London, May, 1838, art 8, (xix. 389,) and the numerous recent authorities in support of the notice are there referred to.

(*b*) Dig. 13, 7, 9, 2. Inst. 4, 6, 7. See, further, *infra*, vol. iv. p. 138, on the distinction between a pledge and a mortgage of goods.

passed with a condition of defeasance upon the payment of the debt, or whether a mere right of possession, with an authority to sell, in case of default of payment, is the substance of the agreement. Brownell *v.* Hawkins, 4 Barb. S. C. Rep. 491. Wilson *v.* Little, 2 Comst. R. 443. Dykers *v.* Allen, 7 Hill's N. Y. Rep. 498. Houser *v.* Kemp, 3 Barr's R. 208. In the case last cited, the question is discussed whether the contract amounts to a sale, or only to a pledge. See *post*, p. 589, *note* (1).

[1] It is not necessary that the possession of the pledge should be *actual.* Stocks, and, *it would seem*, equitable interests, may be pledged; and it will be sufficient if, by a proper transfer, the property be put within the power and control of the pledgee. Wilson *v.* Little, 2 Comst. R. 443. Story on Bail. § 297. Dykers *v.* Allen, 7 Hill, N. Y. R. 497.

[2] An hypothecation may be made of things not in existence, which will attach to the parties' interest in the things when they come into existence. The Hull of New Ship, Daveis's Dist. Ct. R. 199. See *ante*, p. 468. 1 Hare's R. 549.

of the English law. (*a*) The pawnee is secure in the payment of his debt; and the pawnor is enabled thereby to procure credit. Lord Holt, in *Coggs* v. *Bernard*, gives a clear and excellent summary of the English law on this species of bailment. The pawnee, upon delivery, has a special property in the goods pawned; and if they be such as to be injured by use, as clothes or linen, for instance, then the pawnee cannot use them. But if they be such as not to be the worse for use, as jewels, earrings, or bracelets, pawned to a lady, she to whom they are pawned may use them, though the use is at her peril, because she is at no charge in keeping the pawn. (*b*) She shall be responsible in every event for the loss or damage which may happen while she is using the jewels. If the pawn be of such a nature as to be a charge upon the Pawnee, as a horse or cow, he may, in that case, use the pawn in a reasonable manner. He may ride the horse moderately, and milk the cow regularly, as if he were the owner; and if he derives any profit from the pledge, he must apply those profits towards his debt. (*c*) The common law requires the pawnee or pledgee to account for all the income, increase, profits, and advantages derived by him from the pledge, in all cases where such an account is within the scope of the engagement, after deducting * his necessary charges and expenses. (*d*) It is reasonable that these charges and expenses should be deducted from the profits of the pledge; and even extraordinary expenses necessarily incurred by the pawnee for the preservation of the pledge, and without his default, ought to be borne by the pledgor; and Pothier (*e*) considers this obligation to be implied

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(*a*) Dig. 13, 6, 5, 2. Ibid. 13, 7, 14. Heinecc. Pand. 13, 6, sec. 117, 118, tom. v. 271. Pothier, Traité du Contrat de Nantissement, Nos. 32, 33, 34. Bracton, 99 b. Lord Holt, in Coggs *v.* Bernard, 2 Ld. Raym. 916. Story's Com. § 332. 1 Bell's Com. 453

(*b*) This is so said by Lord Holt, in Coggs *v.* Bernard, 2 Lord Raym. 917, and repeated by Sir William Jones; but Mr. Justice Story, in his Commentaries, § 330, doubts the right of the pawnee to use the jewels.

(*c*) Mores *v.* Conham, Owen's Rep. 123. Pothier, Traité du Contrat de Nantissement, Nos. 23, 35, 36. Civil Code of Louisiana, art. 2919, 3135. Thompson *v.* Patrick, 4 Watts, 414.

(*d*) Story's Com. § 343.

(*e*) Pothier, Traité du Contrat de Nantissement, No. 61.

in the contract of bailment, and it is the rule in the French and Louisianian codes. (*a*)

In general, the law requires nothing extraordinary of the pawnee, but only that he shall take ordinary care of the goods; and if they should then happen to be lost, he may, notwithstanding, resort to the pawnee for his debt. If, however, he refuses to deliver the pawn on tender of the debt, his special property then ceases, and he becomes a wrongdoer, and will be answerable, at all events, for any loss or damage which may afterwards happen to the pawn. (*b*) It is likewise admitted that the pawnee may assign over the pawn, and the assignee will take it under all the responsibility of the original pawnee. (*c*) So the pawnor may sell or assign his qualified property in the pawn, subject to the rights of the pawnee. (*d*) [1]

If the pawn be lost by casualty, or unavoidable accident, or by superior force, or perishes from intrinsic defect or infirmity, the pawnee is not answerable, if the loss from such causes be duly made to appear, and no act was done, or omitted to be done, inconsistent with the pawnee's duty; for he was only bound to bestow ordinary care and diligence. (*e*) If the pawn be stolen, it would be presumptive evidence that the pawnee had not used ordinary care, and he ought to show, by the circumstances, that he was in no default. Sir William Jones (*f*) enters into a critical examination of the cases, to prove * 580 that * the pawnee is responsible, if the pawn be stolen or taken from him clandestinely, and not if it be robbed or taken from him by violence. The ground he takes is, that the

(*a*) Code Civil of France, art. 2080. Code of Louisiana, art. 3139.

(*b*) 2 Lord Raym. 916, 917.

(*c*) Mores *v.* Conham, Owen's Rep. 123. Kemp *v.* Westbrook, 1 Vesey, 178. Ratcliff *v.* Vance, 2 Const. Rep. S. C. 239. Whitaker *v.* Sumner, 20 Pick. Rep. 399. Story on Bailments, §§ 314, 324–328.

(*d*) Franklin *v.* Neate, 13 Meeson & W. 481. Story on Bailments, § 350.

(*e*) Code, 4, 24, 5. Pothier, Traité du Contrat de Nantissement, No. 31. Story's Com. § 339.

(*f*) Essay on Bailment, 33, 59, 60, 63, 69.

[1] The general rules applicable to pledges, do not apply to commercial paper. Appleton *v.* Donaldson, 3 Barr's R. 381.

loss of the pawn by theft is evidence of ordinary neglect; and he vindicates his principle against a contrary doctrine of Lord Coke, with great acuteness and learning. Lord Coke held, (a) that if the goods were delivered to one in pledge, and they were stolen, he should not be answerable for them; for he only undertook to keep them as his own. The opinion of Lord Holt would rather seem to agree with that of Coke, as he refers to him on this point without objection; and he says, that if the pawnee uses due diligence, and the pawn be lost, he is not responsible. Bracton uses the same language. If the pawnee bestows an exact diligence, and the pawn be lost by chance, he is not responsible for the loss. (b)[1] Bracton took all his principles from the Roman law; and Pothier has written a particular treatise upon this identical species of contract. (c) He discusses the question, what degree of care a pawnee is bound to bestow upon the pawn; and as it is a contract made for the reciprocal benefit of the contracting parties, the creditor is bound to bestow upon the preservation of the pledge ordinary care. He is bound, according to the civil law, to bestow that care which a careful man bestows upon his own property. He is not bound to bestow the exactest diligence, as in the case of a loan to use, which is beneficial to the bailee only, nor is he responsible for the smallest neglect. He is responsible for light, but not the lightest neglect, *de levi culpa*, and not *de levissima culpa*. (d)

The rule would appear to be, that the pawnee was neither absolutely liable, nor absolutely excusable, if the pledge be stolen. It would depend upon circumstances whether he was or was not liable. A theft may happen without even * a slight neglect on the part of the possessor of the chattel; and I think it would be going quite far enough to *581

(a) Co. Litt. 89 a. 4 Co. 83 b.
(b) Bracton, 99 b.
(c) Pothier, Traité du Contrat de Nantissement.
(d) Ibid. Nos. 32, 36.

[1] *It seems*, that where it is necessary for a pledgee to employ an agent, and he exercises reasonable care in the choice of such agent, he will not be responsible for his neglect or misconduct. Commercial Bank *v.* Martin, 1 La. Ann. R. 344. See vol. iii. p. 98, *notes* (c) and (1).

hold that such a loss is *primâ facie* evidence of neglect, and that it lies with the pawnee to destroy the presumption. It is not sufficient, says Pothier, that the pawnee allege that the pledge is lost. He must show how it was lost, and that it was not in his power to prevent it. This was also the decision of the civil law. (a)

In the case of *Cortelyou* v. *Lansing*, (b) it was shown, by a careful examination of the old authorities, to have been the ancient and settled English law, that delivery was essential to a pledge, and that the general property did not pass, as in the case of a mortgage, but remained with the pawnor. The pledge of movables without delivery is void, as against creditors. (c) The Roman law allowed the creditor, after delivery of the pledge, to return it to the debtor on the footing of location; but Voet and Bell very properly condemn the Roman rule, as leading to fraud and the insecurity of property. (d) At common law, if the pledge was not redeemed by the stipulated time, it did not then become the absolute property of the pawnee, but he was obliged to have recourse to process of law to sell the pledge;[1] and until that was done, the pawnor was entitled to

(a) Pothier, Traité du Contrat de Nantissement, No. 31. Mr. Justice Story (Com. §§ 333–338) has very fully and ably vindicated the doctrine of Lord Coke against that of Sir William Jones; and he has satisfactorily proved, that theft *per se* establishes neither responsibility nor irresponsibility in the bailee.

(b) 2 Caines's Cases in Error, 200.

(c) 2 Bell's Com. 25, 5th edit. Story's Com. §§ 297, 298.

(d) Dig. 20, 1, 36. Voet, Com. ad Pand. 20, 1, 12. 2 Bell's Comm. 22. The pledge may, however, as it would seem, be delivered back to the owner in a new character, as a special bailee or agent, and the pledgee will still be entitled to the pledge, even as against third persons. Macomber *v.* Parker, 14 Pick. Rep. 497.[2] Story on Bailment, § 299. If a thing be not in existence, there cannot be a technical pledge; but there may be a *hypothetical* contract, which will attach as a lien or pledge to it as soon as it comes into existence. Macomber *v.* Parker, 13 Pick. 175. Calkins *v.* Lockwood, 16 Conn. Rep. 276. Story on Bailment, § 290. *Vide supra*, pp. 517, 578.

[1] Where the debt is payable on demand, a demand must be made before a sale of the pledge. Wilson *v.* Little, 1 Sandf. (Law) R. 351. S. C. 2 Comst. R. 443. Where the pledge has been improperly sold, the pledgor may maintain an action for its value without making a tender of the debt for which the property was pledged. An agreement that the pledge may be sold, without notice, is not an agreement that it may be sold, without demanding payment of the debt.

[2] Hays *v.* Riddle, 1 Sandf. (Law) R. 248.

redeem. (*a*) If the pledge was for an indefinite time, the creditor might, at any time, call upon the debtor to redeem by the same process of demand. Where no time was limited for the *redemption, the pawnor had his own lifetime to redeem, unless the creditor, in the mean time, called upon him to redeem; and if he died without such call, the right to redeem descended to his personal representatives. (*b*) The law now is, that after the debt is due, the pawnee may not only proceed personally against the pawnor for his debt without selling his pawn, for it is only a collateral security, (*c*) but he has the election of two remedies upon the pledge itself. He may file a bill in chancery, and have a judicial sale under a regular decree of foreclosure; and this has frequently been done in the case of stock, bonds, plate, and other chattels, pledged for the payment of the debt. (*d*) But the pawnee is not bound to wait for a sale under a decree of foreclosure, as he is in the case of a mortgage of land; (though Lord Chancellor Harcourt once held otherwise;) and he may sell without judicial process, upon giving reasonable notice to the debtor to redeem. This was so settled in the cases of *Tucker* v. *Wilson* (*e*) and of *Lockwood* v. *Ewer*. (*f*) The notice to the party in such cases is, however, indispensable. This was conceded in *Tucker* v. *Wilson*, and it has been since so ruled in this country. (*g*)[1] The old rule existing in the time of Glanville, and

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(*a*) Glanville, lib 10, ch 6 Cortelyou *v* Lansing, 2 Caines's Cases in Error, 204, 205

(*b*) Cortelyou *v* Lansing, *ub. sup* Ratcliff *v* Davis, 1 Bulst Rep 29 Yelv Rep 178 Cro J 244, S C Demandray *v* Metcalf, Prec in Ch 420 Vanderzee *v.* Willis, 3 Bro 21 The pledgee, by the Roman law, might also insist upon a compulsory sale by the creditor Pothier, Pand 20, 5, 16 This is also the law in Louisiana. Williams *v* Schooner St Stephens, 14 Martin's Rep 24

(*c*) South Sea Company *v* Duncomb, Str 919. Elder *v* Rouse, 15 Wend 218 Story on Bailment, § 315

(*d*) Demandray *v* Metcalf, Prec in Ch 419 Gilbert's Eq Rep 104. Kemp *v.* Westbrook, 1 Ves 278 Vanderzee *v* Willis, 3 Bro 21

(*e*) 1 P Wms Rep 261 1 Bro P C. 494

(*f*) 2 Atk Rep 303.

(*g*) De Lisle *v* Priestman, 1 Browne's Penn. Rep 176. Covell *v* Gerts, 9 Law Reporter for July, 1846

[1] See Brown *v.* Ward, 3 Duer, 360. But commercial paper, pledged as collateral security, cannot be sold by the pledgees They must wait till the paper is mature and then collect it. Ib.

which is now the rule on the continent of Europe and in Scotland, required a judicial sentence to warrant the sale. (*a*) The Code Napoleon (*b*) has retained the same check, and requires a judicial order for the sale; and the Code of Louisiana (*c*) has * followed the same regulation. The civil law allowed the pawnee to sell, in case of default of payment, and after due notice on his own authority; but if there was no special agreement, it required a two years' notice to the debtor, by an order of Justinian. (*d*) The English and American law, with the exception of Louisiana, agree in the prompt and easy remedy which they place in the hands of the creditor, when the pawn is not under the control of a special agreement; and there is not any distinction as to the right to sell between the case of a pledge, and of a mortgage of chattels. (*e*) But the creditor will be held at his peril to deal fairly and justly with the pledge, both as to the time of the notice and the manner of the sale.[1] The law, especially in the equity courts, is vigilant and zealous in its circumspection of the conduct of trustees. (*f*)

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By the *lex commissoria* at Rome, the debtor and creditor might agree, that if the debtor did not pay at the day, the pledge should become the absolute property of the creditor. But a law of Constantine abolished this power, as unjust and

(*a*) Glanville, lib 10, ch 6, 8 Huber's Prælect tom iii 1072, sec 6. Perezius in Cod tom ii p 63, sec 8 Domat, vol ii p 362, sec 9, 10: Ersk. Inst. vol ii p. 455 Pothier, Traité du Contrat de Nantissement, No 24 2 Bell's Com. 22, 5th edit.

(*b*) Art. 2078.

(*c*) Art. 3132.

(*d*) Code, 8, 34, 3, 1. See also Dig 13, 7, 4. Pothier, Pand 20, 4, n 18, 19.

(*e*) Hart *v.* Ten Eyck, 2 Johns Ch Rep 62, 100. Patchin *v.* Pierce, 12 Wendell, 61.

(*f*) Cortelyou *v.* Lansing, 2 Caines's Cases in Error, 200. Hart *v.* Ten Eyck, 2 Johns. Ch. Rep. 62. See also *infra*, vol iv p 139, S P. The holder of hypothecated stock cannot, on default, without an express stipulation, have it sold at the board of brokers. It must be sold at public auction on responsible notice By assistant vice-chancellor in Castello *v.* City Bank of A., 1 N Y. Legal Observer, 25.

[1] If a note held as collateral security for a debt is sold by the creditor, he is presumed to have taken it in payment of the debt Cocke *v.* Chaney, 14 Ala. 65. Hawks *v.* Hinchcliff, 17 Barb. 492.

oppressive, and having a growing asperity in practice. (a) Every agreement preventing the right of redemption, in mortgages of chattels, as of lands, would, no doubt, be equally condemned in the English law. (b)

The pledge covers not only the debt, but the interest upon it, and all necessary expenses that may have attended the possession of the pledge; and the lien may, by agreement, be created to extend to cover subsequent advances. This has been considered to be the law in respect to mortgages and judgments; (c) but the power is subject to some qualifications, as respects the rights of third persons. Lord Chancellor Cowper gave validity and operation to such a * mortgage, as against a subsequent mortgagee, who had notice of the agreement appearing on the face of the first mortgage; (d) and in Connecticut, it has been justly held, that the mortgage must contain within itself reasonable notice of the incumbrances, by stating the nature of those thereafter to arise, and the manner in which they were to be created; so that collusion and fraud may be avoided, and the extent of the incumbrances ascertained, by the exercise of ordinary discretion and diligence. (e) Though there be no express agreement that a pledge for a debt shall be held as security for future loans, yet if circumstances warrant the presumption that a further loan was made upon the credit of the pledge, a court of equity will not suffer the debtor to redeem the pledge without payment of the further loan. (f) If, however, there be no reasonable ground for such a presumption, the better opinion is, that the pawnee will not be allowed to retain the pledge for any other debt than that for which it was made. (g)

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(a) Code, 8, 35, 3 Hub tom. iii. 1038, sec. 17. 1 Domat, 362, sec. 11. Pothier, de Nantissement, n. 18.

(b) Cortelyou v. Lansing, 2 Caines's Cases in Error, 200. Garlick v. James, 12 Johnson's Rep. 146.

(c) United States v. Hooe, 3 Cranch's Rep. 73. Shirras v Caig & Mitchel, 7 Ibid. 34. Hendricks v. Robinson, 2 Johns. Ch. Rep. 309. Livingston v. M'Inlay, 16 Johns. Rep. 165. Lyle v. Ducomb, 5 Binney's Rep 585. See *infra*, vol. iv. p. 175.

(d) Gordon v. Graham, 7 Viner's Abr. 52, E. pl. 3.

(e) Pettibone v. Griswold, 4 Conn. Rep 158. Stoughton v. Pasco, 5 Ibid. 442. Crane v. Deming, 7 Ibid. 387.

(f) Demandray v. Metcalf, Prec. in Ch. 419. 2 Vern. Rep. 691. Gilliat v. Lynch, 2 Leigh's Rep. 493.

(g) *Ex parte* Ockenden, 1 Atk. Rep. 236. Jones v. Smith, 2 Vesey, Jr. 372.

In *Jarvis* v. *Rogers*, (*a*) this question was extensively discussed, and the weight of opinion would seem to have been, that the pawnee could not retain the pledge, independent of a special agreement, for any other debt than that for which the chattel was specifically given; and that good faith would require the restoration of it, without deduction, on account of any cross demand. This, I think, to be the better opinion. It was, however, stated, in that case, that by the civil law the pawnee might retain the pledge, not only for the sum for which *585 the pledge was taken, but for the general *balance of accounts, unless there were circumstances to show that the parties did not so intend. (*b*) If the pawnor has only a limited interest in the articles pawned, the pawnee cannot hold them against the person entitled in remainder, after the particular interest has expired; (*c*) and if a factor pledges the goods of his principal, the pawnee cannot detain them, not even to the extent of the loan. (*d*) [1] And if there be various claims upon the fund after the pledge has been duly sold, the party who was in possession of the pledge is to be first satisfied his debt. (*e*) [2]

Vanderzee v. Willis, 3 Bro 21 But see Adams v. Claxton, 6 Vesey, 226, where the authority of the two last cases is somewhat disturbed Jarvis v. Rogers, 15 Mass Rep 389, 397, 414 Story on Bailments, § 304 [3]

(*a*) 15 Mass Rep 389

(*b*) Code, 8, 27. Heinec Elem Jur sec ord. Pand 4, sec 46, and Hub. Prælec. lib 20, tit 6, sec 1, were referred to in support of the doctrine in the civil law. Pothier, in his Traite du Contrat de Nantissement, No 47, lays down the same rule, and it also exists in the Scottish law 2 Bell's Com 22, 5th edit.

(*c*) Hoare v. Parker, 2 Term Rep 376

(*d*) Patterson v. Tash, 2 Str Rep 1178 Daubigny v. Duval, 5 Term Rep 604, M'Combie v. Davies, 7 East's Rep 5

(*e*) Marshall v. Bryant, 12 Mass Rep 321 This was also the rule in the civil law. Dig 50, 17, 128 Story on Bailments, §§ 312, 313

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1 And not even against a subsequent purchaser from the factor, acting within the scope of his agency. Nowell v. Pratt, 5 Cush 111. *Contra*, Bott v. McCoy, 20 Ala. 578. See, however, on this subject, p. [*628,] n b.

2 At common law, goods pawned or pledged are not liable to be taken on execution against the pledgor or pawnor, but under the New York Statutes, (2 R. S. 366, § 20, 2d ed.) the sheriff may take goods from the possession of the bailee, and sell the interest of the bailor; after which the bailee will be entitled to the possession. Stief v. Hart, 1 Comst. R. 20.

3 Robinson v. Frost, 14 Barb. 586.

As every bailee is in the lawful possession of the subject of the bailment, and may justly be considered, notwithstanding all the nice criticisms to the contrary, as having a special or qualified property in it for the protection of that possession; and as he is responsible to the bailor in a greater or less degree for the custody of it, he as well as the bailor, may have an action against a third person for an injury to the thing; and he that begins the action has the preference; and a judgment obtained by one of them is a good bar to the action of the other. (*a*)

V. *Of locatum, or hiring for a reward.*

This is the fifth and last species of bailment remaining to be examined. It is a contract by which the use of a thing, or labor or services about it are stipulated to be given for a reasonable compensation, express or implied. (*b*) It includes the thing let, the price or recompense, and a valid contract between the letter and hirer. (*c*) This bailment or letting for hire, is of three kinds: *locatio rei*, by which the *hirer, for a *586 compensation, gains the temporary use of the thing; *locatio operis faciendi*, or letting out of work and labor to be done, or care and attention to be bestowed by the bailee on goods bailed for a recompense;[1] *locatio operis mercium vehendarum*, as when goods are bailed to a public carrier or private person, for the purpose of being carried from one place to another for a stipulated or implied reward. (*d*)

(*a*) Flewellin *v* Rave, 1 Bulst Rep 68. 2 Blacks Com 395. Rooth *v*. Wilson, 1 Barn & Ald 59 Faulkner *v* Brown, 13 Wendell, 63. Thayer *v*. Hutchinson, 13 Vermont Rep. 504. See *supra*, p. 568, and see Story on Bailments, §§ 94, 279, 280. The pawnee may maintain replevin against the pawnor as well as against a stranger, for a wrongful taking of the goods pledged. Story on Bailments, § 303. Gibson *v*. Boyd, Kerr's N B Rep. 150

(*b*) 1 Bell's Com. 255, 451, 5th edition. Story on Bailments, §§ 374-377.

(*c*) Pothier, Traite du Contrat de Louage, No. 6. Story's Com § 372. The books usually follow the civil law, and consider the price as being payable in money; but the contract at common law may be classed under the head of location, or *locatio-conductio rei*, be the recompense what it may. Ibid. § 377.

(*d*) Coggs *v* Bernard, 2 Lord Raym. 909. Jones on Bailment, 85, 90. The letter

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[1] Lord Holt, in Coggs *v*. Bernard, and Sir William Jones, make four subdivisions of *locatio*. The letting out of work and labor to be done, they call *locatio operis faciendi*. The letting out of care and attention to be bestowed, they call *locatio custodiæ*.

(1.) In the case of the *locatio rei*, or letting to hire, the hirer gains a special property in the thing hired, and the letter to hire an absolute property in the price, and retains a general property as owner in the chattel. This is a contract in daily use in the common business of life; and it is very important that the rules regulating it should be settled with clear and exact precision. The letter, according to the civil law, is bound not to disturb the hirer in the use of the thing during the period for which it was hired, and to keep the subject in suitable order and repair, and to pay for extraordinary expenses necessarily incurred upon it. (*a*). But the extent of the obligations of the letter, under the common law on the point of repairs and expenses, remains to be defined and settled by judicial decisions. (*b*) The hirer is bound to ordinary care and diligence, and is answerable only for ordinary neglect; for this species of bailment is one of mutual benefit. He is bound to use the article with due care and moderation, and not apply it to any other use,[1] or detain it for a longer period than that for which it was hired. (*c*) The responsibility of the hirer is sufficiently shown by Sir William Jones, in his subtle but perfectly judicious criticism on the cases in the English and the Roman law. (*d*) The hirer, says Pothier, *587 is only held to a common diligence, and *answerable

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or owner who lets out the thing for hire, is called in the civil law *locator*, and the hirer, who has the benefit of the thing for a compensation, the *conductor*, and the bailment or contract for hire itself, is called *locatio* or *locatio conductio*, or, in English, location, and this is the language used in the Scottish law 1 Stair's Inst b 1, tit. 15, secs 1, 5, 6 Wood's Inst of the Civil Law, 236 Story on Bailments, §§ 368, 369

(*a*) Pothier, Traite du Contrat de Louage, Nos 77, 106, 107, 130, 139. Civil Code of Louisiana, art 2663, 2664 1 Bell's Com 453, 5th edit.

(*b*) Story's Com. § 392.

(*c*) Pothier, Traite du Contrat de Louage, 180 Johnson, J, in De Tollenere *v* Fuller, 1 Const Rep S C 121 Wheelock *v*. Wheelwright, 5 Mass Rep. 104 Story's Com §§ 397, 398, 413–415

(*d*) Essay on Bailment, 66–69.

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1 If the thing hired be used for any other purpose, the hirer will be liable for any damage which it may receive. Duncan *v*. Railroad Co 2 Rich. R 613. Mayor of Columbus *v*. Howard, 6 Geo R. 213. In Harvey *v*. Epes, 12 Gratt. 153, it was held, after a thorough examination of the cases, that where chattels, hired for a term, were lost during a *misuser*, trover would not lie unless the *misuser* was the occasion of the loss; but the burden was on the bailees to prove that the loss was not occasioned by their wrongful act.

only for slight neglect. He is bound to bestow the same degree of diligence that all prudent men use in keeping their own goods, and to restore the article in as good condition as he received it, unless it be deteriorated by internal decay or by external means, without his default; and if the article be injured or destroyed without any fault or neglect on the part of the person who takes on hire, the loss falls upon the owner, for the risk is with him. (a)[1] But if the thing hired be lost or damaged by the hirer, or by his servants acting under him, for want of ordinary care and diligence, he is responsible. (b) The bailee, when called upon for the article deposited, must deliver it, or account for his default by showing a loss of it by some violence, theft, or accident. (c)[2] When the loss is shown, the proof of negligence or want of due care is thrown upon the bailor, and the bailee is not bound to prove affirmatively that he used reasonable care. (d)[3] The care must rise in proportion to the demand for it; and things that may easily be deteriorated require an increase of care and diligence in the use of them. Negligence is a relative

(a) Pothier, Traité du Contrat de Louage, Nos. 190, 192, 197, 200. Garside v. T. & M. Navigation Company, 4 Term Rep 581. Cooper v. Barton, 3 Campb. Rep. 5, note. Millon v. Salisbury, 13 Johns. Rep 211. Story's Com. §§ 406–412. Salter v. Hurst, 5 Louis. Rep. 7 Reeves v. The Constitution, Gilpin's Rep. 579.

(b) Bray v. Mayne, Gow's Rep. 1. Dean v Keate, 3 Campb. Rep. 4. Story's Com. § 399, *et seq.* Sinclair v. Pearson, 7 N. H. Rep. 219

(c) If a bailee for hire sells the goods without authority, the bailor may maintain trover against even the *bonâ fide* purchaser. Loeschman v. Machin, 2 Starkie, N. P. C. 311. Cooper v Willomatt, 1 Manning, Granger, & Scott, 672.

(d) Harris v. Packwood, 3 Taunt. Rep. 264. Marsh v. Horne, 5 Barn. & Cress. 322. 7 Cowen's Rep. 500, note.

[1] Harrington v. Snyder, 3 Barb. S. C. Rep. 380. In this case, where a hired horse became lame without any fault of the hirer, and was unable to perform the journey home, it was held, that the *extra expenses* necessarily incurred by the hirer, as well as the charges for doctoring the horse, might be *recouped* in an action, by the owner, for the use of the horse. And see McEvers v. Steamboat Sangamore, 22 Missouri, (1 Jones,) 187.

[2] If the bailee of a chattel, having no authority to dispose of it, mortgage it as security for his own debt, and the mortgagee takes possession under the mortgage, the bailor may maintain an action therefor against him, without a previous demand. Stanley v. Gaylord, 1 Cush. (Mass.) R. 536. An absolute sale of a slave, by one who has possession under a contract of hiring, does not transfer to his vendee the right to the unexpired term, but gives the owner the immediate right to take peaceable possession, if he can. Hair v. Little, 28 Ala. 286.

[3] Runyan v. Caldwell, 7 Humph. R. 134. Foote v. Storrs, 2 Barb. S. C. Rep. 326. *Contra*, Logan v. Matthews, 6 Barr's R. 417. Brown v. Waterman, 10 Cush. (Mass.) 117.

term; and the value of the article and the means of security possessed by the bailee, are material circumstances in estimating the requisite care and diligence.[1] That may be gross negligence in the case of a parcel of articles of extraordinary value, which in the case of another parcel, would not be so; for the temptation to theft, and the necessity for care, are in proportion to the value. (a) Gaius uses the word *diligentissimus* *588 when the rule is applied *in the Roman law to the case of an undertaking to remove a column from one place to another. (b)

(2.) The case of *locatio operis faciendi* is, where work and labor, or care and pains, are to be bestowed on the thing delivered, for a pecuniary recompense; and the workmen for hire must answer for ordinary neglect of the goods bailed, and apply a degree of skill equal to his undertaking. Every man is presumed to possess the ordinary skill requisite to the due exercise of the art or trade which he assumes. *Spondet peritiam artis*, and *Imperitia culpæ annumeratur.* If he performs the work unskilfully, he becomes responsible in damages. (c)[2] Every

(a) Batson v. Donovan, 4 Barn & Ald 21 Tracy v Wood, 3 Mason's Rep. 134, 135 See the cases put by Sir William Jones and Lord Stowell, by way of illustration of the reason of the distinction between different degrees of diligence requisite in different cases. Jones on Bailment, 62 6 Rob Adm Rep 142, 155

(b) Dig 19, 2, 25, 7 Sir William Jones, in his Essay on Bailment, 67, says, that the superlative *diligentissimus* was here improperly applied, and that it would be a case only of ordinary care But Ferriere, in his Commentaries upon the Institutes, tom v p 138 thinks otherwise, and that Gaius was speaking of things that might easily be deteriorated, and would require the most exact diligence for their preservation. The case would depend upon circumstances Gaius was speaking, not of unhewn blocks of granite or marble, but of *columns*, which implied, in the midst of the splendid architecture of Rome, productions of great labor and skill, and in such a case, it would, no doubt, require the utmost attention to avoid injury to the polished shaft or capital, and especially if that capital was finished in the Corinthian style, or surmounted by an entablature, adorned with all the beauty and elegance of the Grecian art

(c) Bell's Com. vol i p 459 Pothier, Traité du Contrat du Louage, Nos. 425, 426. McDonald v Simpson, 4 Arkansas Rep 523

[1] See, on the degree of diligence required of the hirer of slaves, Swigert v. Graham, 7 B Mon. 661, Heathcock v. Pennington, 11 Ired. 640; Biles v. Holmes, Ib. 16; Craig v. Lee, 14 B Mon (Ky) 119, Kelly v Wallace, 6 Florida, 690; Couch v. Jones, 4 Jones, Law, (N C) 402, Brooks v Cook, 20 Geo 87; James v. Carper, 4 Sneed, (Tenn) 397.

[2] See, as to the liability of surgeons for unsuccessful operations, Howard v. Grover, 28 Maine R. 97, Bowman v. Woods, 1 Greene's Iowa R. 441.

mechanic who takes any materials to work up for another in the course of his trade, as where a tailor receives cloth to be made into a coat, or a jeweller a gem to be set or engraved, is bound to perform it in a workmanlike manner; he must bestow ordinary diligence, and that care and fidelity which every man of common prudence, and capable of governing a family, takes of his own concerns. (*a*) As this contract is of mutual benefit, the bailee is not answerable for slight neglect, nor for a loss by inevitable accident or irresistible force, or from the inherent defect of the thing itself; (*b*) he is only answerable for ordinary neglect. (*c*)

*But though he must exercise a care, diligence, and *589 skill, adequate to the business; and if he fails in the ordinary care and skill which belongs to his undertaking, and the bailor sustains damage, he must answer for that damage; yet, if the delivery was of a nature to transfer the property, a different result would follow. In the case of a delivery to a goldsmith of a bar of silver, to be made into vases, or an ingot of gold to be made into rings, by the civil law the whole property passed to the smith, and the employer was merely entitled as a creditor, to have metal equally valuable returned in a certain shape. (*d*) If the metal in that case should be lost, even by irresistible force, the smith, as the owner of it, would be held to bear the loss, and the creditor to be entitled to his vase or ring; though it would be otherwise if the same metal was to be returned in its new form. (*e*)

In the case of *Seymour* v. *Brown*, (*f*) a quantity of wheat was sent to a miller to be exchanged for flour, at the rate of a barrel of flour for every five bushels of wheat. The miller mixed the wheat with the mass of the wheat of the same qual-

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(*a*) Dig. 19, 2, 9, 5. Pothier, Ibid. Nos. 419, 428 1 Bell's Com 456, 458. Duncan *v*. Blundell, 3 Starkie's Rep 6 Story on Bailment, § 431

(*b*) Pothier, Traité du Contrat de Louage, n. 428 Dig 19, 2, 13, 5.

(*c*) Story on Bailment, §§ 433-437.

(*d*) Dig. 19, 2, 31.

(*e*) Jones on Bailment, 102. Buffum *v* Merry, 3 Mason's Rep. 478.

(*f*) 19 Johns. Rep 44. This decision has been overruled in the very analogous case of Ewing *v*. French, 1 Blackf. Ind Rep. 353, and in Hurd *v*. West, 7 Cowen, 752, 756, note, and in Smith *v*. Clark, 21 Wendell, 83.

ity belonging to himself and others, and before the flour was delivered, the mill, with all its contents, was destroyed by fire. It was held, upon the question who was to bear the loss, that as there was no fault or negligence imputable to the miller, he was not responsible for the loss, and that the property was not transferred. It was considered, that there was no sale within the intention of the parties. If the same identical wheat was to have been returned in the shape of flour, the decision was correct, according to the general principles of law applicable to the case.[1] But as it did not appear to have been understood that the wheat delivered was to be kept separate, and re- *590 turned * in flour, but only flour equal to wheat of such quantity and quality; and as the miller acted upon that understanding, the decision was not conformable to the true and settled doctrine. There was in that case a transfer of the property in the wheat to the miller, and he was bound, at his own risk, and at all events, to have returned the flour. (a) [2]

(a) Where an article is delivered to be manufactured or altered, and the specific thing to be then restored, it is not a contract of sale, but a regular bailment *locatio operis faciendi*, and the bailor retains his general property, and the bailee acquires no interest in any part of the articles (as logs to be sawed into boards) by a mere part performance. Pierce v. Schenck, 3 Hill, 28.

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[1] The property in rags does not pass to a bailee, who receives them, to manufacture into paper, at a certain price, and when the paper *made from them* is to be delivered to the bailor. King v. Humphreys, 10 Barr's R. 217.

The rule of law that distinguishes a bailment from a sale, in cases of this character, is stated thus by Bronson, J., in Mallory v. Willis, 4 Comst. 76. "When the identical thing delivered, though in an altered form, is to be restored, the contract is one of bailment, and the title to the property is not changed. But when there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, he becomes a debtor to make the return, and the title to the property is changed. It is a sale." This language is cited with approval in subsequent cases. See Foster v. Pettibone, 3 Seld. 433. Hyde v. Cookson, 21 Barb. 93. But the application of the rule to the facts of various cases, has given rise to an apparent conflict. See the cases before cited, and also Wadsworth v. Alcott, 2 Seld. 64; Norton v. Woodruff, 2 Comst. 153; Chase v. Washburn, 1 Ohio St. 244; Washburn v. Jones, 14 Barb. 193.

[2] Where property was hired and annexed to real estate, and in that condition sold with the real estate, it was held, it could not be reclaimed by the owner, but his only remedy was against his bailor. Fryatt v. The Sullivan Co., 5 Hill's N. Y. Rep. 116. S. C. 7 Hill, 529.

In this case an engine and boilers were so affixed to the freehold that they could not be removed "without *destroying* the building in which they were placed."

The law on this subject has been discussed with great learning and ability in the courts

There are very embarrassing questions, as has been justly observed, (*a*) arising in cases where the labor bestowed has not been properly applied, or not according to contract, or left incomplete, or where the subject has perished before it was finished. (*b*) Thus, it was held, in *Ellis* v. *Hamlen*, (*c*) that if a person undertakes to build a house upon a specified plan, and with certain materials, and he departs, without leave, from the terms of the contract, he is not entitled to any compensation for his labor. This decision rests on the strict ground of contract; but the civil law speaks a more benign language, and gives the builder, acting in good faith, and in cases where the work is united with the property of the employer, an indemnity to the extent of the benefit conferred. This is also the rule in the Scotch law. (*d*) If the employer derives no benefit from the work and labor of the mechanic, (as where the whole subject-matter of the undertaking is destroyed, by inevitable accident, before the work is completed and the thing delivered;) even in that case the civil law gave to the mechanic a ratable compensation for his labor and expenses bestowed upon the materials of his employer. And Pothier concludes that it is just and equitable; for, as fast as the building advanced, it had

(*a*) Story's Com § 441

(*b*) See *supra*, 509, note The Scottish law deals on this subject upon very equitable grounds, for it balances the inconvenience and damage arising from the imperfect or faulty performance against the benefit actually derived from the work, and gives the workman either a *pro tanto* compensation, or assesses him in damages, as the difference in the result may require 1 Bell's Com 455, 456

(*c*) 3 Taunt Rep 52

(*d*) 1 Bell's Com 456

of New York, in the case of Silsbury v. McCoon. The plaintiff had manufactured into whiskey some grain belonging to another, and the question was, whether the property was thereby changed and vested in the plaintiff In 6 Hill, 425, the Supreme Court held that it was In 4 Denio, 332, the case came again before the court, when it appeared, that at the time of the manufacture, the plaintiff knew the grain to be the property of another; but the majority of the Supreme Court held, that the fact that the act of taking and manufacturing the grain was a known and voluntary trespass, could not defeat the legal effect of a total change *in specie* of the property The case was then taken to the Court of Appeals, when the majority of the court reversed the last-mentioned decision, and declared, that a wilful wrongdoer can never acquire property by any change in the property of another, so long as it can be proved that the new article was made from the original material. S C 3 Comst. R. 379. See *ante*, pp [363-365]

become, by accession, part of the property of the owner. (*a*) So, if an article be delivered to a mechanic to be repaired, or materials are delivered to be wrought into a new form and shape, and the thing is accidentally destroyed before the work is finished and ready for delivery, without any fault or *591 negligence * on the part of the mechanic, the entire loss, according to the English law, falls upon the owner of the materials; for he is bound to answer for the work and labor already bestowed. This is the general rule of law, though it is liable to be controlled by the custom of the trade. (*b*) According to the French law, if the mechanic was to furnish the materials, and the thing accidentally perished before completion and delivery, he bears the loss both of the materials and of his work; but if the materials were furnished by the employer, and the workman furnished only his skill and labor, and the article was destroyed without fault, and before it was finished, the one loses the materials and the other his labor. (*c*) The Civil Code of Louisiana follows, in this respect, the rule in the French code. (*d*) The reason of the distinction is, that, in the one case, the employer is the owner of the article or subject with which the

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(*a*) Dig. 19, 2, 59 Pothier, Traité du Contrat de Louage, No. 433.

(*b*) Menetone *v* Athawes, 3 Burr. Rep. 1592. Gillett *v.* Mawman, 1 Taunt Rep 137. Story on Bailment, § 441 But if the mechanic was by contract to complete the work before payment for a specific sum, and the employer to furnish the materials, and when the work was nearly finished the same be destroyed by an accidental fire, no compensation is recoverable, for the contract is entire, and performance is a condition precedent But without a contract postponing the payment to the completion of the work, the workmen would be entitled to a *pro rata* payment. 3 Burr. *sup.* Story on Bailment, § 426. Brumby *v* Smith, 3 Ala. Rep. N. S 123, where A contracted with B to build a house on A.'s land, and A. to furnish the materials, and the builder to be paid when the house was finished. It was burnt down by accident when nearly completed, and the builder was held entitled to the value of his labor, on the maxim that A. was owner of the materials and the structure, and *res perit domino.* Wilson *v.* Knott, 3 Humph. Tenn R 473. So when a manufacturer agrees to construct an article out of his own materials, the property remains with him until completed and delivered It would be the same if the manufacturer furnished the principal part of the materials, but if the employer furnished the whole or principal part of the materials. he would retain the property during the performance of the work. Gregory *v.* Stryker, 2 Denio, 628.

(*c*) Civil Code, Nos. 1788, 1789, 1790 2 Pardessus, Droit Com. p. 2, tit. 7, art. 526.

(*d*) Civil Code of Louisiana, art. 2731. Seguin *v.* Debon, 3 Martin's La Rep. 6.

labor is incorporated; and, in the other case, the workman is the owner. The principle is still the same. *Res perit domino.* (a)

Mr. Justice Story (b) subdivides this head of *Locatio* into 1. *Locatio operis faciendi*, or hire of labor and services. 2. *Locatio custodiæ*, or receiving goods on deposit for hire. He includes under the last head, agisters of cattle, warehousemen, and wharfingers; and to these may be added, a class of bailees known in this country by the term of forwarding men, or merchants. They are all responsible for want of good faith, and of reasonable care and ordinary diligence, and not to any greater extent, unless the business and duty of carriers be attached to their other character. (c) * But INNKEEPERS *592 form an exception to the general rule, and they are held responsible to as strict and severe an extent as common carriers; and the principle was taken from the Roman law, and adopted into modern jurisprudence. (d)

(3.) The responsibility of an INNKEEPER for the horse or goods of his guest, whom he receives and accommodates for hire, has been a point of much discussion in the books. In general, he is responsible at common law for the acts of his domestics, and for thefts, and is bound to take all due care of the goods and baggage of his guests deposited in his house, or intrusted to the care of his family or servants, without subtraction or loss, day and night. He is said to be chargeable on the ground of the profit which he receives for entertaining his guests. (e) The

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(a) Story's Com. § 438.

(b) Ibid. § 422.

(c) Cailiff v. Danvers, Peake's N. P. Rep. 114. Finucane v. Small, 1 Esp. N. P. Rep. 315. Garside v. Trent Navigation Co. 4 Term Rep. 581. Sidaways v. Todd, 2 Starkie's N. P. Rep. 400. Platt v. Hibbard, 7 Cowen's Rep. 497. Brown v. Dennison, 2 Wendell's Rep. 593. Schmidt v. Blood, 9 Wend. Rep. 268. Streeter v. Horlock, 1 Bing. Rep. 34. Roberts v. Turner, 12 Johns. Rep. 232. Story's Com. §§ 442–456. See also *supra*, p. 600, n. (d).

(d) Dig. 4, 9. The edict of the prætor included shipmasters, innkeepers, and stable-keepers in the same severe but wise and wholesome responsibility. See *infra*, vol. iii. p. 7, note *a*, where the edict is specially noticed. Mr. Justice Story has given a general view of the responsibility of innkeepers in the civil law and in the law of those nations of Europe which have adopted it. Story on Bailments, §§ 464–469.

(e) Morse v. Slue, 1 Vent. Rep. 238. Lane v. Cotton, 12 Mod. 483, 487. Towson v. Havre-de-Grace Bank, 6 Harr. & Johns. 47.

custody of the goods of his guest is part and parcel of the contract to feed, lodge, and accommodate the guest for a suitable reward. (*a*)

In *Calye's case*, (*b*) it was decided, upon the authority of the original writ in the register, (and which Lord Coke said was the ground of the common law on the subject,) that if a guest came to an inn, and directed that his horse be put to pasture, and the horse was stolen, the innkeeper was not responsible, in his character of innkeeper, for the loss of the horse. However, it was agreed in that case, that if the owner had not directed that the horse be put to pasture, and the innkeeper had done it of his own accord, he would be responsible.

Perhaps this rule might admit of some limitations; for if the putting the traveller's horse to pasture in the summer season, or leaving the carriage in an open shed in the street, be the *593 usual custom, as it is in many parts of * this country, the

(*a*) Holt, Ch. J., 12 Mod. Rep. 487. Grinnell *v.* Cook, 3 Hill's Rep. 485 An innkeeper cannot lawfully refuse to receive guests to the extent of his reasonable accommodations; nor can he impose unreasonable terms upon them. Bennett *v.* Mellor, 5 Term Rep. 274. Thompson *v.* Lacy, 3 B. & Ald. 285. Hawthorn *v.* Hammond, 1 Carr. & Kirwan, 404. And as a compensation for the innkeeper's responsibility, the better opinion is, that he has a lien on all the goods of his guest at the inn, for all his expenses there. Story on Bailments, § 476. Lord Kenyon and Ashhurst, J, in Kirkman *v.* Shawcross, 6 Term Rep. 14. Grinnell *v.* Cook, *supra*.[1] But the innkeeper is not responsible in that character for goods left in his custody, unless the owner be his *guest*, by either having been there, or intending to go there, in that capacity. He must be either actually or constructively the innkeeper's guest. Id.[2]

(*b*) 8 Co. 32.

[1] An innkeeper's lien extends to goods brought to his inn by a guest, though they belong to a third party, provided they are such as a person might ordinarily travel with. Snead *v.* Watkins, 37 Eng. L. & Eq. 384. And where several persons travel together and put up at one inn, the goods of one cannot be detained for the board of all. Clayton *v.* Butterfield, 10 Rich. Law, (S. C.) 300.

[2] Purchasing liquor at an inn is sufficient to constitute one a guest. McDonald *v.* Edgerton, 5 Barb S. C. Rep. 560. In Dickinson *v.* Winchester, 4 Cush. 114, it was held that, where an innkeeper engaged to take travellers "free," from the station to his hotel, and had made arrangements with hackmen for that purpose, he was liable for a trunk lost on the way. The relation of innkeeper and guest ceases when the latter has paid his bill and leaves the house with the declared intention of not returning. Wintermute *v.* Clark, 5 Sandf. S. C. 242. See a learned examination of this subject in McDaniels *v.* Robinson, 26 Vt. 316, and note, per Redfield, C. J. McDaniels *v.* Robinson, 2 Wms. (28 Vt.) 387.

consent or direction of the owner to that effect might be fairly presumed. (*a*)

It was laid down in the same case in Coke, that the innkeeper was bound absolutely to keep safe the goods of his guest deposited, within the inn, and whether the guest acquainted the innkeeper that the goods were there, or did not; and that he would in every event be bound to pay for the goods if stolen, unless they were stolen by a servant or companion of the guest. The responsibility of the innkeeper extends to all his servants and domestics, and to all the movable goods and chattels and moneys of his guest which are placed within the inn, (*infra hospitium*;) but it does not extend to trespasses committed upon the person of the guest, nor does it extend to loss occasioned by inevitable casualty, or by superior force, as robbery. (*b*) It is no excuse for the innkeeper, that he was, at the time the goods of his guest were lost, sick or insane, for he is bound to provide careful servants. (*c*) In *Bennett* v. *Mellor*, (*d*) the responsibility of innkeepers was laid down with great strictness, and even with severity. The plaintiff's servant came to an inn to deposit some goods for a week. The proposal was rejected, and the servant sat down in the inn as a guest, with the goods placed behind him, and very shortly thereafter they were stolen. It was held, that the innkeeper was liable for the goods; for the servant was entitled to protection for his goods during the time

(*a*) Story's Com. § 478 If the traveller directs his horse to be put into the stable, and says nothing about his gig, and if be left in the highway with other carriages, and is stolen, the innkeeper has been held liable, under the implied promise to take the gig *infra hospitium*. Jones *v.* Tyler, 3 Neville & Manning's Rep. 576. 1 Adolph. & Ellis, 522, S. C. This was carrying the protection of the inn sufficiently far.

(*b*) Calye's case, *ub. sup.* Morse *v.* Slue, 1 Vent. Rep. 190, 238. Kent *v.* Shuckard, 2 B. & Adol. 803. Story's Com. §§ 471–473. But from the case of Mason *v.* Thompson, and from the *dictum* of Bailey, J., in Richmond *v.* Smith, 8 B. & Cress. 9, it would seem that innkeepers were responsible, like common carriers, for robbery and burglary. Story on Bailments, § 472. If a horse, chaise, and harness be delivered to an innkeeper, the payment for the horse includes a compensation for keeping the chaise and harness, and he is liable as an innkeeper for the loss of them. Mason *v.* Thompson, 9 Pick. Rep. 280. This last case was questioned and overruled in Grinnell *v.* Cook, 3 Hill's Rep. 485, so far as it went to hold the innkeeper in that character responsible for the goods of a person who was not at the inn, and did not intend to go there as a guest, and therefore was no guest.

(*c*) Calye's case, *ub. sup.* Cross *v.* Andrews, Cro. Eliz. 622.

(*d*) 5 Term Rep. 274.

he continued in the inn as a guest. It was not necessary that the goods should have been in the special keeping of the innkeeper, in order to make him liable; if they be in the inn, *594 that is sufficient to charge him. * It is not necessary to prove negligence in the innkeeper; for it is his duty to provide honest servants, according to the confidence reposed in him by the public; (a) and he ought to answer civilly for their acts, even if they should rob the guests who sleep under his roof. An innkeeper, like a common carrier, is an insurer of the goods of his guests, and he can only limit his liability by express agreement or notice. (b) Rigorous as this law may seem, and hard as it may actually be in some instances, it is, as Sir William Jones observes, founded on the principle of public utility, to which all private considerations ought to yield. Travellers, who must be numerous in a rich and commercial country, are obliged to rely almost implicitly on the good faith of innkeepers; and it would be almost impossible for them, in any given case, to make out proof of fraud or negligence in the landlord. The Roman prætor held innkeepers responsible for the goods of their guests, on the same principle of public utility. It was necessary, says Ulpian, in commenting on the edict of the prætor, to confide largely in the honesty of such men; and if they were not held very strictly to their duty, they might yield to the temptation to commit a breach of trust. They were

(a) If the goods of a guest be deposited in a public inn, and be lost or injured, the *primâ facie* presumption is, that the loss was occasioned by the negligence of the innkeeper or his servants, but the presumption may be rebutted. Dawson *v.* Chamney, 5 Adol. & Ellis, N. S. 164.[1]

(b) Richmond *v.* Smith, 8 Barn. & Cress. 9.

[1] See, also, Merritt *v.* Claghorn, 23 Vt. 177; Metcalf *v.* Hess, 14 Ill. 129; Kisten *v.* Hildebrand, 9 B. Mon. 72; McDaniels *v.* Robinson, 26 Vt. 316; Laird *v.* Eichold, 10 Ind. 212. But a stricter liability was imposed in Shaw *v.* Berry, 31 Me. 478. Mateer *v.* Brown, 1 Cal. 221. Sibley *v.* Aldrich, 33 N. H. 533, where the subject is examined at length. Negligence on the part of the guest will discharge the innkeeper. Armistead *v.* White, 6 Eng. L. & Eq. 349. Chamberlain *v.* Masterson, 26 Ala. 371. Gross negligence on the part of the guest need not be shown. Fowler *v.* Dorlon, 24 Barb. (N. Y.) 384. In Cashill *v.* Wright, 37 Eng. L. & Eq 175, the negligence on the part of the guest was defined to be such, that the loss would not have happened, if the guest had used the ordinary care that a prudent man might be reasonably expected to have taken under the circumstances.

bound to answer for all losses and damages happening even without their default, unless they were fatal losses, occurring from *vis major* or irresistible force. (*a*)

The responsibility of innkeepers, to the full extent of the English law, has been recognized in the courts of justice in this country. (*b*) Thus, in *Quinton* v. *Courtney*, (*c*) the innkeeper was held liable for money stolen out of the saddle-bags of the guest, which he had delivered to the servant without informing him, or his master, that there was money in them.[1] And in *Clute* v. *Wiggins*, (*d*) the innkeeper was * held responsible for a theft of bags of grain in a loaded sleigh of a guest which had been placed for the night in a wagon or out-house appurtenant to the inn, with fastened doors. The sleigh was deemed *infra hospitium*, and the innkeeper liable, without any negligence being proved against him. *595

Under so extended a responsibility, it becomes very important that the nature of inns and guests, and the persons to whom the description applies, should be precisely understood.

Common inns were declared in *Calye's case* to be instituted for passengers and wayfaring men, and that a neighbor, who was no traveller, and lodged at the inn as a friend, at the request of the innkeeper, was not a guest whose goods would be under special protection. A house merely for lodging strangers

(*a*) Dig. 4, 9, 1, 3. Jones on Bailment, 95, 96.

(*b*) Mason *v.* Thompson, 9 Pick. 280.

(*c*) 1 Haywood's N. C. Rep. 40.

(*d*) 14 Johns. Rep. 175. Newson *v.* Axon, 1 M'Cord's Rep. 509, and Piper *v.* Manny, 21 Wendell, 282, contain a recognition of the same principle.

[1] In Simon *v.* Miller, 7 La. Ann. 360, it was held that an innkeeper is responsible only for usual and ordinary baggage, and not for unknown treasure belonging to the traveller. See also Mateer *v.* Brown, 1 Cal. 221. But this relaxation of the innkeeper's liability was not admitted in Berkshire Woollen Co. *v.* Proctor, 7 Cush. 417. In Pettigrew *v.* Barnum, 11 Ind. 434, it was held that an innkeeper is responsible for the guest's baggage only, and that that term does not include merchandise or other valuables, such as silver knives, forks, and spoons. By a recent statute of New York, (Laws of 1855, ch. 421,) a proprietor of a hotel may limit his responsibility as to money, jewels, and ornaments, belonging to his guests, by posting in their rooms a notice, that he has provided a safe for the safekeeping of money, jewels, and ornaments; and if the guest neglect to deposit his money, jewels, or ornaments, in the safe, the proprietor of the hotel is not responsible for loss by theft or otherwise.

for a season, who came to a watering-place, and furnishing hay and stable-room for their horses, and selling beer to them and to no one else, has been held not to be a public inn. (a) It must be a house kept open publicly for the lodging and entertainment of travellers in general, for a reasonable compensation. If a person lets lodgings only, and upon a previous contract with every person who comes, and does not afford entertainment for the public at large indiscriminately, it is not a common inn. (b) In *Thompson* v. *Lacy*, (c) this subject was fully discussed; and it was decided that a house of public entertainment in London, where provisions and beds were furnished for travellers, and all others capable of paying a suitable compensation for the same, was a public inn. The owner was subject to all the liabilities of an innkeeper, even though he kept no stables, and was not frequented by stage-coaches and wagons from the country; and even though the guest did not appear to have been a traveller, but to have previously resided in furnished lodgings in the city.

A lodging-house keeper was one that made a contract *596 with every *person that came; but an inn, said one of the judges in that case, is a house, the owner of which holds out that he will receive all travellers and sojourners who are willing to pay a price adequate to the sort of entertainment provided, and who come in a situation in which they are fit to be received. (d)[1] But the keeper of a mere coffee-house or private boarding or lodging-house, is not an innkeeper in the sense

(a) Parkhurst v. Foster, 1 Salk. Rep. 387. Carth. 417, S. C.

(b) Entertaining strangers occasionally for compensation, does not make a person an innkeeper. The State v. Mathews, 2 Dev. & Battle, 424.

(c) 3 B. & Ald. 283.

(d) Parker v. Flint, 12 Mod. 254, S. P. A guest is not entitled to select a particular room or bedroom for the purpose of sitting up all night, so long as the innkeeper offers to furnish him with a proper room for that purpose. Fell v. Knight, 8 Meeson & Wels. 269.

[1] To charge one as an innkeeper, it is "sufficient to prove that all who came were received as guests, without any previous agreement as to the length of their stay or the terms of their entertainment. . . A public house of entertainment for all who choose to visit it, is the true definition of an inn." Oakley, C. J., in Wintermute v. Clark, 5 Sandf. S. C. 242. A hotel in a city, which receives transient guests, is a common inn. Taylor v. Monnot, 4 Duer, (N. Y.) 116.

of the law. (*a*)[1] If a guest applies for a room in an inn, for a purpose of business distinct from his accommodation as a guest, the particular responsibility does not extend to goods lost or stolen from that room. (*b*) Though a landlord cannot exonerate himself by merely handing over a key to his guest, yet, if the guest takes the key, it will be a question of fact whether he took it *animo custodiendi*, so as to exempt the landlord.

In New York, and throughout the Union, inns and taverns are under statute regulations, and their definition and character are contained in the statute. Taverns in New York are to be licensed by the commissioners of excise; and the license is necessary except in cases of necessity, and it is deemed a personal trust, and cannot be assigned. (*c*) There are licenses merely to sell strong and spirituous liquors under five gallons, granted to merchants and grocers, but they cannot be sold to be drunk in the house or store of the seller; and there are other licenses to retail strong and spirituous liquors, granted to persons *who keep an inn or tavern.* Those persons, so licensed, are the ordinary innkeepers, within the contemplation of the statute law of New York; for the statute declares * that no person who has not at the time a license to sell strong or spirituous liquors or wines, to be drunk in his house, shall put up any sign indicating that he keeps a tavern. (*d*) *597

(*a*) Doe *v.* Laming, 4 Campb. N. P. Rep. 77. Whathey *v.* M'Dougal, 1 Bell's Com. 469.

(*b*) Burgess *v.* Clements, 4 Maule & Selw. 306. Farnworth *v.* Packwood, 1 Holt's N. P. 209.

(*c*) Alger *v.* Weston, 14 Johns. Rep. 231. Palmer *v.* Doney, 2 Johns. Cas. 346. Commonwealth *v.* Bryan, 9 Dana's Rep. 310.

(*d*) N. Y. Revised Statutes, vol. i. pp. 678–682. Ibid. 661, sec. 6. By the statute,

[1] For the distinction of the liability of an innkeeper to a boarder from the liability which he is under to a guest, see Manning *v.* Wells, 9 Humph. R. 746; Chamberlain *v.* Masterson, 26 Ala. 371; Willard *v.* Reinhardt, 2 E. D. Smith, (N. Y.) 148. A traveller stopping at an inn does not cease to be a guest and become a boarder by an agreement to pay by the week. Berkshire Woollen Co. *v.* Proctor, 7 Cush. 417. As to the liability of boarding-house keepers, see Dansey *v.* Richardson, 25 Eng. L. & Eq. 76. By a recent statute of New York, (Laws of 1860, ch. 446,) boarding-house keepers have the same lien upon and right to detain the baggage and effects of any boarder, for the amount which may be due for board by such boarder, to the same extent and in the same manner as innkeepers have such lien and right of detention.

(4.) The *locatio operis mercium vehendarum*, is a contract relating to the carriage of goods for hire; and this is by far the

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every keeper of a public inn or tavern, except in the city of New York, is required to keep at least two spare beds for guests, well provided, and good and sufficient stabling, grain, hay, or pasturage, for horses and other cattle belonging to travellers. Every innholder or tavern-keeper, who is licensed as such, is also required to put and keep up a proper sign on or adjacent to the front of his house; and every person who erects or keeps up such a sign without a license to sell spirituous liquors by retail, or sells them by retail to be drunk in his house, outhouse, yard, or garden, without entering into recognizance as an innkeeper, is subjected to a penalty for every offence. If the innkeeper has not put up a sign, yet if he keeps a tavern, he is still responsible at common law as an innkeeper. Calye's case, 8 Co 32. At common law, any person might keep a tavern and sell vinous liquors there without control; but under the English statute of 5 & 6 Edw. IV., a license to keep a tavern would not authorize the retail of liquors without another license. Stevens *v.* Duckworth, Hard. Rep. 338. The better opinion would seem to be, that under the New York statute there may lawfully be a public inn without an excise license, though without a license no person can put up a sign *indicating that he keeps a tavern;* and if he has the excise license to retail in small quantities liquors to be drunk in his house, he must be bound also to keep *an inn* for the accommodation of travellers, in the common-law sense of the term. The excise license may perhaps be regarded as a criterion to determine between the common-law *inn*, and the statute *inn* and *tavern* combined. In the case of the Overseers of Crown Point *v.* Warner, 3 Hill, 150, occurring in 1842, since the preceding observations were made, it was adjudged that the words *inn* and *tavern*, and *innholder* and *tavernkeeper*, were used in the N. Y. R. S. vol. i. p 676, synonymously, and that the right to keep an inn without an excise license is common to all persons. But if a license to sell spirituous liquors be added, the inn then becomes a statute franchise, and the statute regulations prescribing rules of conduct to inn and tavern-keepers, apply *only* to such licensed houses. By a statute of New York of 12th April, 1843, ch. 97, licenses to keep taverns may now be granted, without including a license to sell spirituous liquors or wine. So in Alabama, no person can keep a public inn without a license, though spirituous liquors be not retailed. The State *v.* Cloud, 6 Ala. R. N. S. 628. The Act of Michigan of 1833, is essentially the same, for no person, *unless licensed to keep a tavern*, can sell spirituous liquors by retail under a quart. In Pennsylvania, a license to keep a *tavern* or *inn*, would seem, *ipso facto*, to imply a license, to retail vinous and spirituous liquors, though licenses to sell liquors may be granted to persons combining other business with the same. Purdon's Dig. 502–507. By the law of Ohio, no person is permitted to keep a *tavern* without a license from the Court of Common Pleas of the county. Statutes of Ohio, 1831. By the Act of Kentucky of 1834, no tavern within any town or city, or within one half mile thereof, can be kept without license, *even though spirituous liquors be not retailed.* So, in Vermont, no person can keep *an inn* without a license from the county court; and a license to keep a victualling-house will not authorize a person to keep a house for public entertainment; and a person may keep an inn without selling spirits or wine. State *v.* Stone, 6 Vermont Rep. 295. In Connecticut, a distinction is made by statute between taverns and victualling-houses. Both kinds require a license, but tavern-keepers only have a right to retail spirituous liquors. The victualling-houses are called, also, houses of

most important, extensive, and useful of all the various contracts that belong to the head of bailment. The carrier for hire

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refreshment. Statutes of Connecticut, 1838, pp. 592–595. In Massachusetts, there seems to be three descriptions of persons in purview of the Revised Statutes, c. 47; (1.) A common innholder, who sells liquors and provides accommodation for man and beast; (2.) A common victualler, who sells liquors and food only. Both of these must be licensed; (3.) A common grog-shop, or drinking-house keeper, who is not entitled to a license. Commonwealth *v.* Pearson, 3 Metc. 449. In North and South Carolina, a person is indictable for retailing spirituous liquors without license; and in the former state, public inns are called, in the statute, ordinaries. 1 N. C. R. S. p. 445. State *v.* Morrison, 3 Dev. N. C. Rep. 299. The State *v.* Mooty, 3 Hill's S. C. Rep. 187. Tavern-keepers and innholders are generally used synonymously; and as the local laws in all the states prohibit persons from retailing spirituous liquors, and in Alabama, by Act of 1807, even beer or cider, without a license, that license ordinarily becomes essential to the character, and, in some instances, to the lawfulness of a public inn or tavern. In Tennessee, the prohibition to retail spirituous liquors is held not to include wine which is procured by fermentation, and only those liquors which are procured by distillation. Caswell *v.* The State, 2 Humphrey, 402. Since the growth and diffusion of temperance societies, the restrictions by law on the retail of spirituous liquors have greatly increased. In Massachusetts, by statute, in 1838, the retail of spirituous liquors under fifteen gallons was wholly prohibited. By the Revised Statutes of Massachusetts of 1836, ch. 47, no person can be an innholder or seller of spirituous liquor, to be used about his house or other building, without license. Licenses to innkeepers and retailers may be granted for each town and city, and licenses *may be* confined to the sale of fermented liquors, such as wine, beer, ale, and cider, and excluding the sale of brandy, rum, or other spirituous liquors. The interdiction in Mississippi was limited to one gallon, and in most of the states the regulations on the subject have become very strict. The laws of the Old Plymouth Colony (edit. 1836, by W. Brigham, p. 287,) declared that no person licensed to keep a public house of entertainment *should be without good beer.*

Innkeepers are liable to an action if they refuse to receive a guest without just cause. See *infra* p. 634. The innkeeper is even indictable for the refusal, if he has room in his house, and the guest behaves properly. Rex *v.* Ivens, 7 Carr. & Payne, 213. In the case of The State *v.* Chamblyss, 1 Cheve's S. C. Law Rep. 220, the subject of inns and taverns was elaborately discussed. It was held by a majority of the court, that a license to keep a *tavern* included, also, the privilege of retailing spirituous liquors, in small quantities, to travellers and guests. The minority of the court held, that the tavern license and the license to retail were two distinct things, and that the former license did not necessarily include the other. It would appear, from the learned investigations in that case, that a *tavern* was originally a place where the keeper sold wine alone, but, in process of time, the seller of wine (including other strong drinks) began to supply food and lodging for wayfaring men, and the term *tavern* became to be synonymous with that of *inn,* as far back as the reign of Elizabeth. The preamble to the statute of 1 James I. c. 9, declared, that "the ancient, true, and principal use of inns, alehouses, and victualling houses, was for the receipt, relief, and lodging of wayfaring people, travelling from place to place, and not meant for entertainment and harboring of lewd and idle people," &c. The statutes of 2

in a particular case, and not exercising the business of a common carrier, is only answerable for ordinary neglect, unless he, by express contract, assumes the risk of a common carrier. (*a*) But if he be a COMMON CARRIER, he is in the nature of an insurer, and is answerable for accidents and thefts, and even for a loss by robbery. He is answerable for all losses which do not fall within the excepted cases of the act of God (meaning inevitable accident, without the intervention of man) and public enemies.[1] This has been the settled law of England for ages;

James I. c. 7, 4 James I. c. 5, and 1 Chas I. c. 4, show, also, the primitive use of the inn, now commonly called a tavern In the statutes of South Carolina, both under the colony and under the state, inns and taverns have been used promiscuously for places where spirituous liquors were sold under a license. But there were licensed retailers of spirituous liquors who do not keep a tavern, and there were licensed retailers who keep a tavern and retail spirituous liquors as part of the entertainment, together with food, lodgings, &c., for travellers and wayfaring people. The mere business of entertaining travellers and others with food, lodging, &c., does not require an excise license. They are not tavern-keepers within the purview of the excise laws, but innkeepers, in the primitive sense, and they are entitled to some of the privileges and subject to some of the liabilities of keepers of taverns. I presume they are responsible for the goods of their guests to the extent of innkeepers and tavern-keepers at common law. The regulations of some late English statutes (11 Geo. IV. and 1 Wm. IV. c. 64, and 4 & 5 Wm. IV. c. 85) are very strict, even as to beer-houses. No person licensed to sell beer by retail shall have or keep his house open for the sale thereof, nor retail the same, or suffer it to be drank in or at his house before 4 A. M. and after 10 P. M.; nor at any time between 10 A. M. and 1 P. M.; nor between the hours of 3 and 5 o'clock P. M. on Sundays.

(*a*) Robinson *v.* Dunmore, 2 Bos. & Pull. 416. Brind *v.* Dale, 8 Carr. & Payne, 207. But in Gordon *v.* Hutchinson, 1 Watts & Serg. 285, the rule was carried out

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[1] The act of God must be both the *proximate* and the *sole* cause of the loss to protect the carrier. New Brunswick S. & C. T. Co. *v.* Tiers, 4 Zabr. 697. See, however, Morrison *v.* Davis, 20 Penn. 171. As to the meaning of inevitable accident, under different circumstances, see Fish *v.* Chapman, 2 Kelly's (Geo.) R. 349, 356; Europa, (U. S. Law Mag. Dec. 1850, p. 497,) before Dr. Lushington; King *v.* Shepherd, 3 Story's R. 349; Friend *v.* Woods, 6 Gratt. 189.

A loss occurring from collision, by the negligence of either party, renders the carrier liable. Mershon *v.* Hobensack, 3 Zabr. 580.

When the carrier stipulates to deliver within a limited period, the obligation is said to be absolute, the excepted cases in the bill of lading relating to the damage of the goods. Harmony *v.* Bingham, 1 Duer, R. 209.

When the goods have been injured by inevitable accident, the carrier cannot be held liable for not remedying the injury. Steamboat Lynx *v.* King, 12 Miss. 272. In Chevaillier *v.* Patton, 10 Tex. 344, it was held that a *custom* of carriers, known to the plaintiff, to carry cotton in open wagons, was a good defence to an action for damages caused by rain.

and the rule is intended as a guard against fraud and collusion, and it is founded on the same broad principles of public policy and convenience * which govern the case of inn- *598 keepers. (a) This principle of extraordinary responsibility was taken from the edict of the prætor in the Roman law, (b) and it has insinuated itself into the jurisprudence of all the civilized nations of Europe. But the rule in the civil law was not carried to the severe extent of the English common law. So in France, common carriers are not liable for losses resulting from superior force, as robbery, for that comes within the *damnum fatale* of the civil law, which exempted the carrier; (c) and the same rule has been adopted in the Civil Code of Louisiana. (d) In Scotland, loss by fire is also considered as one happening by inevitable accident, and for which the carrier is not responsible; but Mr. Bell insists that loss by robbery ought not to be deemed an exception to the responsibility of the carrier, and that the many practical illustrations in the English law ought to be received "as of more authority than hundreds of dicta rescued from the cobwebs of the civilians." (e)

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more extensively, and it was held that a waggoner who carried goods for hire, was responsible as a common carrier, though transportation was only an occasional and incidental employment; and this decision seems to be founded in better policy as applicable to business in this country.[1]

(a) Co. Litt. 89 a. Woodleife *v.* Curties, 1 Rol. Abr. 2 C. pl. 4. Lord Holt, in Coggs *v.* Bernard, 2 Lord Raym. 918. Lee, Ch. J., in Dale *v.* Hall, 1 Wils. Rep. 281. Forward *v.* Pittard, 1 Term Rep. 27. Proprietors of the Trent Navigation *v.* Wood, 3 Esp. Rep. 127. Riley *v.* Horne, 5 Bing. Rep. 217.

(b) Dig. 4, 9, 1. Ib. 4, 9, 3, 1.

(c) Code Civil, art. 1782, 1784, 1929, 1954.

(d) Art. 2722, 2725, 2939.

(e) 1 Bell's Com. 470. The English and American decisions held the common carriers responsible for loss by fire. See *infra*, vol. iii. 304. Hale *v.* N. Jersey Steam Navigation Company, 15 Conn. R. 539, S. P.[2]

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[1] See also Chevaillier *v.* Straham, 2 Tex. 115. *Contra*, Fish *v.* Chapman, 2 Geo. 349; Samms *v.* Stewart, 20 Ohio, 69.

[2] Parker *v.* Flagg, 26 Maine R. 181. And the carrier will be liable for a loss by fire at his warehouse, where the goods were detained *in transitu*, until the completion of an aqueduct. Graff *v.* Bloomer, 9 Barr's R. 114.

In Hosea *v.* McCrory, 12 Ala. R. 349, it was held, that the carrier was liable for a failure to deliver money on request, though the carrying of the money under the circumstances was admitted to be a *violation of the Post-Office Laws*. Delivery to a common carrier is

Common carriers undertake, generally, and not as a casual occupation, and for all people indifferently, to convey goods, and deliver them at a place appointed, for hire as a business, (a) and with or without a special agreement as to price. (b) [1] They consist of two distinct classes of men, viz: inland carriers by land or water, and carriers by sea; and in the aggregate body are included the owners of stage wagons and coaches, and railroad cars, who carry goods as well as passengers for hire, *599 wagoners, teamsters, cartmen, porters, the masters *and owner's of ships, vessels, and all watercraft, including steam vessels, and steam tow-boats, belonging to internal as well as coasting and foreign navigation, lightermen, barge owners, canal boatmen, and ferrymen.[2] As they hold themselves to the world as common carriers for a reasonable compensation, they assume to do, and are bound to do, what is required of them in the course of their employment, if they have the requisite convenience to carry, and are offered a reasonable or customary price; and if they refuse without some just ground, they are liable to an action. (c) [3]

(a) Gisbourn v. Hurst, 1 Salk. Rep. 249. Brind v. Dale, 8 Carr. & P. 207. In this last case Lord Abinger suggested, that a town cartman, whose carts ply for hire near the wharves, was not a common carrier. See Story on Bailments, § 496, n. 3, 2d edit., who strongly, and I think properly, questions the solidity of this distinction.

(b) Lawrence, J., in Harris v. Packwood, 3 Taunt. Rep. 264. Story on Bailments, § 495, 3d edit.

(c) Jackson v. Rogers, 2 Show. Rep. 332. Lord Kenyon and Ashhurst, J., in Elsee v. Gatward, 5 Term Rep. 143. Holroyd, J., in Batson v. Donovan, 4 Barn. & Ald. 32. Pickford v. Grand J. Railway Co. 8 Mees. & Welsby, 372. 1 Bell's Com. 467. Dwight v. Brewster, 1 Pick. Rep. 50. Jencks v. Coleman, 2 Sumner, 221. Story's Com. on Bailments, § 496. Bonney v. The Huntress, District Court of Maine, 1840. Pomeroy v. Donaldson, 5 Missouri Rep. 36. Patton v. Magrath, Dud-

requisite to charge him with responsibility, but this delivery may be actual or constructive. Evidence of constant usage by the carrier to receive goods left at a certain place, will be sufficient to render him responsible for goods left at such place. Merriam v. Hartford, &c. R. Co. 20 Conn. R. 354.

[1] Fish v. Chapman, 2 Kelly's (Geo.) R. 349. Citizens' Bank v. Nan. St. Bt. Co. 2 Story, 16.

[2] It seems that electric telegraph companies are common carriers. McAndrew v. El. Tel. Co. 33 Eng. L. & Eq. 180. It is held in Hersfield v. Adams, 19 Barb. 577, that expressmen, who forward goods by the conveyance of others, are not common carriers.

[3] If a carrier carries goods without an order from the owner or his agent, he is not enti-

In *Morse* v. *Slue*, (*a*) it was decided, in the reign of Charles II., by the Court of K. B., upon great consideration, that the master of a vessel employed to carry goods beyond sea, in consideration of the freight, was answerable as a common carrier. It was admitted, in that case, and afterwards declared by Lord Hardwicke, in *Boucher* v. *Lawson*, (*b*) that the action lay equally against masters and owners of vessels. The doctrine in those cases has been recognized ever since; (*c*) and it applies equally to the carrier of goods in the coasting trade from port to port, (*d*) and to a bargeman and hoyman upon a navigable river. (*e*) The cases are contradictory as to its application to wharfingers; and the later cases do not * make the application to them. (*f*) They are all liable in their respective characters as common carriers, and to the whole extent of inland carriers, except so far as they may be exempted by the exceptions in the contracts of charter-party and bill of lading, or by

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ley's S. C. Law & Eq. Rep. 159. Hale *v.* New Jersey Steam Co. 15 Conn. Rep. 539. See also *infra*, pp. 608, 609. An action against a common carrier upon the custom is founded upon a tort, and arises *ex delicto*; and it is unnecessary to join as defendants all the owners of the vehicle employed in the conveyance. Orange Bank *v.* Brown, 3 Wendell's Rep. 158.

(*a*) 1 Vent. Rep. 190, 238. 2 Lev. Rep. 69. Barclay *v.* Gana, 3 Doug. 389, S. P.

(*b*) Cases temp. Hardw. 85, 194.

(*c*) See Goff *v.* Clinkard, cited in 1 Wils Rep. 282.

(*d*) Dale *v.* Hall, 1 Wils. Rep. 281. Proprietors of the Trent Navigation *v.* Wood, 3 Esp. Rep. 127.

(*e*) Rich *v.* Kneeland, Cro. Jac. 330. Wardell *v.* Mourillyan, 2 Esp. N. P. Cas. 693. Elliott *v.* Rossell, 10 Johns. Rep. 1.

(*f*) Ross *v.* Johnson, 5 Burr. Rep. 2825, Maving *v.* Todd, 1 Starkie's Rep. 72, are cases which countenance the idea that wharfingers are liable as common carriers, but later authorities justly question this doctrine, and in Roberts *v.* Turner, 12 Johns. Rep. 232, Platt *v.* Hibbard, 7 Cowen's R. 497, Blin *v.* Mayo, 10 Vermont Rep. 60, and Ducker *v.* Barnett, 5 Missouri Rep. 97, it was considered that *wharfingers* were not liable as common carriers, unless they superadd the character of carrier to that of wharfinger; they are, like *warehousemen*, bound only to ordinary care. *Supra*, p. 591.[1]

tled to any compensation. Fitch *v.* Newberry, 1 Doug. (Mich.) R. 1. It seems that a railway company are not excused from carrying ticket-holders according to their contract, on the ground that there is no room in the train. To exempt themselves, their contract should be conditional upon there being room. Hawcroft *v.* Great Northern R. Co. 8 Eng. L. & Eq. 362.

[1] Foote *v.* Storrs, 2 Barb. S. C. Rep. 326. As to rights of warehousemen, see Sage *v.* Gittner, 11 Barb. R. 120; Teall *v.* Sears, 9 Barb. R. 317.

statute. They are bound to indemnify, in cases in which they are liable as common carriers, according to the value at the place of destination where they contracted to deliver the goods. (a) There is no distinction between a land and a water carrier; and so it was declared by Lord Mansfield, and the other judges of the K. B., in the case of *The Proprietors of the Trent Navigation* v. *Wood;* (b) and the carrier is equally liable for the acts of his servants or agents, and for his own. The maxim of *respondet superior* applies. (c)

The proprietors of a stage-coach do not warrant the safety of passengers in the character of common carriers; and they are not responsible for mere accidents to the persons of the passengers, but only for the want of due care. (d) Slight fault, unskilfulness, or negligence, either as to the competence of the carriage, or the act of driving it, may render the owner *601 responsible in damages for an injury to * the passengers; they are to be transported as safely as human foresight and care will permit. (e) [1] It was held, also, by Lord Holt, that

(a) Watkinson v. Laughton, 8 Johns. Rep. 213. Amory v. M'Gregor, 15 Ibid. 24. Oakey v. Russell, 18 Martin's La. Rep 62. M'Gregor v. Kilgore, 6 Ohio Rep. 358. Sedgwick on Damages, p. 370.

(b) 3 Esp. N. P. Rep. 127. 4 Douglas, 287, S. C.

(c) Cavenagh v. Such, 1 Price's Exch. Rep. 328. Ellis v. Turner, 8 Term Rep. 531.

(d) Aston v. Heaven, 2 Esp. N. P. Rep. 533. Christie v. Griggs, 2 Campb. Rep. 79. Crofts v. Waterhouse, 3 Bing. Rep. 321. In Boyce v. Anderson, 2 Peters's U. S. Rep. 150, it was decided, that the law regulating the responsibility of common carriers did not apply to the case of carrying human beings, such as negro slaves, unless the loss was occasioned by the negligence and unskilfulness of the carrier or his agents. It was decided, in Talmadge v. Zanesville & M. R. Co. 11 Ohio Rep. 197, that if a coach be upset by the *negligence* of the driver, an injured passenger may recover his damages from the proprietors. But the coach proprietors cannot recover an indemnity over against the road company for their negligence in not keeping the road in repair. The proprietors in both cases were wrongdoers by their negligence, and the proprietor of the coach can only recover his *direct* damages for the injury done to his coach by the bad road of the company.

(e) Wordsworth v. Willan, 5 Esp. N. P. Rep. 273. Mayhew v. Boyce, 1 Starkie's Rep. 323. Jones v. Boyce, Ibid. 493. Jackson v. Tollett, 2 Ibid. 37. Dudley v. Smith, 1 Campb. Rep. 167. Israel v. Clark & Clinch, 4 Esp. N. P. Rep. 259. Sharp

[1] Peck v. Neil, 3 M'Lean's R. 22. If a passenger, who, during his journey, kept his overcoat in his possession, upon going from the car, leaves it behind, and it be lost, the

the owners were not answerable as carriers for the baggage of the passengers, unless a distinct price was paid for the baggage; and that it was not usual to charge for baggage, unless it exceeded a certain amount in weight or quantity. (a) But the custody of the baggage is an accessory to the principal contract; and the modern doctrine and the tendency of the modern cases seem to be, to place coach proprietors, in respect to baggage,

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v. Grey, 9 Bing. Rep. 457. If a carriage be upset and a passenger injured, it is incumbent on the part of the owner to relieve himself from damages to prove that the driver was a person of competent skill, of good habits, and in every respect qualified and suitably prepared for the business, and that he acted on the occasion with reasonable skill, and with the utmost prudence and caution. Stokes v. Saltonstall, 13 Peters, 181. M'Kinney v. Neil, 1 M'Lean's Rep. 540. Peck v. Neil, 3 Ibid. 22. Maury v. Talmadge, 2 M'Lean's Rep. 157. This question, as to the responsibility of the proprietors of stage-coaches for accidents to passengers, was ably and learnedly discussed in the case of Ingalls v. Bills, 9 Metcalf's Rep. 1, and it was adjudged that the proprietors were answerable for injuries to a passenger resulting from a defect in a coach which might have been discovered by the most careful and thorough examination, but not from injuries resulting from defects not so discoverable. This appears to be a reasonable and sound distinction. The case went further, and held that the proprietors were liable for an injury to a passenger in leaping from the coach, provided it was an act under the circumstances of "reasonable precaution."[1]

(a) Middleton v. Fowler, 1 Salk. Rep. 282. Upshare v. Aidee, Comyn's Rep. 25.

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company is not liable *as a common carrier*. Tower v. Schenectady R. R. Co. 7 Hill's N. Y. Rep. 47.

At common law no action lies by a widow for the loss of her husband, or by a father for the loss of his child against a railway company, by the negligence of the latter. Carey v. Berkshire Railroad Co. 1 Cushing R. 475. For statutory actions in such cases, see *supra*, 182, n. There is no distinction between railroads and ordinary highways as to the care required in the management of vehicles upon them. Beers v. Housatonic R. R. Co. 19 Conn. R. 566.

[1] The doctrine of Ingalls v. Bills was recognized as law in Frinks v. Potter, 17 Ill. 406. In Hegemann v. W. R. R. Co. 3 Kern. 9, the company was held responsible for injuries caused by a defect in a car-axle which might have been discovered in the process of manufacture, though it could not be found by the closest external examination, and though the car was obtained from skilful manufacturers. See Curtiss v. R. & S. R. R. Co. 20 Barb. 282. Frink v. Potter, 17 Ill. 206. As to how far the negligence of the passenger is a defence to the carrier, see R. R. Co. v. Aspell, 23 Penn. 147. Holbrook v. U. & S. R. R. Co. 2 Kern. 236. Martin v. G. N. R. Co. 30 Eng. L. & Eq. 473. On the liability of common carriers for passengers gratuitously carried, see P. & R. R. R. Co. v. Derby, 14 How. 468. Steamboat New World v. King, 16 How. 469. It was held, in Peters v. Rylands, 20 Penn. 497, that the owners of cars were responsible as common carriers of passengers, though the railroad was owned by the state and the cars managed by its agents. See Schopman v. B. & W. R. R. 9 Cush. 24; Hersfield v. Adams, 19 Barb. 577.

upon the ordinary footing of common carriers. (*a*) [1] Whenever the owner of the coach becomes answerable as a carrier for the safety of the baggage, he is not discharged in consequence of any particular care over his baggage, which the passenger may have voluntarily assumed. (*b*) [2] The responsibility of the proprietors of post coaches is now usually so limited, by means of

(*a*) Brooke *v.* Pickwick, 4 Bing. Rep. 218. 1 Bell's Com. 475. Story's Com. § 499. Hollister *v.* Nowlen, 19 Wendell, 234. Hawkins *v.* Hoffman, 6 Hill's N. Y. Rep. 586. In the case of the Orange County Bank *v.* Brown, 9 Wendell's Rep. 85, it was held, after a very full discussion, that a common carrier, as in the case of the owner of a steamboat, who carries passengers and their baggage, is responsible for the baggage, if lost, although no distinct price be paid for its transportation. But where the baggage consists of an ordinary travelling trunk, in which there is a large sum of money, exceeding an amount ordinarily carried for travelling expenses, such money is not considered as included under the term baggage, so as to render the carrier responsible for it.[3] So if a trunk, containing valuable merchandise, was deposited as baggage, and lost, the carrier was held not liable. Pardee *v.* Drew, 25 Wendell, 459. Hawkins *v.* Hoffman, 6 Hill's N. Y. Rep. 586, S. P.[4] The Act of Congress of March 2, 1819, ch. 170, regulates the conveyance of passengers in American vessels from foreign countries to the United States, as to numbers and their subsistence. The substance of the English statute regulations respecting passengers, is given in Abbott on Shipping, 5th Am. edit. Boston, 1846, ch. 8, p. 282. An English statute of 8 & 9 Victoria, enables canal companies to become common carriers of goods.

(*b*) Chambre, J., in Robinson *v.* Dunmore, 2 Bos. & Pull. 416.

1 Peixotti *v.* McLaughlin, 1 Strobhart R. 468. In Connecticut it is provided, that if a passenger be separated from his baggage, he may require a check of the company. Rev. St. 1849, tit. 44. In New York, there is a somewhat similar provision. Laws of New York, 1850, p. 232, § 37.

2 See, however, Cohen *v.* Frost, 2 Duer, 335. As to the responsibility of a ferryman for the loss of a horse on board his boat in charge of the owner, see Willoughby *v.* Horridge, 16 Eng. L. & Eq. 437. White *v.* Winnisimmet Co. 7 Cush. 155. Wilson *v.* Hamilton, 4 Ohio, St. 722. As to the liability of railroad companies for baggage carried by their porters from the cars to a hackney coach, see Richards *v.* L. B. & S. C. R. Co. 7 C. B. 839. Butcher *v.* L. & S. W. R. Co. 29 Eng. L. & Eq. 347.

3 In the case of Grant *v.* Newton, the New York Court of Common Pleas, in an opinion in which all the cases on the subject are thoroughly examined, held that it is not settled in that state, whether the liability of a passenger carrier, for baggage lost through his negligence, extends to money, even sufficient for travelling expenses, contained in the trunk of the passenger. And the court decided that the liability does not extend to money contained in the trunk of the passenger, however small the amount. 1 E. D. Smith, 95.

4 See, also, Bomar *v.* Maxwell, 9 Humph. 624 ; Dibble *v.* Brown, 12 Geo. 217 ; Doyle *v.* Kiser, 6 Ind. 242 ; Jordan *v.* Fall River R. R. Co. 5 Cush. 69 ; Collins *v.* B. & M. R. R. 10 Cush. 506 ; G. N. R. *v.* Shepherd, 9 Eng. L. & Eq. 477, and Am. editor's note, S. C. 14 Eng. L. & Eq. 367.

a special notice, (*a*) as probably to render this point quite unimportant. The coach, or steamboat, or railroad car proprietor, is not at liberty to turn away passengers, if he has sufficient room and accommodation. He is bound to provide competent vehicles, suitably and safely equipped, and with careful and skilful persons to manage them. (*b*) He is bound to give all reasonable facilities for the reception and comfort of the passengers, and to use all precautions, * as far as human *602 care and foresight will go, for their safety on the road. He is answerable for the smallest negligence in himself or his servants. (*c*) [1]

(*a*) Clarke *v.* Gray, 6 East's Rep. 564. But in Hollister *v.* Nowlen, (*ub. sup.*) Cole *v.* Goodwin, 18 Wendell, 251, and Camden Railroad Company *v* Belknap, 21 Ib. 354, it was held, that a carrier could not restrict his common-law liability by a general notice that the baggage of passengers was at the risk of the owners, even though that notice be brought home to the knowledge of the owner. The restriction can only be by express contract.

(*b*) Bretherton *v.* Wood, 3 Brod. & Bing Rep. 54. Israel *v.* Clark & Clinch, 4 Esp. N. P. Rep. 259. Aston *v.* Heaven, 2 Ibid. 533. Crofts *v.* Waterhouse, 3 Bing. Rep. 319. Christie *v.* Griggs, 2 Campb. N P. Rep. 79 Jackson *v.* Tollett, 2 Starkie's Rep. 37. 1 Bell's Com. 462. Jencks *v.* Coleman, 2 Sumner's Rep. 221, 224. Sharp *v* Grey, 9 Bingham, 457. Ansell *v.* Waterhouse, 2 Chitty's Rep. 1. Massiter *v.* Cooper, 4 Esp. Rep. 260. 1 Bell's Com. 462. Story on Bailment, §§ 591–597. In the case of Jencks *v.* Coleman, it was held, that the proprietor was not bound to receive passengers who would not comply with the reasonable regulations of the boat or vehicle, or were guilty of gross and vulgar habits of conduct, or who were disorderly, or whose characters were unequivocally bad, or whose object was clearly for hostile or injurious purposes. Story on Bailment, § 591, 2d edit.[2]

(*c*) Aston *v.* Heaven, 2 Esp. N. P. Rep. 533. Christie *v.* Griggs, 2 Campb. N. P. Rep. 79. Story's Com. § 601. Stokes *v.* Saltonstall, 13 Peters's Rep. 181, 192.

[1] A person who purchases a ticket entitling him, by the rules of a railroad, to a continuous passage through the entire route, at a reduced price, cannot insist upon being taken up as a way passenger at such stations as he may elect to stop at. Cheney *v.* The Boston & M. R. R. Co. 11 Met. R. 121. A servant, travelling with his master, may recover for a loss, though the master took and paid for the passage ticket. Marshall *v.* York, &c. Co. 7 Eng. L. & Eq. R. 519. A railroad company is not bound to provide an increase of facilities of transportation for extraordinary occasions or an unusual influx of freight on the road. G. & C. U. R. R. Co. *v.* Rae, 18 Ill. 488.

[2] So, in the discharge of their duty to travellers and their property, and for their own convenience, railroad companies may establish and enforce reasonable regulations with respect to those who may enter their depots or other buildings. Commonwealth *v.* Power, 7 Met. R. 596. Hall *v.* Power, 12 Ib. 482.

By a statute of Maine, the master and engineers of steamboats are declared guilty of a

The books abound with strong cases of recovery against common carriers, without any fault on their part; and we cannot but admire the steady and firm support which the English courts of justice have uniformly and inflexibly given to the salutary rules of law on this subject, without bending to popular sympathies, or yielding to the hardships of a particular case. In *Morse* v. *Slue*, (a) armed persons had entered on board the vessel in the night-time, in the river Thames, under pretence of impressing seamen, and plundered the vessel; and in *Forward* v. *Pittard*, (b) the common carrier lost a parcel of hops by a fire which, in the night, originated within one hundred yards of the place where he had deposited the hops, and, raging with irresistible violence, reached and destroyed them. The loss, in both those cases, was by inevitable misfortune, without the least shadow of fault or neglect imputable to the carrier; and yet Sir Matthew Hale, in the one case, and Lord Mansfield in the other, delivered the unanimous opinion of the K. B. in favor of a great principle of public policy, which has proved to be of eminent value to the morals and commerce of the nation in succeeding generations. The rule makes the common carrier in the nature of an insurer, and answerable for every loss not to be attributed to the act of God, or public enemies.[1] According to Lord Holt, it was "a politic establishment, contrived by the policy of the law, for the safety of all persons, the necessity of

(a) *Supra*, p. 599. (b) 1 Term Rep. 27.

misdemeanor, when a boiler bursts by reason of their ignorance, neglect, or competition in speed, by which human life is endangered. They are declared guilty of *manslaughter*, if death ensue; and the owners are liable in a sum not exceeding two thousand dollars to the heirs of the deceased. Acts of Maine, 1849, ch. 70.

An Act similar in character, applicable to railroads, has been passed in New Hampshire. Laws, New Hampshire, 1850, ch. 953. In Mass., by Stat. 1853, c. 418, any person guilty of gross carelessness in managing a railroad train, steamboat, or other public conveyance, while used for conveying passengers, may be fined not more than five thousand dollars, or imprisoned not more than three years.

[1] He will not be discharged from his liability to pay for goods lost, though, without his fault, they are seized and confiscated by a foreign power. Spence *v.* Chodwick, 10 Ad. & El. (N. S.) R. 517. And the act of God must be the *proximate* cause of the loss. King *v.* Shepherd, 3 Story's R. 349. In the absence of any special agreement, the carrier will be liable for a loss by collision at sea, in which *neither colliding vessel was in fault*. Plaisted *v.* Boston & K. &c. Co. 27 Maine R. 132. See 12 Smedes and M. R. 599.

whose affairs obliged them to trust these sorts of persons;" and it was introduced to prevent the necessity of going into circumstances impossible to be unravelled. The law presumed against the public carrier unless he could show it was done * by public enemies, or such acts as could not happen by the intervention of man, as lightning and tempests. * 603 If it were not for such a rule, the carrier might contrive, by means not to be detected, to be robbed of his goods, in order to share the spoil. (*a*) Sheriffs and jailers, in respect to debtors in custody, have been placed under the same responsibility as common carriers. (*b*)

The common carrier is responsible for the loss of a box or parcel of goods, though he be ignorant of the contents, or though those contents be ever so valuable, unless he made a special acceptance. (*c*) [1] But the rule is subject to a reasonable quali-

(*a*) Jones on Bailment, 103-111. Lord Holt, in Coggs *v.* Bernard, 2 Ld. Raym. 909. Barclay *v.* Heygena, cited in 1 Term Rep. 33. Trent Navigation Co. *v.* Wood, 3 Esp. N. P. Rep. 127. Hyde *v.* Trent and Mersey Navigation Co. 5 Term Rep. 389. If a vessel be lost by means of the shifting of a buoy in the channel, the common carrier is still responsible. It was not an unavoidable peril. Reaves *v.* Waterman, 2 Speer's S. C. Rep. 197.

(*b*) Elliott *v.* Duke of Norfolk, 4 Term Rep. 789. Alsept *v.* Eyles, 2 H. Blacks. Rep. 108. Green *v.* Hern, 2 Penn. Rep. by P. & W. 167. Ch. J. Gibson, in this last case, vindicates with great force the stern policy of the rule of the common law, in its application to sheriffs and jailers. The Code Napoleon, and the Civil Code of Louisiana, have declared, in the same words, that carriers and watermen were subject to the like obligations and duties as tavern-keepers, and that they were responsible for goods intrusted to them, against loss and damage by theft or otherwise, unless they could show that the loss proceeded from *force majeure*, or uncontrollable events. Code Napoleon, art. 1782, 1784, 1929, 1953, 1954. Civil Code of Louisiana, art. 2722, 2725, 2910, 2939.

(*c*) Titchburne *v.* White, 1 Str. Rep. 145. Phillips *v.* Earle, 8 Pick. Rep. 182. Malpica *v.* M'Kown, 1 La. Rep. 248. The latter case speaks of the principle as doubtful; but concludes it to be the better opinion, that the master would be responsible for a trunk or parcel received on board of a vessel without any information of its contents, unless there be a notice or declaration that he was not to be responsible.

[1] In Michigan, a person losing luggage, is permitted to testify to his loss; but he cannot, in such case, unless corroborated, recover more than $150. Laws of Mich. 1850, p. 307. The owner of a trunk is admitted by the courts of Ohio to testify to its contents. It is put on the ground of necessity. Mad River Co. *v.* Fulton, 20 Ohio R. 318. The testimony is only evidence of such articles as are usually carried in travelling trunks. See 9 E. L. & Eq. 480, note by Am. Ed.

fication; and if the owner be guilty of any fraud or imposition in respect to the carrier, as by concealing the value or nature of the article, or deludes him by his own carelessness in treating the parcel as a thing of no value, he cannot hold him liable for the loss of the goods. Such an imposition destroys all just claim to indemnity; for it goes to deprive the carrier of the compensation which he is entitled to, in proportion to the value of the article intrusted to his care, and the consequent risk which he incurs; * and it tends to lessen the vigilance that the carrier would otherwise bestow. (*a*)

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If goods be destroyed by necessity, as by throwing them overboard from a vessel or barge, for the preservation of the vessel and crew in a tempest, the carrier is not liable. (*b*) The responsibility of the common carrier does not commence until there has been a complete delivery to him; and if, according to the usage of the business, it be a sufficient delivery to leave the goods on the dock, by or near the carrier's boat, yet this must be accompanied with express notice to the carrier. (*c*) When the responsibility has begun, it continues until there has been a due delivery by him, or he has discharged himself of the custody of the goods in his character of common carrier. (*d*) There has been some doubt in the books as to what facts amounted to a delivery, so as to discharge the common carrier. If it be the business of the carrier to deliver goods at the house to which they were directed, he is bound to do so, and to give notice to the consignee. (*e*) In *Hyde* v. *Trent and Mersey Navigation Company*, (*f*) it was much discussed whether the carrier was bound to deliver to the individual at his house, or whether he

(*a*) Gibbon *v.* Paynton, 4 Burr. Rep. 2298. Clay *v.* Willan, 1 H. Blacks. Rep. 298. Batson *v.* Donovan, 4 Barn. & Ald. 21. Phillips *v.* Earle, 8 Pick. Rep. 182. Baldwin *v.* Collins, 9 Robinson's La. Rep. 468. And see *supra*, 601, note *a*.

(*b*) Mouse's case, 12 Co. 63. Smith *v.* Wright, 1 Caines's Rep. 43.

(*c*) Packard *v.* Getman, 6 Cowen's Rep. 757. And see, also, Selway *v.* Holloway, 1 Ld. Raym. 46; Cobban *v.* Downe, 5 Esp. Rep. 41.

(*d*) Garside *v.* Trent and Mersey Navigation Company, 4 Term Rep. 581. Hyde *v.* Trent and Mersey Navigation Company, 5 Term Rep. 389.

(*e*) Golden *v.* Manning, 2 W. Blacks. Rep. 916. 3 Wilson, 429, 433, S. C. Storr *v.* Crowley, 1 M'Clell. & Younge, 129.

(*f*) 5 Term Rep. 389.

discharged himself by delivery to a porter at the inn in the place of destination. The opinion of the majority of the court (though there was no decision on the point) was, that the risk of the carrier continued until a personal delivery at the house or place of deposit of the consignee, with notice. The actual delivery to the proper person is generally conceded to be the duty of the carrier; (a)[1] *and it is settled that he *605 cannot dispute the title of a party who delivers goods to him. (b) The consignee may take charge of the goods before they have arrived at their extreme or ultimate place of delivery,

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(a) Smith v. Horne, 8 Taunt. Rep. 144. Bodenham v. Bennett, 4 Price's Exch. Rep. 31. Garnett v. Willan, 5 Barn. & Ald. 53. Duff v. Budd, 3 Brod. & Bing. Rep. 177. Bonney v. The Huntress, Daveis's Dist. Ct. R. 82. In Muschamp v. Lancaster R. W. Co. 8 Meeson & W. 421, the important principle was declared, that if a parcel be delivered to the carrier whose principals carry only to a particular place, to be carried continuously by different lines to the ultimate place, the principals remain responsible for the safe delivery to the ultimate destination.[2] Watson v. Ambergate Co. 3 Eng. L. & Eq 497. The goods lost were models intended for competition for a prize. The damages allowed were simply the value of the goods. See Rooke v. Midland Co. 14 Eng. L. & Eq. 175. Fowles v. Great Western Co. 16 Eng. L. & Eq. 531. Scotthorn v. South Staffordshire Co. 18 Id. 553. But see Farmers' & Mechanics' Bank v. Champlain T. Co 16 Vermont R. 52. 18 Vermont R. 131. Van Santvoord v. St. John, 6 Hill, 158. Wilcox v. Parmelee, 3 Sandf. S. C. R. 610. Moore v. Evans, 14 Barb. R. 524. Parsons v. Monteath, 13 Barb. R. 353. Owners of goods delivered to proprietors of an express line, are bound by contracts made between the forwarders and the carriers. Stoddard v. Long Island R. Co. 5 Sandf. R. 180. New Jersey Steam N. Co. v. Merchants' Bank, 6 Howard's R. 344.

(b) Miles v. Cattle, 6 Bing. Rep. 743.

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1 Merwin v. Butler, 17 Conn. R. 138. Adams v. Blankenstein, 2 Cal. 413. A delivery of goods according to label discharges the carrier. Bristol v. R. & S. R. R. Co. 9 Barb. 158.

2 The American cases do not support this doctrine. Farmers' and Mechanics' Bank v. Champlain T. Co. 23 Vt. 186, 209. Nutting v. Connecticut River R. R. 1 Gray, 502. Elmore v. Naugatuck R. R. Co. 23 Conn. 457. N. R. R. Co. v. Waterbury Button Co. 24 Ibid. 468. Hood v. N. Y. & N. H. R. R. Co. 22 Ibid. 1, 502. Straiton v. N. Y. & N. H. R. R. Co. 2 E. D. Smith, (N. Y.) 184. In this last case it was held that a railroad company could not contract for liability beyond their chartered limits. *Contra*, Noyes v. R. & B. R. R. Co. 1 Wms. 110. See, also, Hart v. R. & S. R. R. Co. 4 Seld. 37; Kyle v. L. R. R. Co. 10 Rich. L. 382. It was decided, in Schopman v. B. & W. R. R. Co. 9 Cush. 24, that a railroad company is a common carrier of the passengers, who come upon its road in cars, placed under the control of its agents and servants, and drawn by its own locomotive, over its own road, to their place of destination, notwithstanding that such cars are the cars of another company.

and the carrier's risk will then terminate. (a) In New York, it was held, in *Ostrander* v. *Brown*, (b) that placing goods on the

(a) Strong v. Natally, 4 Bos. & Pull. 16.

(b) 15 Johns. Rep. 39. *In Chickering v. Fawler, 4 Pick. Rep. 371, it was held, that in the absence of any special custom, a delivery at *the wharf*, which is the usual place of delivery, *with notice* to the consignee, is a delivery to the consignee. House v. Schooner Lexington, N. Y. District Court, 2 N. Y. Legal Observer, 4, S. P. The same rule was declared in Cope v. Cordova, 1 Rawle's Rep. 203; and it was grounded on the fact of the general practice in relation to goods coming from a foreign port. In New York, in the case of Fox v. Blossom, (N. Y. Common Pleas, October, 1828,) it was proved upon the trial to be the understanding, that the carrier's responsibility ceased when the goods were *landed on the wharf;* but the decision was, that the delivery was not complete until the goods were carefully separated and designated for the consignee. And in the case of Pacard v. Bordier, decided in the Supreme Court of Louisiana, in the winter of 1831-32, it was held, that landing goods by the captain of a vessel on the levee at New Orleans, being the usual place of unloading, with notice in the newspapers to the consignees, was not sufficient. The notice must be brought home to the consignee. So, a person undertook to carry boxes of lumber down the river to a certain cove, and being refused a place of deposit there, he deposited them near by, in as safe a place as could be found, and left them, and they were afterwards carried away by the flood and lost, and he was held responsible. The carrier did not continue his care until he had given notice to the owner. and until the latter had a reasonable time to assume the care of them, and therefore he was held liable. Pickett v. Downer, 4 Vermont Rep. 21.[1] In the case of Gibson v. Culver, 17 Wendell, 305. the duty of the common carrier received a full discussion, and it was considered to be the settled rule, that *actual delivery* of the goods to the consignee was necessary in order to discharge the carrier, unless it was the course of the business to leave the goods at specified places, and then *notice* of the arrival and place of deposit, comes in lieu of personal delivery. Carriers by ships and boats must stop at the wharf, and railroad cars must remain on the track. Nothing will dispense with the necessity of the notice instead of actual delivery, but some uniform and notorious usage presumed to be known to the consignee. The necessity of delivery of baggage to the passenger at the end of his journey by the common carrier, before his responsibility can cease, was strongly inculcated by the judges in the case of Cole v. Goodwin, 19 Wendell, 251, and also in Powell v. Myers, 26 Wendell, 591. So, in Hemphill v. Chenie, 6 Watts & Serg. 62, it was held that the responsibility of a carrier *upon the Ohio River* did not cease upon the delivery of goods on the wharf, with notice to the consignee. There must be an actual delivery to the consignee.[2] Though, as a general rule, the carrier must deliver the goods to the consignee at the place of delivery;

[1] Barclay v. Clyde, 2 E. D. Smith, (N. Y.) 95.

[2] See, however, Farmers' and Mechanics' Bank v. Champlain Transportation Co. 23 Vt. 186. Where goods were consigned to certain warehousemen in Milwaukie, and were left at the pier at that place, not the warehouse to which they were consigned, and destroyed by fire, it was held this was not a delivery according to the carrier's contract. Sultana v. Chapman, 5 Wisc. 454.

wharf, without notice to the consignee, is not a delivery to the consignee, so as to discharge the carrier, even though there was a usage to deliver goods in that manner. The carrier must not leave or abandon the goods on the wharf, even though there be an inability or refusal of the consignee to receive them.[1]

As carriers by water were liable at common law to the same extent as land carriers, and as their responsibility was more extensive, and their risk greater from the facilities for the commission of acts of fraud and violence upon the water, it was deemed, in England, a proper case for legislative interference, to a guarded and limited extent. The statute *of *606 7 Geo. II. ch. 15, and 26 Geo. III. ch. 86, and 53 Geo. III. ch. 159, exempted owners of vessels from responsibility as common carriers for losses by fire;[2] and provided further that the owner should not be liable for the loss of gold, silver, diamonds, watches, jewels, or precious stones, by robbery or embezzlement, unless the shipper inserted in the bill of lad-

yet where the transportation is by vessels or boats, notice of the arrival and place of deposit come in lieu of personal delivery. If the consignee be dead, or cannot be found, or refuses to receive, the carrier may relieve himself by placing the goods in store with a responsible person in that business at that place, and the storekeeper becomes the agent or bailee of the owner of the property. Fisk *v.* Newton, 1 Denio, 45.

[1] See Price *v.* Dowell, 3 Comst. R. 322, 324; Goold *v.* Chapin, 10 Barb. 612; Miller *v.* S. N. Co. 13 Id. 361; The Peytona, 2 Curt. C. C. 21; The Grafton, Olcott, 43. In Thomas *v.* B. & P. R. R. Co. 10 Met. 472, it was held that the liability of a railroad company as a common carrier ends upon the arrival and storage of the goods in the station. It then becomes liable as a warehouseman. In Norway Pl. Co. *v.* B. & M. R. R. Co. 1 Gray, 263, the same doctrine was affirmed in a case where the goods were destroyed in the station-house, before the consignee had had an opportunity to remove them, and the company was held only to the liability of a warehouseman. And it was so held in McCarty *v.* N. Y. & Erie R. R. Co. 30 Penn. State R. 247. But in the similar case of Moses *v.* B. & M. R. R. Co. 32 N. H. 523, the Supreme Court of New Hampshire held that the liability of the R. R. Co. as a carrier continued till the consignee should have a reasonable opportunity to take away the goods. And see M. C. R. R. *v.* Ward, 2 Mich. 538. Where a package is addressed to the care of the agent and principal representative of the carrier at the point where the carriage is to terminate, it may be regarded as a direction to have the package stopped at the place on the route where the agent is in charge of the business, and does not import that, upon receiving it, the carrier's responsibility ceases, and the agent becomes a consignee. Russell *v.* Livingston, 16 N. Y. (2 Smith) 515.

[2] They are not exempt from liability as common carriers of goods on their way to the ship in lighters. Morewood *v.* Pollok, 18 Eng. L. & Eq. 34.

ing, or otherwise declared in writing to the master or owner of the vessel, the nature, quality, and value of the articles; nor should he be liable for embezzlements, or loss or damage to the goods arising from any act or neglect, without his fault or privity, beyond the value of the ship and freight; nor should part-owners in those cases be liable beyond their respective shares in the ship and freight. (a)[1] Though we have only in one or two instances such statute provisions in this country, (b) yet, according to the modern English doctrine, which may be applicable with us, carriers may limit their responsibility by special notice of the extent of what they mean to assume. The goods in that case are understood to be delivered on the footing of a special contract, superseding the strict rule of the common law; and it is necessary, in order to give effect to the notice, that it be previously brought home to the actual knowledge of the bailor, and be clear, explicit, and consistent. (c) The doctrine of the carrier's exemption by means of notice, from his extraordinary responsibility, is said not to have been known until the *607 case of *Forward* *v. *Pittard*, in 1785; (d) and it was

(a) Wilson *v.* Dickson, 2 Barn. & Ald. 2. The statute of 53 Geo. III. further limited the responsibility of ship-owners for damage done, without their fault, to other vessels or their cargoes, to the value of the ship doing the damage at the time of the accident.

(b) In Massachusetts, the responsibility of owners was, by a statute passed in 1818, and reënacted in the Revised Statutes of 1836, part 1, tit. 12, ch. 32, secs. 1 and 2, limited to the value of their interest in the ship and freight, in cases where they were liable for loss and damage occasioned by the acts of the master or mariners. By the statute of New York of April 13, 1820, ch. 202, the conduct of canal-boats is under specific regulations, and freight boats are bound to afford facilities to the passage of packet or passenger-boats, through the locks and on the canals, and the master and owners are held responsible in damages for injuries resulting from any undue non-compliance with their duty. Farnsworth *v.* Groot, 6 Cowen's Rep. 698.

(c) Butler *v.* Heane, 2 Camph. Rep. 415. Cobden *v.* Bolton, Ibid. 108. Gouger *v.* Jolly, 1 Holt's Rep. 317. Mayhew *v.* Eames, 3 Barn. & Cress. 601. Brooke *v.* Pickwick, 4 Bing. Rep 218. It is not sufficient, in order to fix notice on a party, that it was inserted weekly in a newspaper which the party took. Rowley *v.* Horne, 3 Bing. Rep 2. The difficulty of giving the requisite notice, said the K. B. in Kerr *v.* Willan, 2 Starkie's Rep. 53, arises from the attempt of the carrier to depart from the old rule of the common law.

(d) Burrough, J., 8 Taunt. Rep. 146.

[1] For similar provisions in a late Act of Congress, see vol. iii. p. 217, note (1).

finally recognized and settled by judicial decision in *Nicholson* v. *Willan*, (*a*) in 1804. The language of the court in *Bodenham* v. *Bennet*, (*b*) and in *Garnett* v. *Villan*, (*c*) is, that those notices were introduced to protect the carrier only from extraordinary events, or from that responsibility by mistake or inadvertence which belongs to him as an insurer, and not from the consequences of the want of due and ordinary personal care and diligence. It has been strenuously urged in some of the cases, that there was no sound distinction, as to the responsibility of the common carrier under the notice, between ordinary negligence and misfeasance of him or his servants. Be that as it may, it is perfectly well settled, that the carrier, notwithstanding notice has been given and brought home to the party, continues responsible for any loss or damage resulting from gross negligence or misfeasance in him or his servants; and the question of responsibility has generally turned upon the fact of gross negligence. (*d*)

The English judges have thought that the doctrine of * exempting carriers from liability by notice, had been carried too far; and its introduction into Westminster Hall has been much lamented. (*e*) The decisions in this country have shown a firmness of purpose not to relax the strictness *608

(*a*) 5 East's Rep. 507. Chippendale *v.* Lancashire Co. 7 E L. & Eq. R. 395.

(*b*) 4 Price's Exch. Rep. 31.

(*c*) 5 Barn. & Ald. 53. Mr. Bell strongly condemns the policy of restricting the responsibility of the common carrier by means of the notice; and he says the effect of notice ought legitimately to be confined to the regulation of the consideration for risk, and that the carrier ought, at all events, to be held to the ordinary diligence of the contract, and responsible for the reasonable amount of loss, according to the appearance of the package delivered, if the owner does not choose to pay the amount of the premium, unless he shows a *special* agreement, or evidence not merely of notice, but of *assent* to that notice. 1 Bell's Com. 473–475.

(*d*) Ellis *v.* Turner, 8 Term Rep. 531. Beck *v.* Evans, 16 East's Rep. 247. Smith *v.* Horne, 8 Taunt. Rep. 144. Birkett *v.* Willan, 2 Barn. & Ald. 356. Batson *v.* Donovan, 4 Ibid. 21. Garnett *v.* Willan, 5 Ibid. 53. Sleat *v.* Fagg, 5 Ibid. 342. Duff *v.* Budd, 3 Brod. & Bing. 177. Lowe *v.* Booth, 13 Price's Exch. Rep. 329. Brooke *v.* Pickwick, 4 Bing. Rep. 218. 12 B. Moore, 447, S. C. Wyld *v.* Pickford, 8 Meeson & W. 443. Carriers, after the notice, are not liable for a robbery by their servants, if there has been great carelessness on the part of the owner, and no gross negligence on their part. Bradley *v.* Waterhouse, 1 Danson & Lloyd, 1.

(*e*) See Smith *v.* Horne, 8 Taunt. Rep. 144.

of the English rule in respect to the responsibility of common carriers, and they have shown an inclination even to restrict the effect of notice upon that responsibility. (*a*)

(*a*) Eagle *v.* White, 6 Wharton's Rep. 516. In the case of Barney *v.* Prentiss & Carter, 4 Harr. & Johns. 317, it was a question raised, but left undecided, whether a common carrier can exonerate himself from the responsibility, by means of a previous notice; but if he can, the notice should, at least, be plain, explicit, and free from all ambiguity.[1] It was, however, declared in Beckman *v.* Shouse, 5 Rawle, 179, and in Bingham *v.* Rogers, 6 Watts & Serg. 495, that common carriers might, by *special contract*, limit the extent of their responsibility. In Atwood *v.* The Reliance Transportation Company, (9 Watt's Rep. 87,) Ch. J. Gibson questions the policy of the new rule, that the carrier may lessen his common-law responsibility by a special agreement, and it was held that exceptions to the common rule were to be strictly construed. In Ohio, in the case of Jones *v.* Voorhees, 10 Ohio Rep. 145, the court declared that the proprietors of stage-coaches were common carriers, and that their liabilities could not be limited by actual notice to a traveller, that his baggage was at his own risk, and that a watch in his trunk was part of his baggage. So also in New York, in the case of Hollister *v.* Nowlen, 19 Wendell, 234, Cole *v.* Goodwin, Ibid. 251, Camden R. R. Co. *v.* Belknap, 21 Ibid. 354, and Gould *v.* Hill, 2 Hill's Rep. 623, it was decided that stage-coach proprietors, and other common carriers, could not restrict their common-law liability by a general notice that the baggage of passengers was at the risk of the owners, even though the notice was brought home to the knowledge of the owner. Nothing short of an express contract or special acceptance, as between the proprietor and owner, would be sufficient.[2] These decisions contain very learned and able dis-

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[1] In Pennsylvania, the doctrine of a restricted liability after notice given, especially after a notice warning a passenger not to extend his arms out of the windows of the cars, seems to be favored. Laing *v.* Colder, 8 Barr's R. 479.

[2] The case of Gould *v.* Hill, in so far as it denies the right of a common carrier to restrict his liability by special agreement, has been expressly overruled in New York. Parsons *v.* Monteath, 13 Barb. 353. Dorr *v.* N. J. Steam Navigation Co. 4 Sandf. 136. 1 Kern. 485. Stoddard *v.* L. I. R. R. Co 5 Sandf. 180. Mercantile Mutual Ins. Co. *v.* Chase, 1 E. D. Smith, (N. Y.) 115. Moore *v.* Evans, 14 Barb. 524; and the law is settled, as in the author's note, that though notice, even if brought home to the plaintiff, does not limit the carrier's liability, yet a special agreement does. This is the rule in Michigan, and there the special agreement need not be in writing. Am. Transp. Co. *v.* Moore 5 Mich 368. Also in Georgia; and there the special agreement may exist by usage. Cooper *v.* Berry, 21 Geo. 526. This is also the rule of the Supreme Court of the United States, in Merchants' Bank *v.* N. J. S. N. Co. 6 How. 344. In M. C. R. R. *v.* Ward, however, it was held that a corporation, chartered as a common carrier, could not, consistently with its contract with the state, make a special agreement diminishing its liability. 2 Mich. 538. See, further, F. & M. Bank *v.* Champlain T. Co. 23 Vt. 186; Kimball *v.* R. & B. R. R. Co. 26 Ibid. 247; Derwort *v.* Loomer, 21 Conn. 245; Moses *v.* B. & M. R. R. Co. 4 Fost. 71; Davidson *v.* Graham, 2 Ohio St. 131. None of these cases go so far as to say that the carrier may by special agreement divest himself of *all* liability. Goldey *v.* Penn. R. R. Co. 30 Penn. State R. 242. Notice, if brought to the plaintiff's knowledge, will limit the carrier's liability in Maine, Sager *v.* Portsmouth A. S. Co. 31 Me. 228; and in Pennsylvania, Laing *v.* Colder, 8 Barr. 479; C. & A. R. R. *v.* Baldauf, 16 Penn. 67.

In New York, the English common law on the subject of the general responsibility of common carriers, has been fully, explicitly, and repeatedly recognized it its full extent; and equally in respect to carriers by land and water, and equally in respect to foreign and inland navigation. (a)[1] In *Elliott* v. *Rossell*, the whole doctrine was extensively considered; and it was

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cussions of the subject, and the solidity of the stern rule of the common law is ably and successfully vindicated.[2] But though *common carriers* cannot contract for a restricted responsibility, yet *other bailees for hire* may so contract, and leave the whole risk, in cases free from fraud, on the owner of the property; and it has been held that the owners of a steamboat undertaking for hire to tow a canal-boat and her cargo on the Hudson River, while the master and hands of the canal-boat remain on board, and in possession and charge of the property, are not common carriers, but ordinary bailees for hire; and as it was stipulated that the canal-boat was to be towed *at the risk of her master*, the owners of the steamboat were not responsible, even for the want of ordinary care and skill. Alexander *v.* Greene, 3 Hill, 1. But this case was reviewed and reversed in the New York Court of Errors, 7 Hill, 533. The English statute, (1 Wm. IV. ch. 68,) made *for the more effectual protection of common carriers for hire*, declares that they shall not be liable for the *loss* of *or* injury to, any property of the following description: that is to say, of gold or silver coin, or gold or silver in a manufactured or unmanufactured state, or any precious stones, jewelry, watches, &c., bills, notes, writings, pictures, plated articles, glass, silks, furs, or lace, contained in any parcel to be carried for hire, or to accompany a passenger in any public conveyance, where the value exceeds 10*l*., unless delivered as such with an express formal declaration of the value, and the carrier to be entitled to an increased rate of charge, according to pevious notice. See Hinton *v.* Dibbin, 2 Adolph. & Ellis, N. S. 646, on the strict construction of the statute. No public notice is to limit the responsibility of the carrier in respect to other goods. The exception in bills of lading of goods on inland navigation, of "dangers of the river which are unavoidable," narrows the liability of the boat-owner, and exempts him from liability for accidents and loss occasioned by hidden obstructions newly placed in the river, and which human skill and foresight could not discover and avoid. Gordon *v.* Buchanan, 5 Yerger's Tenn. Rep. 71.

(*a*) Colt *v.* M'Mechen, 6 Johns. Rep. 160. Schieffelin *v.* Harvey, 6 Ib. 170. Elliott *v.* Rossell, 10 Ibid 1. Kemp *v.* Coughtry, 11 Ibid. 107. Allen *v.* Sewall, 2 Wendell's Rep. 327. McArthur *v.* Sears, 21 Ibid. 190.

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[1] The questions, who are servants of carriers, and the extent of the principal's liability for their acts, were much discussed in a late case, which arose upon the construction of the Carrier's Act. 11 Geo. IV. and 1 Will. IV. ch. 68. Machu *v.* Railway Co. 2 Wels. H. & G. Rep. 415. See, as to the effect of notices printed on tickets and way-bills, Chippendale *v.* L. & Y. Railway Co. 7 Eng. L. & Eq. 395; Morville *v.* Great Northern Co. 10 Eng. L. & Eq. 366; Austin *v.* Manchester R. Co. 11 Eng. L. & Eq. 506; Carr *v.* Lancashire Co. 14 Eng. L. & Eq. 340; Brown *v.* E. R. R. 11 Cush. 97.

[2] Fish *v.* Chapman, 2 Kelly's (Geo.) R. 349. The opinion of Judge Nesbit, in this case, is prepared with his usual learning and ability.

understood and declared, that a common carrier warranted the safe delivery of goods in all but the excepted cases of the act of God and public enemies; and that there was no distinction between a carrier by land and a carrier by water, whether the water navigation was internal or foreign, except so far as the exception is extended to perils of the sea by the special *609 terms of the contract *contained in the charter-party or bill of lading. It was further shown, that the marine law of Europe went to the same extent, as did also the civil law, and the law of those nations in Europe which have made the civil law the basis of their municipal jurisprudence. The principle appeared to be sound and wise, and to have a very general reception among nations. The same doctrine was again declared in New York, in *Allen* v. *Sewall;* (*a*) and the owners of a steamboat carrying light freight and parcels for hire, were held to be liable as common carriers. Bank-bills were held to be goods, within the meaning of the law; and directions to the captain not to carry money did not excuse the owner, unless notice of such instructions were brought home to the shipper. There is no doubt, also, that the doctrine of the English common law, which declares that persons carrying goods for hire by land or water, including all kinds of internal as well as external navigation, are common carriers, and liable for all losses happening otherwise than by inevitable accident, prevails generally in these

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(*a*) 2 Wendell's Rep. 327. The case of Aymar *v.* Astor, (6 Cowen's Rep. 266,) would seem to have gone far to unsettle and reverse the common-law doctrine respecting carriers by water. But if there was not originally some inaccuracy or mistake in the statement or report of that case, it is to be considered as completely overruled by the case of Allen *v* Sewall. This last case was reversed by the Court of Errors; (6 Wendell's Rep. 335,) on the ground that bank-bills were not goods, wares, and merchandise, within the meaning of the statute incorporating the steamboat company, whose agent the defendant was, and that the carriage of such bills was not a part of their ordinary business, and was forbidden by instructions to the master. But the general doctrine in the text respecting the liability of common carriers was not disturbed. So, in the case of Camden Company *v.* Burke, 13 Wendell, 611, it was held, that steamboat and railroad companies were liable for the baggage as common carriers; and even notice, brought home to the passengers, that all baggage is to be at the risk of the owners, will not exempt the owners from the implied agreement that the vehicle is sufficient. But they are not responsible for the passengers if due care be used.

United States, as part of the common law of the land.[1] The slightest neglect or fault, *levissima culpa*, renders the master of a vessel liable. (*a*)

*It has been the settled law in England, since the *610 case of *Lane* v. *Cotton*, (*b*) that the rule respecting common carriers does not apply to postmasters, and there is no analogy between them. The post-office establishment is a branch of the public police, created by statute, and the government have

(*a*) M'Clures *v.* Hammond, 1 Bay's S. C. Rep. 99. Miles *v.* James & Johnson, 1 M'Cord's Rep. 157. Cohen *v.* Hume, Ibid. 439. Smyrl *v.* Niolon, 2 Bailey's S. C. Rep. 421. Murphy *v.* Staton, 3 Munf. Rep. 239. Bell *v.* Reed, 4 Binney's Rep. 127. Moses *v.* Norris, 4 N. H. Rep. 304. Craig *v.* Childress, Peck's Tenn. Rep. 270. Gordon *v.* Buchanan, 5 Yerger's Tenn. Rep. 71. Turney *v* Wilson, 7 Ib. 340. Faulkner *v.* Wright, 1 Rice's S. C. Rep. 107. Hennen *v.* Munroe, 11 Martin's La. Rep. 579. Smith *v.* Pierce, 1 La. Rep. 349. Spencers *v.* Daggett, 2 Vt. Rep. 92. Gilmore *v.* Carman, 1 Smedes & Marsh. Miss. Rep. 279. Hale *v.* New Jersey Steam N. Co. 15 Conn. Rep. 539. Adams *v.* New Orleans Steam Towboat Co. 11 La. Rep. 46. Alexander *v.* Greene, 7 Hill's N. Y. Rep. 533. In this last case it was held, that the owners of a steamboat on the Hudson, engaged generally in the business of towing canal-boats for hire, were responsible as common carriers; and though the business was in that special case undertaken at the risk of the master and owners of the *towboat*, yet that the master and owners of the *steamboat* were in that case liable for ordinary neglect, and certainly for gross neglect; and there was evidence of both in that case.[2] I was much struck in this case with the learning and ability of the lay members of the Court of Errors, several of whom gave separate opinions; and this case leads me to part with still deeper regret with the *Court of Errors*, which existed, and generally with great dignity and usefulness, from the independence of the state of New York in 1777 down to its destruction, and the substitution of the *Court of Appeals*, in 1847. In Pennsylvania, the English law, as to carriers by land, is admitted in the full extent; but with respect to carriers by inland navigation, the law was considered, in Gordon *v.* Little, 8 Serg. & Rawle, 533, to be unsettled in respect to its application in that state. The carrier on inland waters was held to be clearly liable for every accident which skill, care, and diligence could have prevented; but beyond that point it was competent for the common carrier to prove a usage different from the common law. In Harrington *v.* M'Shane, 2 Watts's Penn. Rep. 443, it was, however, adjudged, that under the usage of trade on the western waters, (the river Ohio,) the owners of steamboats carrying goods on freight were common carriers, and liable as such for all losses, except those occasioned by the act of God or the public enemy.

(*b*) 1 Ld. Raym. 646.

[1] It seems clear, that there may be common carriers from a place within, to a place without the realm. Benett *v.* Peninsular S. B. Co. 6 M. G. & S. Rep. 786.

[2] See, as to the liability of towing vessels, Lec. XLVII. vol. iii. It will be seen that the case of Alexander *v.* Greene has been disapproved in the Court of Appeals. 2 Comst. 208 The Broeder Trow, 20 Eng. L. & Eq. 634. Leonard *v.* Hendrickson, 18 Penn. 40.

the management and control of the whole concern. The postmasters enter into no contract with individuals, and receive no hire, like common carriers, in proportion to the risk and value of the letters under their charge, but only a general compensation from government. In the case referred to, the postmaster-general was held not to be answerable for the loss of exchequer bills stolen out of a letter while in the defendant's office. The subject was again elaborately discussed in *Whitfield* v. *Lord Le Despencer*, (a) and the same doctrine asserted. The postmaster-general was held not to be responsible for a bank-note stolen by one of the sorters, out of a letter in the post-office. But a deputy postmaster or clerk in the office, is still answerable in a private suit, for misconduct or negligence; as, for wrongfully detaining a letter an unreasonable time. (b)[1] The English law on this subject was admitted in *Dunlop* v. *Munroe*, (c) to be the law of the United States; and a postmaster was considered to be liable in a private action for damages arising from misfeasance or for negligence, or want of ordinary diligence in his office, in not safely transmitting a letter. (d) Whether he was liable himself for the negligence of his clerks or assistants, was a point not decided; (e)[2] though if he were so to be *611 deemed *responsible in that case, it would only result from his own neglect, in not properly superintending the discharge of his duty in his office. (f)

(a) Cowp. Rep. 754.

(b) Rowning v. Goodchild, 3 Wils. 443.

(c) 7 Cranch's Rep. 242.

(d) See, also, Schroyer v. Lynch, 8 Watts, 453; Story on Bailment, § 463.

(e) In Conwell v. Voorhees, 13 Ohio Rep. 523, it was held that a mail contracter was not liable to the owner of a letter for money lost by the mail by the carelessness of the contractor's agents carrying the mail.

(f) Since the first edition of this work, my learned and estimable friend, Mr. Justice Story, in the discharge of his duties as Dane Professor of Law in Harvard Uni-

[1] Or for refusing to deliver a newspaper. Teall v. Felton, 3 Barb. S. C. R. 512. S. C. 1 Comst. R. 537. The state courts have jurisdiction of such cases; and the act of the postmaster in charging letter postage on a newspaper, is not such a *judicial* act as protects him from liability.

[2] It has been *declared* that he is not. Wiggins v. Hathaway, 6 Barb. S. C. Rep. 632. He must be shown to have been guilty of a want of ordinary care, and that such negligence was the cause of the loss. See Strong v. Campbell, 11 Barb. R. 135.

The general doctrines of agency and lien have a material bearing on this subject of bailment; but as they are essentially connected with mercantile transactions, their extent and importance require a separate discussion.

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versity, has favored the public with Commentaries on the Law of Bailments, with Illustrations from the Civil and Foreign Law; and in 1840, he gave to the public an improved and enlarged edition of that work. I would strongly recommend that volume to the student, who wishes to pursue more extensively than the plan of the present lecture permitted, the refined distinctions and practical illustrations which accompany this branch of the law. I have availed myself of the lights which that work has afforded, and the confidence which it has inspired, while engaged in the revision of my own more brief and imperfect survey of the subject. This excellent treatise is the most learned and the most complete of any that we have on the doctrine of bailment. It aims to lay down all the principles appertaining to the subject, both in the civil, the foreign, the English, and the American law, with entire accuracy; and I beg leave to say, after a thorough examination of the work, that, in my humble judgment, it has succeeded to an eminent degree.

LECTURE XLI.

OF PRINCIPAL AND AGENT

THE law of principal and agent is of constant application in the commercial world, and the rights and duties which belong to that relation ought to be accurately, as well as universally understood. And while recommending that title to the attention of the student, as well as of the practising lawyer, I will give a summary view of those general principles which apply at large to every branch of the subject, and more especially to agencies that relate to commercial concerns.

I. *Agency, how constituted.*

Agency is founded upon a contract, either express or implied, by which one of the parties confides to the other the management of some business to be transacted in his name, or on his account, and by which the other assumes to do the business, and to render an account of it. The authority of the agent may be created by deed or writing, or verbally without writing; and, for the ordinary purposes of business and commerce, the latter is sufficient. (a) Though the statute of frauds of 29 * 613 . Charles II. * requires, in certain cases, a contract for the sale of goods to be in writing, and signed by the party to be charged, or by his authorized agent, the authority to the agent need not be in writing. It may be parol. (b) The agency

(a) Chitty on Commercial Law, vol. iii. p. 104. Lord Eldon, 9 Ves. 250. Stackpole v. Arnold, 11 Mass. Rep. 27. Long v. Colburn, Ibid. 97. Northampton Bank v. Pepoon, Ibid. 288. Ewing v. Tees, 1 Binney's R. 450. Shaw v. Nudd, 8 Pick. Rep. 9. Turnbull & Phyfe v. Trout, 1 Hall's N. Y. Rep. 336. M'Comb v. Wright, 4 Johns. Ch. Rep. 667.

(b) Rucker v. Cammeyer, 1 Esp. N. P. Rep. 105. Chitty on Contracts, 213. Lord Eldon, in Coles v. Trecothick, 9 Vesey, 250.

may be inferred from the relation of the parties and the *nature of the employment, without proof of any express *614 appointment. (a) It is sufficient that there be satisfactory evidence of the fact that the principal employed the agent, and that the agent undertook the trust. The extent of the authority of an agent will sometimes be extended or varied on the ground of implied authority, according to the pressure of circumstances connected with the business with which he is intrusted. (b) The statute of frauds does not require that the authority of the agent *contracting* even for the sale of land, should be in writing. (c) But if the agent is to *convey* or complete the conveyance of real estate or any interest in land, or to make livery of seisin, the appointment must be in writing; (d) and where the conveyance or any act is required to be by deed, the authority to the attorney to execute it must be commensurate in point of solemnity, and be by deed also. (e) [1]

The agency must be antecedently given, or be subsequently

(a) Whitehead v. Tuckett, 15 East's Rep. 400. Hooe v. Oxley, 1 Wash. Va. Rep. 19. Long v. Colburn, *ub. sup.*

(b) Judson v. Sturges, 5 Day's Rep. 556.

(c) Clinan v. Cooke, 1 Sch. & Lef. 27, 31. Barry v. Lord Barrymore, cited in 1 Sch. & Lef 28. McWhorter v. McMahan, 10 Paige, 394. But in Louisiana, it is settled that an agency to purchase real estate cannot be established by parol. Breed v. Guay, 10 Robinson's Rep. 35.

(d) The statute of frauds, on this point, was adopted *verbatim* in the first revision of the Laws of New York, (sess. 10, ch. 44,) and the provision was continued in the N. Y. Revised Statutes, vol. ii. p. 134, sec. 6.

(e) Co. Litt. 52 a. Horsley v. Rush, cited in 7 Term Rep 209. Cooper v. Rankin, 5 Binney's Rep. 613. Plummer v. Russell, 2 Bibb's R. 174. Sedgwick, J , 5 Mass. Rep. 40. Shamburger v. Kennedy, 1 Dev. Rep 1. Mellen, Ch J., in 2 Greenleaf's Rep. 260. Blood v. Goodrich, 9 Wendell's Rep. 68. Delius v. Cawthorn, 2 Dev. N. C. Rep. 99. Toomer, J., Ibid. 153. Gibson, J., 6 Serg. & Rawle, 331. Davenport v. Sleight, 2 Dev. & Battle, 381. Paley on Agency, by Lloyd, 158–160.

[1] Where a statute prescribes the formalities requisite for making a deed, a power to make such deed must be executed with the same formalities. Thus, where a conveyance of land must have two witnesses, a power to convey with only one witness is not good. Gage v. Gage, 10 Fost. 420. See, also, Clark v. Graham, 6 Wheat. 577. If the agent, authorized by parol, executes a sealed instrument, the agreement binds the principal as a simple contract. Worrall v. Munn, 1 Selden, R. 229. Wood v. A. & R. R. R. Co. 4 Seld. 160. Crozier v. Carr, 11 Tex. 376. *Contra*, Wheeler v. Nevins, 34 Me. 54. And a sealed instrument, executed by an agent authorized by parol only, will be upheld in chancery, as evidence of a contract to sell. Morrow v. Higgins, 29 Ala. 448.

adopted; and in the latter case, there must be some act of recognition. But an acquiescence in the assumed agency of another, when the acts of the agent are brought to the knowledge of the principal, is equivalent to an express authority.[1] By permitting another to hold himself out to the world as his agent, the principal adopts his acts, and will be held bound to the person who gives credit thereafter to the other, in the capacity of his agent. Thus, where a person sent his servant to a shopkeeper for goods upon credit, and paid for them afterwards, and sent the same servant again

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[1] By adopting the act of a person who assumed to act in his behalf, the principal will make himself liable, as though he had actual knowledge of facts which were within the knowledge of the agent, at the time of doing the act. Hovey *v.* Blanchard, 13 N. Hamp. R. 145. But a ratification of the act of the agent, in ignorance of his misconduct, will not, *as to the agent*, be binding upon the principal. Hays *v.* Stone, 7 Hill's N. Y. R. 132. Owings *v.* Hull, 9 Pet. R. 608. Paley on Agency, Dunlap's ed. p. 171, n. (o).

An act done for another, by a person not assuming to act for himself, but for such other person, though without any precedent authority, becomes the act of the principal, if subsequently ratified by him. Wilson *v.* Tumman, 6 M. & G. R. 242. Ratification of the unauthorized act of an agent does not operate as presumptive evidence of original authority, but as a confirmation *per se* of the unauthorized act. Commercial Bank *v.* Warren, 15 N. Y. (1 Smith,) 577. But where A. does act as an agent of B., without any communication with C., a subsequent ratification by C. does not make A. his agent. Id. The act, it would seem, cannot be ratified unless it was done in the name of the person ratifying. The principle is concisely expressed by the learned editors of the last report, in the quotation of the Latin maxim, *Ratum quis habere non potest, quod ipsius nomine non est gestum.* If the act of the agent is in itself *unlawful* and *directly injurious* to another, no subsequent ratification will operate to make the principal a trespasser. 2 Greenl. Ev. § 68.

Ratification of a person's unauthorized acts will not be permitted to defeat the rights of third persons, which have accrued in the mean time. Accordingly, it has been held, that a consignor of goods, *after* the *transitus* was ended, could not, by adopting the act of one who had claimed the goods for him *in transitu*, entitle himself to the goods. In delivering the opinion of the court, Pollock, C. B., said, "*the act of ratification must take place at a time and under circumstances where the ratifying party might himself have lawfully done the act ratified.*" Bird *v.* Brown, 19 Eng. Law Journal R. 1850.

So, where a notice to quit was such that the tenant must act upon it *at the time*, a subsequent ratification will not make it good by relation. Right *v.* Cuthell, 5 East, R. 491. Doe *v.* Goldwin, 2 Ald & El. N. S. 143. So the holder of a dishonored bill cannot adopt a notice given by a stranger. Story on Promissory Notes, § 301.

A general agent has no authority to order or ratify a wilful trespass on the part of a sub-agent, so as to subject his principal to liability. Vanderbilt *v.* The Richmond Turnpike Co. 2 Comst. R. 479, 482. The principal must ratify the entire doings of one who acted for him, or repudiate the whole. Farmers' Loan Co. *v.* Walworth, 1 Comst. R. 447. Story on Agency, § 250. Hovey *v.* Blanchard, 13 N. H. R. 145.

It seems, that the act of a public officer, exceeding the authority conferred on him by law, may be adopted by the party for whose benefit it was done. 1 Comst. R. 444, *supra.*

to the same place for goods, and with money to pay for them, and the servant received the goods, but embezzled *the cash, the master was held answerable for *615 the goods; for he had given credit to his servant by adopting his former act. (a) So, where a broker had usually signed policies of insurance for another person, or an agent was in the habit of drawing bills on another, the authority was implied from the fact that the principal had assumed and ratified the acts; and he was held bound by a repetition of such acts, where there was no proof of notice of any revocation of the power, or of collusion between a third party and the agent. (b) [1] It is the prior conduct of the principal that affords just ground to infer a continuance of the agency in that particular business; and the rule is founded on obvious principles of justice and policy. It was familiar to the Roman law, (c) and is equally so in the law of modern Europe, and the jurisprudence of this country. (d) Emerigon states an interesting case within his experience, of the presumption of ratification of an act, from omission in due season to dissent from it. A merchant of Palermo wrote to a house at Marseilles, that he had shipped goods consigned to them, to be sold on his account. The ship being out of time, the consignees at Marseilles caused the cargo to be insured on account of their friend at Palermo, and gave him advice of it. He received the letter, and made no reply, and the vessel arriving safe, he refused to account for the pre-

(a) Hazard v. Treadwell, 1 Str. Rep. 506. Rusby v. Scarlett, 5 Esp. R. 76. Todd v. Robinson, Ryan & Moody's Rep. 217.

(b) Neal v. Erving, 1 Esp. Rep. 61. Hooe v. Oxley, 1 Wash. (Va.) Rep. 19. So also, if a confidential clerk had been accustomed to draw checks for his principal, and had occasionally been permitted to indorse for him, the jury would be warranted to infer a general authority to indorse. Prescott v. Flinn, 9 Bing. Rep. 19.

(c) Dig. 17, 1, 6, 2. Ibid. 50, 17, 60.

(d) Emerigon, Traité des Assurances, tom. i. p. 144. Nickson v. Brohan, 10 Mod. Rep. 109. Williams v. Mitchell, 17 Mass. Rep. 98. Bryan v. Jackson, 4 Conn. R. 288.

1 So where the defendant had permitted goods to be delivered at two different places, by the plaintiff, on his credit, to a woman with whom he cohabited, and the plaintiff delivered goods at a third place, the defendant was held liable. Ryan v. Sams, 12 Jurist, R. 745, 1848.

mium paid by the consignees, under the pretence they had insured without orders. But the reception of the letter, and the subsequent silence, were deemed by the law-merchant equiv- *616 alent to a ratification of the act. At this day, and * with us, the authority would be implied from the duty of the consignee, without the aid of the subsequent silence, provided the previous course of dealing between the parties had been such as to warrant the expectation. (*a*) The ground taken at Marseilles was undoubtedly sufficient; and it is a very clear and salutary rule in relation to agencies, that where the principal, with knowledge of all the facts, adopts or acquiesces in the acts done under an assumed agency, he cannot be heard afterwards to impeach them, under the pretence that they were done without authority, or even contrary to instructions. *Omnis rati habitio mandato æquiparatur.* When the principal is informed of what has been done, he must dissent, and give notice of it in a reasonable time; and if he does not, his assent and ratification will be presumed. (*b*) *Semper qui non prohibet pro se intervenire, mandare creditur. Procurator qui recepit literas mandati, et statim non contradixit, videtur acceptare mandatum.*[1]

The Roman law would oblige a person to indemnify an assumed agent, acting without authority, and without any assent or acquiescence given to the act, provided it was an act necessary and useful at its commencement. (*c*) But the English law

(*a*) Buller, J., in Wallace *v.* Tellfair, 2 Term Rep. 188, n. Smith *v.* Lascelles, Ibid.

(*b*) Dig. 14, 6, 16. Dig. 46, 3, 12, 4. Dig. 50, 17, 60. Towle *v.* Stevenson, 1 Johns. Cas. 110. Cairnes & Lord *v.* Bleecker, 12 Johns. Rep. 300. Erick *v.* Johnson, 6 Mass. Rep. 193. Frothingham *v.* Haley, 3 Ibid. 70. Clement *v.* Jones, 12 Ibid. 60. Shaw *v.* Nudd, 8 Pick. Rep. 9. Merlin, Questions de Droit, vol. i. p. 482. Verbo, Compte Courant, sec. 1. Pitts *v.* Shubert, 11 La. Rep. 286. Flower *v.* Jones, 7 Martin, N. S. 143.

(*c*) Dig. 3, 5, 45. Ibid. 3, 5, 10, 1. The *negotiorum gestio*, according to the civil-

[1] See Brigham *v.* Peters, 1 Gray, 139. But where the agent disobeys his principal's orders, it is held that, as between them, a failure to notify the agent of the principal's dissent, is no ratification. Lewin *v.* Dille, 17 Mis. 64. With respect to the liability of banks for the acts of their agents, it has been held, that a bank is not bound to receive deposits; and is not liable for not applying properly a deposit, unless it be made with the proper officer, as with the receiving teller, (not the paying teller,) or with the assent of the cashier. Thatcher *v.* Bank of State of New York, 5 Sandf. S. C. R. 121.

has never gone to that extent; and, therefore, if A. owes a debt to B., and C. chooses to pay it without authority, the law will not raise a promise in A. to indemnify * C.; for if *617 that were so, it would be in the power of C. to make A. his debtor, *nolens volens.* (*a*) If there be any relation between the parties, a payment without authority may be binding on the person for whose use it was made, if it be made under the pressure of a situation in which one party was involved by the other's breach of faith. A surety, from his relation to the principal debtor, has an interest, and a right to see that the debt be paid; and if he pays to relieve himself, it is money paid to and for the use of the other. (*b*) So, in the case mentioned by Lord Kenyon, (*c*) from Roll's Abridgment, where a party met to dine at a tavern, and all except one went away after dinner without paying their quota of the tavern-bill, and the one remaining paid the whole bill; he was held entitled to recover from the others their aliquot proportions. The recovery must have been upon the principle, that as a special association, they stood in the light of sureties for each other, and each was under an obligation to see that the bill was paid. (*d*)

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ians, is a species of spontaneous agency, or an interference by one in the affairs of another, in his absence, from benevolence or friendship, and without authority. The *negotiorum gestor* acquires no right of property by means of the interference, and he is strictly bound, not only to good faith, but to ordinary care and diligence; and in some cases he is held responsible for the slightest neglect. Jones on Bailment, 37. 1 Bell's Com. 269. Pothier, du Quasi. Contrat Negotiorum gestorum, Nos. 208, 209, 210. Pothier, Contrat de Mandat. Nelson *v.* Macintosh, 1 Starkie's Rep. 237. Louisiana Civil Code, art. 2274, 2275. Lord Ellenborough, in Drake *v.* Shorter, 4 Esp. Rep. 165 To lay a foundation for a claim of recompense or remuneration on the part of the *negotiorum gestor*, the labor or expense must be bestowed either with the direct intention of benefiting the third party against whom the claim is made, or in the *bonâ fide* belief that the subject belongs to the person by whom the expense or labor is bestowed. Lord Stair's Institutions, vol. i. edit. 1832, note *g*, p. 54, by J. E. More, the editor.

(*a*) Lord Kenyon, 8 Term Rep. 310. Story, J., 5 Mason's Rep. 400.

(*b*) Exall *v.* Partridge, 8 Term Rep. 308.

(*c*) Ibid. 614.

(*d*) When several persons dine together at a tavern, each is liable for the reckoning. Collyer on Part. 25, note *w*. They are considered to be liable jointly. They are parties to a *joint contract.* But the members of a club are not *partners*, and are not to be treated as such. The committee of a club are the agents of the members at large, and bound by the contracts they make in that character, but the members are

II. *Of the power and duty of agents.*

An agent who is intrusted with general powers, must exercise a sound discretion, and he has all the implied powers which are within the scope of the employment. A power to settle an account, implies the right to allow payments already made.[1] If he be an empowered agent in a particular transaction, he is not bound to go on and do all other things connected with, or arising out of the case; for the principal is presumed to have his attention awakened to every thing not within the spe- *618 cific charge. (a) If his powers *are special and limited, he must strictly follow them;[2] but whether there be a

not bound by the acts of the committee, if they exceed their authority as agents. Todd v. Emly, before Abinger, Ch. B., 8 Meeson & W. 505, and cited at large in Woodworth on Joint-stock Companies, pp. 174–185. See also Eichbaum v. Irons, 6 Watts & Serg. 67, S. P. As to the liability of a member of a club, the question is, if the contract was not made personally with the member, whether there was sufficient evidence of an authorized *agency* to make a contract binding on the members personally. Flemyng v. Hector, 2 Meeson & Welsby, 172. It is not a question of partnership, but of principal and agent.

(a) Dubreuil v. Rouzan, 13 Martin's La. Rep. 158. Hodge v. Durnford, Ibid. 100. But the *negotiorum gestor* of the civil law, who interferes where the interest of his principal does not positively require it, must do everything necessarily dependent on the business he commences, though not within the order or knowledge of the person for whom it is transacted.

[1] But an agent appointed to settle claims, has not the power to commute them. Kingston v. Kincaid, 1 Wash. C. C. R. 454. Lewis v. Gamage, 1 Pick. R. 347. Nor to submit them to arbitration, unless according to a general usage, or by a rule of court. The Alexandria Canal Co. v. Swann, 5 How. S. C. R. 83. Story on Agency, § 99. Inhabitants of Buckland v. Inhabitants of Conway, 16 Mass. Rep. 396. Henley v. Soper, 8 B. & C. R. 16.

An attorney at law has a general power to submit to arbitration. Filmer v. Delber, 3 Taunt. R. 486. Faviell v. E. Counties R. Co. 2 Exchequ. R. 348. Wilson v. Young, 9 Barr R. 101. Holker v. Parker, 7 Cranch, R. 436. Talbot v. McGee, 4 Monroe (Ky.) R., 377. Swinfen v. Swinfen, 37 E. L. & Eq. 327. But it seems this power is limited to suits already commenced. Jenkins v Gillespie, 10 S. & M. R. 31. Scarborough v. Reynolds, 12 Ala. R. 252. An attorney, either at law or in fact, has no authority either to make a lease, or to ratify or confirm an imperfect one, or to perfect an inchoate agreement for a lease of property of his principal, unless authority for such purpose is expressly given. Howard v. Carpenter, 11 Md. 259. An agent employed to sell or lease real property, has not authority to make such representations in regard to title as will bind the principal. Tondro v. Cushman, 5 Wisc. 279. An agent, authorized to collect debts, can only receive money. Earnhart v. Robertson, 10 Ind. 8.

No officer of the United States has authority to enter into a submission in their behalf, which will be binding upon them. United States v. Ames, 1 Wood. & Minot, C. C. R. 76, 89.

[2] So sternly has the rule been enforced, that the agent must obey his instructions, that

special authority to do a particular act, or a general authority to do all acts, in a particular business, each case includes the usual and appropriate means to accomplish the end. (*a*) An agent, acting as such, cannot take upon himself at the same time an incompatible duty. He cannot have an adverse interest or employment. He cannot be both buyer and seller, for this would expose his fiduciary trust to abuse and fraud. (*b*)

If A. authorizes B. to buy an estate for him at fifty dollars per acre, and he gives fifty-one dollars an acre, A. is not bound to pay that price; but the better opinion is, that if B. offers to pay the excess out of his own pocket, A. is then bound to take the estate. This case is stated in the civil law, and the most equitable conclusion among the civilians is, that A. is bound to take the estate at the price he prescribed. *Majori summæ minor inest.* (*c*) So, where an agent was directed to cause a ship to be insured at a premium not exceeding three per cent., and the agent, not being able to effect insurance at that premium, gave three and a quarter per cent., the assured refused to reimburse any part of the premium, under the pretence that his correspondent had exceeded his orders; but the French admiralty decreed that he should refund the three per cent.; and Valin thinks they might have gone further, and made him pay the quarter per cent. *ex bono et æquo;* because, he says, it is permitted, in the usage of trade, for factors to go a little beyond their orders, when they are not very precise and absolute. (*d*) The

(*a*) Paley on Agency, by Lloyd, pp. 198–207. Story on Agency, §§ 58, 83.

(*b*) See *infra*, vol. iv. p. 438. Story on Agency, § 165. McGhee *v.* Lindsay, 6 Ala. Rep. 16.

(*c*) Inst. 3, 27, 8. Ferriere, sur Inst. h. t. Pothier, Traité du Contrat de Mandat, Nos. 94, 96. The act of an agent exceeding his authority is good *pro tanto,* and void as to excess. Johnson *v.* Blasdale, 1 Smedes & Marshall's Miss. Rep. 1.

(*d*) Valin, Com. sur l'Ord. de la Mer. tom. ii. pp. 32, 33.

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in a case where an agent having money of his principal in his hands, was directed to employ it in the purchase of a bill for his principal, but the agent purchased the bill on his own credit, and the bill could not be collected, it was held, that the principal, *by reason of the disobedience,* might recover the amount of the bill of the agent. Hays *v.* Stone, 7 Hill's N. Y. R. 128.

decree was undoubtedly correct, and the injustice of the defence disturbed in some degree the usually accurate and severe judgment of Valin.

If the agent executes the commission of his principal in part only, as if he be directed to purchase fifty shares of bank stock, and he purchases thirty only, or if he be directed to cause 2,000 dollars to be insured on a particular ship, and he effect an insurance for 1,000 dollars, and no more, it then becomes a question, whether the principal be bound to take the stock, or pay the premium. The principal may perhaps be bound to the *619 extent of the execution of *the commission in these cases, though it has not been executed to the utmost extent; and this seems to have been the conclusion of the civil law. (a) But a distinction is to be made according to the nature of the subject. If a power be given to buy a house, with an adjoining wharf and store, and the agent buys the house only, the principal would not be bound to take the house, for the inducement to the purchase has failed. So, if he be instructed to purchase the fee of a certain farm, and he purchases an interest for life or years only, or he purchases only the undivided right of a tenant in common in the farm; in these cases the principal ought not to be bound to take such a limited interest, because his object would be defeated. It might be otherwise, if the agent was directed to buy a farm of one hundred and fifty acres, and he buys one corresponding to the directions as nearly as possible, containing one hundred and forty acres only. The Roman lawyers considered and discussed these questions with their usual sagacity and spirit of equity; and whether the principal would or would not be bound by an act executed *in part only*, depends in a measure upon the reason of the thing, and the nature and object of the purchase. (b)

If the agent does what he was authorized to do, and something more, it will be good, as we have seen, so far as he was authorized to go, and the excess only would be void. If an agent has a power to lease for twenty-one years, and he leases

(a) Dig 17, 1, 33 Green, J, in Gordon v. Buchanan, 5 Yerger's Tenn Rep. 81.

(b) Dig 17, 1, 36 Pothier, Traité du Contrat de Mandat, No 95. 1 Livermore on the Law of Principal and Agent, 100, 101

for twenty-six years, the lease, in equity, would be void only for the excess, because the line of distinction between the good execution of the power and the excess can be easily made. (*a*) But, at law, even such a lease would not be good, *pro tanto*, or for the twenty-one years, according to a late English * decision in the K. B. (*b*) If, however, the agent does a *620 different business from that he was authorized to do, the principal is not bound, though it might even be more advantageous to him; as if he was instructed to buy such a house of A., and he purchased the adjoining house of B. at a better bargain; or, if he was instructed to have the ship of his correspondent insured, and he insured the cargo. The principal is not bound, because the agent departed from the subject-matter of the instruction. (*c*)

There is a very important distinction on this subject of the powers of an agent, between a general agent and one appointed for a special purpose. The acts of a general agent, or one whom a man puts in his place to transact all his business of a particular kind, or at a particular place, will bind his principal, so long as he keeps within the general scope of his authority, though he may act contrary to his private instructions; [1] and the rule is necessary, to prevent fraud and encourage confidence in dealing. (*d*) But an agent, constituted for a particular

(*a*) Sir Thomas Clarke, in Alexander *v.* Alexander, 2 Ves. 644. Campbell *v.* Leach, Amb. Rep. 740. Sugden on Powers, 545.

(*b*) Roe *v.* Prideaux, 10 East's Rep. 158.

(*c*) Dig. 17, 1, 5, 2. Pothier, Traité du Contrat de Mandat, No. 97. Grotius, de Jure, B. & P. b. 2, ch. 16, sec. 21, says, that the famous question stated by Aulus Gellius, whether an order or commission might be executed by a method equally or more advantageous than the one prescribed, might easily be answered, by considering whether what was prescribed was under any precise form, or only with some general view that might be effected as well in some other way. If the latter did not clearly appear, we ought to follow the order with punctuality and precision, and not interpose our own judgment when it had not been required.

(*d*) Whitehead *v.* Tuckett, 15 East, 400. Walker *v.* Skipwith, Meig's Tenn. Rep. 502. Lightbody *v.* N. A. Ins. Co. 23 Wendell's Rep. 22. Lobdell *v.* Baker, 1 Metcalf's Rep. 202. Attorneys, having a discretionary power to collect a debt, may, in the exercise of their discretion, assent to an assignment for the benefit of creditors, and

1 Johnson *v.* Jones, 4 Barb. Sup. Ct. Rep. 369.

purpose, and under a limited power, cannot bind his principal if he exceeds that power. (*a*) The special authority *621 *must be strictly pursued. (*b*) Whoever deals with an agent constituted for a special purpose, deals at his peril, when the agent passes the precise limits of his power; though if he pursues the power as exhibited to the public, his principal is bound, even if private instructions had still further limited the special power. (*c*) [1] Thus, where a holder of a bill of ex-

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bind their clients thereto. Gordon *v.* Coolidge, 1 Sumner's Rep. C. C. U. S. 537. But a law agent is responsible for the consequences of professional error when the injury thereby to his client arises from the want of reasonable *skill* or *diligence* on his part, both of which qualities he assumes to have and duly employ. Hart *v.* Frame, 6 Cl. & F. 193. A general agent is to act for his principal as he would for himself, and is bound to exercise a sound discretion. A special agent is confined to his instructions. Master of the Rolls, in Bertram *v.* Godfray, 1 Knapp's Rep. 383. Anderson *v.* Coonley, 21 Wendell, 279.

(*a*) Munn *v.* Commission Company, 15 Johns. Rep. 44. Beals *v.* Allen, 18 Ibid. 363. Thompson *v.* Stewart, 3 Conn. Rep. 172. Andrews *v.* Kneeland, 6 Cowen's Rep. 354. Buller, J., 3 Term Rep. 762. East India Company *v.* Hensley, 1 Esp. Rep. 111. Allen *v.* Ogden, Wharton's Dig. tit. Agent and Factor, A. 1. Blane *v.* Proudfit, 3 Call's Rep. 207. If possession of goods be given for a *specific purpose*, as to a carrier or wharfinger, the property is not changed by the sale of such a bailee, and the owner may recover them from the *bonâ fide* buyer. Wilkinson *v.* King, 2 Campb. N. P. Rep. 335.

(*b*) Gordon *v.* Buchanan, 5 Yerger's Tenn. Rep. 71.

(*c*) The principle that pervades the distinction on this subject rests on sound and elevated morality. There must be no deception anywhere. The principal is bound by the acts of his agent, if he clothe him with powers calculated to induce innocent third persons to believe the agent had due authority to act in the given case. On the other hand, if there be no authority, nor the show or color of authority from the principal, to do an act beyond his powers, the party who deals with the agent in any such transaction must look to the agent only. In the case of Williams *v.* Walker, decided by the Ass. V. Ch. of New York, in January, 1845, 2 Sandford's Ch. R. 325, it was held, after a learned discussion of the authorities, that the agent or money scrivener for defendant, who had possession of her bond and mortgage, and received interest for her and part of the principal, was entitled to receive the same, and the payments were valid; but that after the bond was withdrawn from his possession, and delivered to the owner of it, payments of the principal afterwards to him were not good against the owner of the bond, as he was not her general agent, for the inference of agency was founded on the possession of the securities.

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[1] Wilkinson *v.* Candlish, 5 Exch. 91. Towle *v.* Leavitt, 3 Fost. 360. Hunter *v.* Iron and Machine Co. 20 Barb. 493. Young *v.* Wright, 4 Wisc. 144. In Mechanics' Bank *v.* N. Y. & N. H. R. R. Co. 4 Duer, 480, 3 Kern. 599, the plaintiffs demanded the transfer of certain shares of stock, the certificate of which in due form had been pledged to them.

change desired A. to get it discounted, but positively refused to indorse it, and A. procured it to be indorsed by B., it was held, that the original holder was not bound by the act of A., who was a special agent under a limited authority not to indorse the bill. (a) So, in the case of *Batty* v. *Carswell*, (b) A. authorized

(a) Fenn v. Harrison, 3 Term Rep. 757. Unless the manner of doing a particular business be prescribed, even a *special* agent will be deemed clothed with the usual means of accomplishing it; and if he makes *false* representations on the subject, to induce purchasers to enter into the contract, the principal is affected by them, and responsible for the deceit. He who created the trust, and not the purchaser, ought to suffer. Hern v. Nichols, 1 Salk. 289. Sandford v. Handy, 23 Wendell's Rep. 260. Putnam v. Sullivan, 4 Mass. Rep. 45. North River Bank v. Aymar, 3 Hill, 262. The power of the agent to affect the contract in the name of his principal by an innocent misstatement, was elaborately discussed in Cornfoot v. Fowke, 6 Meeson & W. 358. A., by his agent, leased a house to B. which had a nuisance adjoining it, of which A. was apprised, but did not communicate the fact to his agent, who was ignorant of it, and said, in answer to the inquiry of the lessee, if there were any objections to the house, that there were not. There was no fraudulent intention on the part of the owner, for he was merely passive, and gave no directions to his agent, who acted in good faith. The court held that the contract was valid, as there was no fraud in either principal or agent, and the representation of the latter, collateral to the contract, could not affect the principal in a case free from fraud. Lord C. B. Abinger strongly dissented, on the ground that the knowledge of the principal was the knowledge of the agent, and I think he was sustained by strong principles of policy.[1]

(b) 2 Johns. Rep. 48.

It was admitted, that the stock was a fraudulent issue made by the transfer-agent who had authority only to *transfer* stock, not to issue it. It was held by the Court of Appeals, reversing the judgment of the Superior Court, that the certificate was void and that the corporation was not responsible for the act of its agent because it was clearly beyond his authority. A distinction was drawn between acts within the apparent powers of the agent and acts apparently, but not really, within his powers. For the former, the principal is liable, as he is responsible for the appearance of his agent's *powers*; but not for the latter, as the agent alone, if any one, is responsible for the appearance of his *acts*. This distinction is illustrated by the cases of Grant v. Norway, 2 Eng. L. & Eq. 337; Hubberstey v. Ward, 18 Ibid. 551; Coleman v. Riches, 29 Ibid. 323, where it was held that the master of a ship, or a wharfinger, cannot bind their employers by receipts or bills of lading for goods, which they have not received, though such documents are apparently within their authority.

[1] The case of Cornfoot v. Fowke, 6 M. & W. 358, has been condemned in Fitzsimmons v. Joslin, 21 Vt. R. 129, and the opinion of Lord Abinger sustained. It was there held, that the principal would be implicated to the fullest extent for that which he knew, if he took the benefit of the agent's act. If there was fraud in the transaction, whether of the principal or the agent, the contract was equally vitiated. In the recent case of National Exchange Co. v. Drew, 32 Eng. L. & Eq. 1, it was said by Lord Cranworth that the case of Cornfoot v. Fowke was decided solely on the *pleadings*, which alleged *fraud*, whereas there was clearly no fraud in either principal or agent; and Lord St. Leonards said that if the defendant had alleged misrepresentation merely, he must have prevailed. See, fur-

B. to sign his name to a note for 250 dollars, payable in six months, and he signed one payable in sixty days; and the court held that A. was not liable, because the special authority was not strictly pursued.[1] On the other hand, if the servant of a horse-dealer, and who sells for him, but with express instructions not to warrant as to soundness, does warrant, the master is held to be bound; because the servant, having a general authority to sell, acted within the general scope of his authority, and the public cannot be supposed to be acquainted with the private conversations between the master and servant. (*a*) So, if a broker, whose business is to buy and sell goods in his own name, be intrusted by a merchant with the possession and apparent control of his goods, it is an implied authority to sell, and the principal will be concluded by the sale. There would be no safety in mercantile dealings if it were not so. If the principal sends his goods to a place where it is the ordinary business of the person to whom they are confided to sell, a power to sell is implied. (*b*) If one sends goods to an auction-room, it is not to be supposed that they were sent there merely for safe-keeping. The principal will be bound, and the purchaser safe, by a sale under those circumstances. (*c*)

(*a*) Ashhurst, J., in 3 Term Rep. 757. Bayley, J., in 15 East's Rep. 45. If an agent be appointed to sell personal property, the law *implies* an authority to warrant the soundness of the article in behalf of his principal.[2] Hunter *v.* Jameson, 6 Iredell's N. C Rep. 252. Ch. J. Ruffin, *contra.* The declarations of an agent, acting within the scope of his authority, and made in the course of the transaction, are evidence as part of the *res gestæ.* Franklin Bank *v.* Steam Navigation Co. 11 Gill & Johns. 28.

(*b*) Saltus *v.* Everett, 20 Wendell, 267.

(*c*) Pickering *v.* Busk, 15 East's Rep. 38. An implied agency is never construed

ther, on fraudulent representations by agents, Crump *v.* Mining Co. 7 Gratt. 352; Concord Bank *v.* Gregg, 14 N. H. 331.

[1] In a late case, the court declared the law to be, that "the power of binding by negotiable notes can be conferred only by direct authority of the party to be bound, or by the delegation of a power which cannot be otherwise executed." Paige *v.* Stone, 10 Met. R. 160. To the same effect is Temple *v.* Pomroy, 4 Gray, (Mass.) 128. See, also, Rossiter *v.* Rossiter, 8 Wend. R. 494; Story on Agency, §§ 64–68. It may not be easy to reconcile a late case in Ohio, where an authority to employ an attorney was held to embrace the authority to give a promissory note in payment of his services, with the prevailing doctrine on this subject. Layet *v.* Gano, 17 Ohio R. 466. A power to indorse, it seems, is not sufficient evidence from which to infer a power to receive notice of dishonor. Bank of Mobile *v.* King, 9 Ala. R. 279.

[2] But see Upton *v.* Suffolk County Mills, 11 Cush. 586.

* The presumption of an authority to sell in these cases, * 622 is inferred from the nature of the business of the agent; and it fails when the case will not warrant the presumption of his being a common agent for the sale of property of that description. If, therefore, a person intrusts his watch to a watchmaker to be repaired, the watchmaker is not exhibited to the world as owner, and credit is not given to him as such, merely because he has possession of the watch, and the owner would not be bound by his sale. (a)

A factor or merchant, who buys or sells upon commission, or as an agent for others, for a certain allowance, may, under certain circumstances, sell on credit, without any special authority for that purpose, though, as a general rule, an agent for sale must sell for cash, unless he has express authority to sell on credit. (b) He may sell in the usual way,[1] and, consequently, it is implied that he may sell on credit without incurring risk, provided it be the usage of the trade at the place, and he be not restrained by his instructions, and does not unreasonably extend

to extend beyond the obvious purposes, and the general usage, scope, and course of the business for which it is apparently created, yet the incidental powers of certain agencies, such for instance as those of a master of a ship and the cashier of a bank, are not easily reduced to precise limits. Good sense, sound discretion, and the necessary purposes of the trust, must guide the application of the implied power according to the circumstances of the case. Mr. Justice Story, in his Commentaries on Agency, §§ 114–123, has collected and digested, with his usual care, the leading cases in which the application for this implied authority in the case of cashiers and masters of vessels has been sustained.

(a) Lord Ellenborough, 15 East's Rep. *supra.*

(b) An *agent* is a *nomen generalissimum*, and includes factors and brokers, who are only a special class of agents. A *factor* is distinguished from a broker by being intrusted by others with the possession and disposal, and apparent ownership of property, and he is generally the correspondent of a foreign house. A *broker* is employed merely in the negotiation of mercantile contracts. He is not trusted with the possession of goods, and does not act in his own name. 1 Domat, b. 1, tit. 17, sec. 1, art. 1. Story on Agency, §§ 28, 33. Baring *v.* Corrie, 2 Barn. & Ald. 137, 143, 148. His business consists in negotiating exchanges, or in buying and selling stocks and goods; but in modern times, the term includes persons who act as agents to buy and sell, and who charter ships and effect policies of insurance. A stock-broker cannot sell upon credit, for that is not the usual course of *his* business.

[1] It seems, if a factor hurries a sale, and does not make it in the usual course, it will be void. Shaw *v.* Stone, 1 Cush. (Mass.) R. 248.

the term of credit, and provided he uses due diligence to ascertain the solvency of the purchaser. (a) But the factor cannot sell on credit in a case in which it is not the usage, as the sale of stock, for instance, unless he be expressly authorized, because this would be to sell in an unusual manner. (b) Nor can he bind his principal to other modes of payment *623 *than a payment in money at the time of sale, or on the usual credit. If a factor, at the expiration of the credit given on a sale, takes a note payable to himself at a future day, he makes the debt his own. (c) He cannot bind his principal to allow a set-off on the part of a purchaser. (d) If the factor, in a case duly authorized, sells on credit, and takes a negotiable note, payable to himself, the note is taken in trust for his principal, and subject to his order; and if the purchaser should become insolvent before the day of payment, the circumstance of the factor having taken the note in his own name, would not

(a) Van Alen v. Vanderpool. 6 Johns. Rep. 69. Goodenow v. Tyler, 7 Mass. Rep. 36. James & Shoemaker v. M'Credie, 1 Bay's S. C. Rep. 294. Emery v. Gerbier, 2 Wash. C. C. 413 Cases cited in Wharton's Dig. of Penn. Rep. tit. Agent and Factor, A. 24. Burrill v. Phillips, 1 Gall. Rep. 360. Willes, Ch. J., in Scott v. Surman, Willes's Rep. 400. Chambre, J., in Houghton v. Matthews, 3 Bos. & Pull. 489. Leverick v. Meigs, 1 Cowen's Rep. 645. Greely v. Bartlett, 1 Greenleaf's Rep. 172. Forrestier v. Bordman, 1 Story's R. 43. Story on Agency, §§ 110, 209.

(b) Wiltshire v. Sims, 1 Camph. N. P. Rep. 258. State of Illinois v. Delafield, 8 Paige's Rep. 527. S. C. 26 Wendell, 192. In this last case it was held, that an agent *for a state*, authorized to borrow money on a sale of *stock*, cannot sell on *credit* without express authority, even though, by the usages of trade, it be the custom to sell such stocks on a credit, when they are the private property of individuals.[1] It was further held, that if the agent for a state unauthorizedly sell its stock on credit, or below par, to a purchaser chargeable with notice of his want of authority, the state may repudiate the contract, and follow the property in the hands of such purchaser, and before it has been passed away to a *bonâ fide* holder without notice.

(c) Hosmer v. Beebe, 14 Martin's La. Rep. 368. So, if a factor sells on credit, and takes the notes of the vendee, and has them discounted for his own accommodation, he becomes responsible for the debt. Myers v. Entriken, 6 Watts & Serg 44. The same results follow if he blend the moneys of the principal with his own, and releases the vendee. He is bound to keep his principal duly informed of matters material to his interest. Brown v. Arrott, Id. 402. Story on Agency, § 196.

(d) Guy v. Oakley, 13 Johns. Rep. 332.

[1] But an agent, employed by government to collect debts, may, in the exercise of a judicious discretion, give the debtor reasonable indulgence and time for payment. United States v. Hudson, 3 McLean's C. C. R. 156.

render him personally responsible to his principal. (a) [1] Even if the factor should guaranty the sale, and undertake to pay if the purchaser failed, or should sell without disclosing his principal, the note taken by him as factor would still belong to the principal, and he might waive the guarantee and claim possession of the note, or give notice to the purchaser not to pay it to the factor. In such a case, if the factor should fail, the note would not pass to his assignees, to the prejudice of his principal; and if the assignees should receive payment from the vendee, they would be responsible to the principal; for the debt was not in law due to them, but to the principal, and did not pass under the assignment. (b) The general doctrine is, that where the principal can trace his property into the hands of an agent or factor, he may follow either the identical article or its proceeds, into the possession of the factor, or of his legal representatives or assignees, unless they should have paid away the same in their representative character, before notice of the claim of * the principal. (c) [2] The same rule applies to the case *624 of a banker, who fails, possessed of his customer's property. If it be distinguishable from his own, it does not pass to his creditors, but may be reclaimed by the true owner, subject to the liens of the banker upon it. (d) [3]

(a) Messier v. Amery, 1 Yeates's Rep. 540. Goodenow v. Tyler, 7 Mass. Rep. 36. Scott v. Surman, Willes's Rep. 400.

(b) Godfrey v. Furzo, 3 P. Wms. Rep. 185. *Ex parte* Dumas, 1 Atk. Rep. 234. Tooke v. Hollingworth, 5 Term Rep. 226. Garratt v. Cullum, cited in Scott v. Surman, Willes's Rep. 405, and also by Chambre, J., in 3 Bos. & Pull. 490. Kip v. Bank of N. Y. 10 Johns. Rep. 63. Thompson v. Perkins, 3 Mason's Rep. 232.

(c) Veil v. Mitchel, 4 Wash. Cir. Rep. 105. Taylor v. Plumer, 3 Maule & Selw. 562.

(d) Walker v. Burnell, Doug. Rep. 317. Bryson v. Wylie, 1 Bos. & Pull. 83, n. Bolton v. Puller, Ibid. 539. In the case of Sargeant, 1 Rose's Cas. 153. Parke v. Eliason, 1 East's Rep. 544. 3 Mason's Rep. 242.

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[1] Rich v. Monroe, 14 Barb. 602.

[2] Warner v. Martin, 11 How. U. S. 209. Beach v. Forsyth, 14 Barb. 499. Blackman v. Green, 24 Vt. 17. Benny v. Pegram, 18 Mis. 191. In this last case it was held to make no difference that there was a balance against the principal in favor of the factor.

[3] Bankers have a general lien, by the law-merchant, which will be judicially noticed, like the negotiability of bills of exchange. Brandão v. Barnett, 3 M. G. & S. R. 530. The

Though payment to a factor, for goods sold by him be valid, the principal may control the collection, and sue for the price in his own name, or for damages for non-performance of the contract; and it is immaterial whether the agent was an auctioneer or common factor. (a)

There are some cases in which a factor sells on credit at his own risk. When he acts under a *del credere* commission, for an additional premium, he becomes liable to his principal when the purchase-money falls due; and according to the doctrine in some of the cases, he is substituted for the purchaser, and is bound to pay, not conditionally, but absolutely, and in the first instance. The principal may call on him without first looking to the actual vendee. This is the language of the case of *Grove* v. *Dubois*, (b) and it seems to have been adopted and followed in *Leverick* v. *Meigs;* (c) and yet there is some difficulty and want of precision in the cases on the subject. It is said, that a factor under a *del credere* commission, is a guarantor of the sale, and that the notes he takes from the purchaser belong to his principal, equally as if he had only guaranteed them. (d) If he sells under a *del credere* commission, he is to be considered, as between himself and the vendee, as the sole owner of the

(a) Girard *v.* Taggart, 5 Serg. & Rawle, 19.
(b) 1 Term Rep. 112.
(c) 1 Cowen's Rep. 645.
(d) But if he takes depreciated paper in payment, he must account for the full value in specie. Dunnell *v.* Mason, 1 Story's Rep. 543.

circumstances under which this lien will arise, have lately been under the consideration of the Supreme Court of the United States. It was there held,

1. That a bank has no lien for its general balance against a person, upon funds deposited by him, when such person was known to have acted as agent for another, to whom the deposit wholly belonged.

2. That if it was not known to the bank that the depositor was an agent, and though he was treated as owner, yet the bank has no such lien, as against the owner, unless credit had been given to the agent upon the security of such deposit, in the usual course of business.

3. That in case the agency was unknown, and such credit had been given, the bank was entitled to a lien; for its general balances were against the owner of the deposit. Bank of the Metropolis *v.* New England Bank, 6 How. U. S. 512. See also Lawrence *v.* The Stonington Bank, 6 Conn. R. 521. It may not be easy to reconcile the latter case with the case in Howard's Reports.

See on the subject generally, Jones *v.* Starkey, 11 Eng. L. & Eq. 285.

goods; and yet he is considered only as a surety. (a) In some late cases in the C. B., in England, (b) *the doctrine in the case of *Grove* v. *Dubois* was much questioned, and it was considered to be a *vexata quæstio*, whether a *del credere* commission was a contract of guaranty merely on default of the vendee, or one altogether distinct from it, and not requiring a previous resort to the purchaser. (c) [1] *625

Though a factor may sell and bind his principal, he cannot pledge the goods as a security for his own debt, not even though there be the formality of a bill of parcels, and a receipt.[2] The principal may recover the goods of the pawnee; and his

(a) Chambre, J, 3 Bos. & Pull. 489. Thompson v. Perkins, 3 Mason's Rep. 232. A *del credere* factor or agent may sell in his own name. This is according to a custom in the London corn-market. Johnston v. Usborne, 11 Adol. & Ellis, 549.

(b) Gall v. Combe, 7 Taunt. Rep. 558. Peel v. Northcote, Ibid. 478.

(c) The liability of a factor to his principal for the proceeds of sales made by him under a *del credere* commission, is not affected by the statute of frauds; for the undertaking is original, and not collateral. Swan v. Nesmith, 7 Pick. Rep. 220. Wolff v. Koppel, 5 Hill, N. Y. Rep. 458. The correct legal import of a *del credere* engagement, says Mr. Bell, is an engagement to be answerable, as if the person so binding himself was the proper debtor. 1 Bell's Com. 378. But the final settlement of the question in the English courts is otherwise, and the doctrine of the case of Grove v. Dubois may be considered as overruled. It was held, in Morris v. Cleasby, (4 Maule & Selw. 566,) that the character of a broker, acting under a *del credere* commission, was that of a *surety*, for the solvency of the party with whom his principal deals through his agency. He becomes a *guarantor* of the price of the goods sold, and has an additional percentage for his responsibility. This was the opinion of Mr Justice Story, in the case of Thompson v. Perkins, 3 Mason's Rep. 236, and confirmed in his Commentaries on Agency, § 215. In Wolff v. Koppel, 2 Denio, R. 368, this point was discussed and much considered in the New York Court of Errors; the conclusion was, that the contract of a factor to account for the amount of sales under a *del credere* commission, was not within the statute of frauds, and need not be in writing.

[1] An engagement of a factor to sell upon a *del credere* commission, need not be in writing. Couturier v. Hastie, 16 Eng. L. & Eq. 562. It is an original, and not a collateral contract, and is not within the statute of frauds. Bradley v. Richardson, 23 Vt. R. 721. He has the same claim on his principal for advances under a *del credere* as under an ordinary commission. Graham v. Ackroyd, 19 Eng. L. & Eq. 654. The guaranty of a *del credere* commission does not extend to the remittance of receipts; but, if it is agreed that remittances shall be guaranteed, and a commission charged therefor, the factor is liable, whether he charge the commission or not. Heubach v. Mollman, 2 Duer, 227.

[2] So the factor may himself sell the goods he has already pledged. Nowell v. Pratt, 5 Cush. 111. *Contra*, Bott v. McCoy, 20 Ala. 578.

ignorance that the factor held the goods in the character of factor, is no excuse. The principal is not even obliged to tender to the pawnee the balance due from the principal to the factor; for the lien which the factor might have had for such balance is personal, and cannot be transferred by his tortious act, in pledging the goods for his own debt. Though the factor should barter the goods of his principal, yet no property passes by that act, any more than in the case of pledging them, and the owner may sue the innocent purchaser in trover. (*a*) The doctrine that a factor cannot pledge, is sustained so strictly, that it is admitted he cannot do it by indorsement and delivery of the bill of lading, any more than by delivery of the goods themselves. (*b*) To pledge the goods of the principal, is beyond the scope of *626 the factor's power; and every *attempt to do it under color of a sale, is tortious and void. If the pawnee will call for the letter of advice, or make due inquiry as to the source from whence the goods came, he can discover (say the cases) that the possessor held the goods as factor, and not as vendee; and he is bound to know, at his peril, the extent of the factor's power. (*c*) There may be a question, in some instances, whether the *res gestæ* amounted to a sale on the part of the factor, or was a mere deposit or pledge as collateral security for his debt. But when it appears that the goods were really pledged, it is settled that it is an act beyond the authority of the factor, and the principal may look to the pawnee. There is an exception to the rule in the case of negotiable paper, for there possession and property go together, and carry with them a disposing power. A factor may pledge the negotiable paper of his principal as security for his own debt, and it will bind the principal,

(*a*) Guerreiro *v.* Peile, 3 Barn. & Ald. 616. Rodriguez *v.* Heffernan, 5 Johnson's Ch. Rep. 429.

(*b*) Martini *v.* Coles, 1 Maule & Selw. 140. Shipley *v.* Kymer, Ibid. 484. Graham *v.* Dyster, 6 Ibid. 1.

(*c*) Paterson *v.* Tash, 2 Str. Rep. 1178. Daubigny *v* Duval, 5 Term Rep. 604. De Bouchout *v.* Goldsmid, 5 Vesey, 211. M'Combie *v.* Davies, 7 East's Rep. 5. Martini *v.* Coles, 1 Maule & Selw. 140. Fielding *v.* Kymer, 2 Brod. & Bing. 639. Kinder *v.* Shaw, 2 Mass. Rep. 398. Van Amringe *v.* Peabody, 1 Mason's Rep. 440. Bowie *v.* Napier, 1 M'Cord's Rep. 1.

unless he can charge the party with notice of the fraud, or of want of title in the agent. (*a*)[1]

But though the factor cannot pledge the goods of his principal as his own, he may deliver them to a third person for his own security, with notice of his lien, and as his agent, to keep possession for him. Such a change of the lien does not divest the factor of his right, for it is, in effect, a continuance of the factor's possession. (*b*) So, if a factor, having goods consigned to him for sale, should put them *into the hands *627 of an auctioneer, or commission-merchant connected with the auctioneer in business, to be sold, the auctioneer may safely make an advance on the goods for purposes connected with the sale, and as part-payment in advance, or in anticipation of the sale, according to the ordinary usage in such cases. (*c*) But if the goods be put into the hands of an auctioneer to sell, and, instead of advancing money upon them in immediate reference to the sale, according to usage, the auctioneer should become a pawnbroker, and advance money on the goods by way of loan, and in the character of pawnee instead of seller, he has no lien on the goods. It may be difficult, perhaps, to discriminate in all cases between the two characters. It will be a matter of evidence and of fact, under the circumstances. The distinction was declared in *Martini* v. *Coles*, (*d*) and it was observed in that case, that it would have been as well if the law had been, that where it was equivocal whether the party acted as principal or factor, a pledge in a case free from fraud should be valid.

(*a*) Collins *v.* Martin, 1 Bos. & Pull. 648. Treuttel *v.* Barandon, 8 Taunt. Rep. 100. Goldsmyd *v.* Guden, in chancery, and cited in Collins *v.* Martin. Trover will lie by the principal against the agent, when the latter converts the property to his own use, or disposes of it contrary to his instructions. M'Morris *v.* Simpson, 21 Wendell, 610.

(*b*) M'Combie *v.* Davies, 7 East's Rep. 5. Urquhart *v.* M'Iver, 4 Johns. Rep. 103.

(*c*) Laussatt *v.* Lippincott, 6 Serg. & Rawle, 386. If goods be consigned to a commission-merchant or factor for sale, at a limited price, and he makes advances on them, and they cannot be sold for that price, he may, on reasonable notice to his principal, at a fair market, sell them below that price for his indemnity. Frothingham *v.* Everton, 12 N. H. Rep. 239.

(*d*) 1 Maule & Selw. 140.

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[1] Warner *v.* Martin, 11 How. U. S. 209.

To guard against abuses and fraud, it is admitted, that if the factor be exhibited to the world as owner, with the assent of his principal, and by that means obtained credit, the principal will be liable. It was suggested, in the case last mentioned, that perhaps if a consignment of goods to a factor to sell, be accompanied with a bill drawn on the factor for the whole or part of the price of the consignment, an advance to take up the bill of the consignor, and appropriated to that end, might be considered as an advance, under the authority given by the principal, so as to bind him to a pledge by the factor for that purpose. *628 But in *Graham* v. *Dyster*, (*a*) it was decided *by the K. B., that though the principal drew upon his factor for the amount of the consignment, and the goods were sent to the factor to be dealt with according to his discretion, the factor could not pledge the goods, even in that case, to raise money to meet the bills. This was a very hard application of the general rule; and the cases go so far as to hold, that though there should be a request of the consignor accompanying the consignment, that his agent, the consignee, will make remittances in anticipation of sales, that circumstance does not give an authority to pledge the goods to raise money for the remittance. (*b*) In the last case, referred to, the judges of the K. B. expressed themselves decidedly in favor of the policy and expediency of the general rule of law, that a factor cannot pledge. They considered it to be one of the greatest safeguards which the foreign merchant had in making consignments of goods to England; and that, as a measure of policy, the rule ought not to be altered. It operated to increase the foreign commerce of the kingdom, and was founded, it was said, upon a very plain reason, viz: that he who gave credit, should be vigilant in ascertaining whether the party pledged had, or had not, authority so to deal with the goods, and that the knowledge might always be obtained from the bill of lading and letters of advice. (*c*)

(*a*) 2 Starkie's Rep. 21. If, however, the owner arms the factor with such *indicia* of property, as to enable him to deal with it as his own, and mislead others, the factor, in that case, can bind the property by pledging it. Boyson *v.* Coles, 6 Maule & Selw. 14.

(*b*) Queiroz *v.* Trueman, 3 Barn. & Cress. 342.

(*c*) Ch. J. Best, in Williams *v.* Barton, 3 Bing. Rep. 139, expressed himself, on the

* Every contract made with an agent in relation to the business of the agency, is a contract with the principal, *629

other hand, strongly in favor of the policy of allowing a pawnee of goods to hold against the real owner, who permitted the pawnor to deal with the property as if it was his own. He insisted that the old law on this subject was not adapted to the new state of things, and to the alterations in the mode of carrying on commerce. The rule that a factor cannot pledge the goods consigned to him for sale, even for *bonâ fide* advances, in the regular course of commercial dealing, originated in the case of Paterson *v.* Tash, in Str. Rep. 1178, which was a *nisi prius* decision of Ch. J. Lee; though it has been suggested that the report of that case was inaccurate. In the year 1823, the merits of that rule were discussed in the British Parliament, and the discussion was followed by the statutes of 6 Geo. IV ch. 94, and 7 & 8 Geo. IV. ch. 29, *for the better protection of the property of merchants and others, in their dealings with factors and agents,* by which a factor was authorized to pledge, to a certain extent, the goods of his principal. A great deal may be properly said against the principle of the old rule, and, with the exception of England, it is contrary to the law and policy of all the commercial nations of Europe. See the report of the committee of the English House of Commons, which led to the statute of 4 Geo. IV. On the European continent, possession constitutes title to movable property, so far as to secure *bonâ fide* purchasers, and persons making advances of money or credit on the pledge of property by the lawful possessor. There may be something in the commercial policy of the rule alluded to by the English judges; but it would seem to be a conclusion of superior justice and wisdom, that a factor or commercial agent, clothed by his principal with the apparent symbols of ownership of property, should be deemed the true owner in respect of third persons dealing with him fairly in the course of business, as purchasers or mortgagees, and under an ignorance of his real character. See 1 Bell's Com. 483–489.

By the statute of 5 & 6 Vict. c. 39, in *amendment of the law relating to advances bonâ fide made to agents intrusted with goods,* any agent intrusted with the possession of goods, or of the documents of title to goods, is to be deemed owner of such goods and documents so far as to give validity to any contract or agreement by way of pledge, lien, or security *bonâ fide* made by any person with such agent so intrusted, as well for any original loan, advance, or payment made upon the security of such goods or documents, as also for any further or continuing advance in respect thereof; and such contract shall be binding upon and against the owner of such goods and others interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such contract is made is only an agent.[1]

The statute law of New York has changed the former rule of the English courts on this subject. By the Act of April 16, 1830, it was enacted, (and an Act of the state of Rhode Island, passed since the session of January, 1831, and of Pennsylvania, in 1834, Purdon's Dig. 402, are to the same effect,) that the person in whose name goods were shipped should be deemed the owner, so far as to entitle the *consignee to a lien* thereon for his advances and liabilities for the use of the consignor, and

[1] See, for interpretation of English statutes on this subject, Navulshaw *v.* Brownrigg, 13 Eng. L. & Eq. 261.

entered into through the instrumentality of the agent, provided the agent acts in the name of his principal. The party so dealing with the agent is bound to his principal; *630 *and the principal, and not the agent, is bound to the party. It is a general rule, standing on strong foundations, and pervading every system of jurisprudence, that where an agent is duly constituted, and names his principal, and contracts in his name, and does not exceed his authority, the principal is respon-

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for moneys or securities received by the consignor to his use. But the lien is not to exist if the consignee had previous notice, by the bill of lading or otherwise, that the consignor was not the actual and *bonâ fide* owner.[1] *Every factor* intrusted with the possession of any bill of lading, custom-house permit, or warehouse-keepers' receipt for the delivery of the goods, or with the possession of goods for sale, or as security for advances, shall be deemed the owner, so far as to render valid any contract by him for the sale or disposition thereof, in whole or in part, for moneys advanced, or any responsibility in writing assumed upon the faith thereof.[2] The true owner will be entitled to the goods on repayment of the advances, or restoration of the security given on the deposit of the goods, and on satisfying any lien that the agent may have thereon. The Act does not authorize a common carrier, warehouse-keeper, or other person to whom goods may be committed for transportation or storage, to sell or hypothecate the same. Acts of fraud committed by factors or agents, in breach of their duty in that character, are punishable as misdemeanors. It has been held under this Act that a *contract of sale* by a factor or agent, intrusted with goods for sale, will protect the purchaser, though no money be advanced, or negotiable instrument, or other obligation be given at the time of the sale. Jennings *v.* Merrill, 20 Wendell, 1.[3]

This Act is founded chiefly upon the provisions of the British statute of 6 Geo. IV. ch. 94, passed in 1825, in pursuance of the recommendation contained in the report of a select committee from the British House of Commons, of January, 1823. So, by the Civil Code of Louisiana, art. 3214, every consignee or commission agent, who has made advances on goods consigned to him, or placed in his hands to be sold for account of the consignor, has a privilege for the amount of those advances, with interest and charges on the value of the goods, if they are at his disposal, in his stores, or in a public warehouse, or if, before their arrival, he can show by a bill of lading or letter of advice, that they have been dispatched to him.

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[1] Nor does the lien exist, when property, intrusted by the owner to an agent, to be shipped in the owner's name, is, without authority, shipped by the agent in his own name. Covill *v.* Hill, 4 Denio's R. 323.

[2] It has been lately enacted in Massachusetts, that pledgees or second consignees, who have made advances in good faith, upon goods of which their consignors had possession, with the right of sale or consignment, shall, under certain restrictions, have the same lien as they would be entitled to if their consignors, depositors, or pledgors were the *actual owners*. Sup. Rev. St. ch. 216, 1849.

[3] Walther *v.* Wetmore, 1 E. D. Smith, (N. Y.) 7.

sible, and not the agent. (*a*) The agent becomes personally liable only when the principal is not known, or where there is no responsible principal, or where the agent becomes liable by an undertaking in his own name, or when he exceeds his power. (*b*) [1] If he makes the contract in behalf of his principal,

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(*a*) Emerigon, Traité des Ass. tom. ii. p. 465. Lord Erskine, 12 Vesey, 352. Davis *v.* M'Arthur, 4 Greenleaf's Rep. 82, note. Owen *v.* Gooch, 2 Esp. N. P. R. 567. Ware, J., in the case of The Rebecca, Ware's Rep. 205. Roberts *v.* Austin, 5 Wharton, 313.

(*b*) Thomas *v.* Bishop, 2 Str. Rep. 955. Leadbitter *v.* Farrow, 5 Maule & Selw. 345. Dusenbury *v.* Ellis, 3 Johns. Cas. 70. Parker, Ch. J., Stackpole *v.* Arnold, 11 Mass. R. 29. and Hastings *v.* Lovering, 2 Pick. R. 221. Hampton *v.* Speckenagle, 9 Serg. & Rawle, 212. Lazarus *v.* Shearer, 2 Ala. Rep. N. S. 718. Woodes *v.* Dennett, 9 N. H. Rep. 55. When the agent becomes personally bound by his own assumption, his principal is not liable. Taber *v.* Cannon, 4 Metcalf, 456. Ch. J. Shaw says, that the case of Stackpole *v.* Arnold, establishing this doctrine, is of the highest authority. Where an agent voluntarily disobeys the instructions of his principal, and converts to his own use moneys belonging to his principal, to which a definite and specific destination was given, and the article he was directed to buy subsequently acquires additional value, the agent has been held responsible, not merely for the money with interest, but for the article. Short *v.* Skipwith, 1 Brockenbrough's Rep. 103. It is likewise a general rule, that the omission of an agent to keep his principal regularly informed of the state of the interest intrusted to him, renders him responsible for the damages his principal may sustain by such neglect; and if the principal be injuriously misled by the information given, so as to place reliance on an outstanding debt, the agent will be deemed to have made the debt his own. Harvey *v.* Turner, 4 Rawle's Rep. 223. Arrot *v.* Brown, 6 Wharton's Rep. 1. It is also a general rule, that notice to an agent is notice to his principal.[2] So, notice to one of the directors

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[1] A promissory note, in the body of which "A. promises to pay" a certain sum, and signed "B., agent for A.," does not bind B. personally on the contract, although he had no legal authority from A. to give such note. Jefts *v.* York, 10 Cush. (Mass.) 324. An agent who has authority to bind his principal by the name of "the Churchman," does not bind him by a note reading, "I promise to pay," and signed "D. H., agent for the Churchman." Dewitt *v.* Walton, 5 Selden, (N. Y.) 571.

[2] Notice to the agent to bind the principal, must be within the scope of his agency, and relate to the very business in which he is engaged, or is represented as being engaged, by authority of his principal. Such knowledge must have been acquired, "while he is acting for the principal, in the course of the very transaction which becomes the subject of the suit." 2 Hill, N. Y. R. 461. Hiern *v.* Mill, 13 Ves. 120. Bracken *v.* Miller, 4 Watts & Serg. 111; or "so near before it, that the agent must be presumed to recollect it." Story on Agency, § 140. Hargreaves *v.* Rothwell, 1 Keen, R. 154. Hood *v.* Fahnestock, 8 Watts, 489. Nixon *v.* Hamilton, 2 Dru. & Walsh, 364, 390, 392. Griffith *v.* Griffith, 1 Hoff. Ch. R. 158. Notice to the agent of a defective title in purchasing property does not affect the ignorant principal in selling the same. Ross *v.* Houston, 25 Miss. 591.

The above doctrine is, of course, applicable to attorneys or counsel. Ashley *v.* Baillie,

and discloses his name at the time, he is not personally liable, even though he should take a note for the goods sold, paya-

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of a bank, while engaged in the business of the bank, is notice to the bank. Bank of U. S. *v.* Davis, 2 Hill's Rep. 451, 461. It is not consistent with the summary view taken in this lecture of the law of agency, to enter into a detail of the particular responsibilities of agents. We must be content to state generally the principle that the agent is liable to his principal for all losses and damages arising from violations of his duty as agent, by reason of misconduct, delinquency, stretch, or abuse of power, or negligences, provided the loss or damage be reasonably attributable to the same. The illustrations of the general principle are to be seen in the authorities stated or referred to in the treatises at large on agency, and especially in Livermore on Agency, ch. 8, Paley on Agency, by Lloyd, *passim*, and particularly pp. 7–20, 46, 55, 100, 130–149, 212–240, 294–304, 335–342, 386–390, in Story on Agency, ch. 8, and in Sedgwick on the Measure of Damages, as between principal and agent. Treatise, ch. 12.

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2 Ves. 370. Griffith *v.* Griffith, 6 Paige, 315. 2 Spence, Eq. Jur. 753–761. Perkins *v.* Bradley, 1 Hare, 219. Hood *v.* Fahnestock, 8 Watts, 489. Lord Eldon, in Mountford *v.* Scott, Tur. & Russ. 279, was inclined to qualify the doctrine, that notice to the attorney in one transaction, is not to be taken as notice to him in another, where the one transaction followed so close on the other as to render it impossible to suppose that the attorney had forgotten it. And see 1 Keen, 154, *supra*, remarks of Ld. Ch. Plunket, in Nixon *v.* Hamilton, 2 Dru. & Walsh, 364, 392.

The cases are probably reconciled by the principle mentioned above, that the knowledge of the attorney is effectual, when acquired "so near before the transaction in question that he must be presumed to recollect it."

The same rules as to notice apply to the agents of incorporated companies. Hence, notice to the cashier, or other agent of a bank, especially if given officially, is notice to the bank. Fulton Bank *v.* N. Y. & S. Canal Co. 4 Paige, 127. National Bank *v.* Norton, 1 Hill, N. Y. R. 575, 578. The New Hope, &c. Co. *v.* The Phenix Bank, 3 Comst N. Y. R. 166. But notice to a mere stockholder is not notice to the company; Powles *v.* Page, 3 M. G. & Scott, R. 16; H. & L. Banks *v.* Martin, 1 Met. R. 308; though notice to an acting director would be. North River Bank *v.* Aymar, 3 Hill, N. Y. R. 262, 274, 275. See also 2 Hill, N. Y. R. 451, 464. It was held, in La. State Bank *v.* Senecal, 13 La. Rep. 525, 527, that nothing short of official notice to the board, will bind the bank. Mr. Justice Story, in his work on Agency, 2d ed. §§ 140–6, argues strongly in favor of the position in this latter case. See also 9 Barr. R. 27. But it has been held, that notice to the president is notice to the bank. Porter *v.* The Bank of Rutland, 19 Vt. Rep. 425.

If a principal authorize a general agent to appoint a subagent, then notice to the subagent will be notice to the principal. Boyd *v.* Vanderkemp, 1 Barb. Ch. R. 273. So, if a person adopt the act of another, who assumed to act as his agent, he will be charged with notice of such facts as were within the knowledge of the agent at the time of doing the act. Hovey *v.* Blanchard, 13 N. Hamp. R. 145.

It has been held, that notice to a clerk in a mercantile house, not to furnish goods, except upon a written order, is not notice to his principal. Grant *v.* Cole, 8 Ala. R. 519.

The authorities on the subject of notice to agents are collected, and largely commented upon, in Story on Agency, § 140, a, b, c, d, and in Paley on Agency, Dunlap's ed. pp. 262–268.

As to constructive notices, generally applicable to both principals and agents, the reader

ble to himself. (*a*) But if a person would excuse himself from responsibility on the ground of agency, he must show that he disclosed his principal at the time of making the contract, * and that he acted on his behalf, so as to enable *631 the party with whom he deals to have recourse to the principal, in case the agent had authority to bind him. (*b*)[1]

(*a*) Owen *v.* Gooch, 2 Esp. N. P. Rep. 567. Rathbone *v.* Budlong, 15 Johns. R. 1. Goodenow *v.* Tyler, 7 Mass. R. 36. Greely *v.* Bartlett, 1 Greenleaf's R. 172. Corlies *v.* Cumming, 6 Cowen's R. 181. The agent is not liable individually, if he draws a bill of exchange which is protested, provided he declares himself at the same time to be *the agent of the drawees.* Zacharie *v.* Nash, 13 Louisiana R. 20. The agent is personally liable, though he discloses the name of his principal, if he signs a contract which does not show upon the face of it that he contracts as agent. Mills *v.* Hunt, 20 Wendell, 431. But if he drew the bill in his own name, without stating his agency, he is personally liable, though the payee knew he was but an agent.[2] Newhall *v.* Dunlap, 14 Maine R. 180. He must disclose his principal's name, though he sell as auctioneer, or he will be personally liable. Mills *v.* Hunt, 20 Wendell, 431. If he acts simply in his own name, he binds himself and not his principal. This is the general rule, but controlled by circumstances. Bank of Rochester *v.* Monteath, 1 Denio, 402.

(*b*) Mauri *v.* Heffernan, 13 Johns. Rep. 58. Seaber *v.* Hawkes, 5 Moore & Payne, 549. Ormsby *v.* Kendall, 2 Arkansas Rep. 338. Mr. Justice Story, in his Treatise on Agency, §§ 268, 290, lays down the rule that agents or factors for merchants

will find the doctrine laid down in the following cases with clearness and succinctness: —

"The cases in which a constructive notice has been established, resolve themselves into two classes: First, cases in which the party charged has had actual notice, that the property in dispute was in fact charged, incumbered, or in some way affected; and the court has therefore bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led, by an inquiry after the charge, incumbrance, or other circumstance affecting the property of which he had actual notice; And, secondly, cases in which the court has been satisfied, by the evidence before it, that the party charged had designedly abstained from inquiry, for the very purpose of avoiding notice." Jones *v.* Smith, 1 Hare, 43-55. Id. 1 Phill. R. 253.

"It is the well-established principle, that whatever is notice enough to excite attention, and put the party upon his guard, and call for inquiry, is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it." Kennedy *v.* Green, 3 My. & K. 719, 721, 722. Sugden, V. & P. 1052. It is the present disposition of courts of equity not to extend the doctrine of constructive notices. Jones *v.* Smith, 1 Phillip's R. 254.

[1] When the act of the agent will admit of more than one construction, the court will adopt that which will bind the principal, and not that which will bind the agent merely. Dyer *v.* Burnham, 25 Maine R. 13. Story on Agency, § 154.

If the person dealing with an agent have actual notice of the agency, his rights will be the same as though the agent himself had disclosed it. Chase *v.* Debolt, 2 Gilm's. R. 371.

[2] Taking the note of an agent with a knowledge of the agency, and that the principal

And if the agent even buys in his own name, but for the benefit of his principal, and without disclosing his name, the principal is also bound as well as the agent, provided the goods come to

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residing in *foreign countries*, are personally liable on contracts made by them for their principals, and this without any distinction, whether they describe themselves as agents or not. The legal presumption is, that the credit is given to the agent exclusively. The Supreme Court of New York, in Kirkpatrick *v.* Stainer, adhered, however, to the old rule, and held that the agent was not personally responsible when he appeared in the transaction as an agent only, and dealt with the plaintiff in that known character. The court held, that there was no distinction known to our law on this point, between an agent acting for a foreign and for a domestic house. This decision was affirmed in the Court of Errors, in December, 1839. 22 Wendell's R. 244. Mr. Senator Verplanck gave the opinion of the Court of Errors, and he examined the question with learning and ability. He held that there was no general presumption known to our law and commercial usages; that the credit in such cases was given exclusively to the agent, and that the English cases, on which the presumption as a settled rule of law was deduced, in the treatise referred to, were of recent origin, and founded on special or local usage in England, and one not adopted here. He cited Eyre, Ch. J., in De Gaillon *v.* L'Aigle, 1 B. & Puller, 368; Bayley, J., in Patterson *v.* Gandasequi, 15 East, 70; Lord Tenterden, in Thompson *v.* Davenport, 9 Barn. & Cress. 78; Lloyd's Notes to Paley on Agency. He questioned the policy of the rule that credit on sales or consignments was not presumed to be given to well-established foreign houses, but to temporary agents, in exoneration of their principals; and that until the course of business had established such a rule here, as well known in mercantile usage and practice, it was wisest to adhere to the general law of agency, holding the known principal responsible when the agent discloses his name, and acts avowedly and authorizedly on his behalf, and leaving it to the discretion of the American trader to obtain the security of the factor or agent, when he judges it best. In Taintor *v.* Prendergast, 3 Hill, 72, it was admitted that there may be a clear intent shown to give an exclusive credit to the agent; and that if the principal reside in a foreign country, that intent may be inferred from the custom of trade. The Supreme Court of Louisiana, in the Newcastle M. C. *v.* Red River R. R. Co. 1 Rob. La. Rep. 145, followed the rule laid down by Mr. Justice Story; and it was also followed in McKenzie *v.* Nevius, 22 Maine R. 138. In the opinion of Mr. Justice Bliss, in the case of Hardy *v.* Fairbanks, in the Supreme Court of Nova Scotia, at Halifax, in April, 1847, this question arose, and was discussed, and the conclusion of the learned judge seemed to be, that the *home* principal, when discovered, will be liable in all cases, unless he can discharge himself; but that a clear case of liability must be established against the *foreigner;* for the presumption will be in his favor that he is not liable, and the *onus* of proof will rest with the seller. The agent may be deemed always responsible for the protection of the seller, and the liability of the foreign principal

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was bound, has been held to be a discharge of the principal. Paige *v.* Stone, 10 Met. R. 160. See also Wilkins *v.* Reed, 6 Greenl. R. 220. It is enacted in Wisconsin, that every note or bill signed by an agent, shall bind the principal, if the agent had authority to sign. Rev. St. Wis. 1849, ch. 44.

his use, or the agent acted in the business intrusted to him, and according to his power. (a) The attorney who executes a power, as by giving a deed, must do it in the name of his principal; for if he executes it in his own name, though he describes himself to be agent or attorney of his principal, the deed is held to be void; and the attorney is not bound, even though he had no authority to execute the deed, when it appears on the face of it to be the deed of the principal. (b) But if the agent binds himself personally, and engages expressly in his own name, he will be held responsible, though he should, in the contract or covenant, give himself the description or character of agent. (c) [1] And though the attorney, who acts without author-

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becomes a question of evidence and presumption; and as to the remedy of the foreign principal and the vendor against each other, that must be a question of evidence, and the case which they can generally establish [2]

(a) Nelson v. Powell, 3 Doug. Rep. 410. Upton v. Gray, 2 Greenleaf's Rep. 373. Thompson v. Davenport, 9 Barn. & Cress. 78. Cothay v. Fennell, 10 Ibid. 671. Beebee v. Robert, 12 Wendell's Rep. 413. By acting in his own name, the agent only adds his personal obligation to that of the person who employs him. This was a principle in the Roman law, and it applies equally to our own. Dig. 14, 3. Pothier, Traité des Oblig. No. 82. Hopkins v. Lacouture, 4 Louis. Rep. 64. Hyde v. Wolf, Ibid. 234. In Andrews v. Estes, 2 Fairfield, 267, it was held, that the rule in Combes's case, that an agent binds himself, *and not his principal*, unless he uses the name of his principal, applies only to *sealed* instruments. In other contracts, it is sufficient if it appear in the contract that he acted as agent, and meant to bind his principal Evans v. Wells, 22 Wendell's Rep. 324, S. P.

(b) Combes's case, 9 Co. 76. Frontin v. Small, 2 Ld. Raym. 1418., Wilks v. Back, 2 East's Rep. 145. Gwillim's Bacon's Abr. tit. Leases, 1, sec. 10. Bogart v. De Bussy, 6 Johns. Rep. 94. Fowler v. Shearer, 7 Mass. Rep. 14, 19. Stinchfield v. Little, 1 Greenleaf's Rep. 231. Hopkins v. Mehaffy, 11 Serg. and Rawle, 126. Smith v. Perry, 1 Harr. & Johns. Rep. 706, n. Harper v. Hampton, 1 Harr. & Johns. Rep. 622. Townsend v. Corning, 23 Wendell, 435. In the American Jurist, No. 5, 71–85, there is a very critical examination of all the cases, and especially of Combes's case, the great leading case for the doctrine in the text, by Mr. Hoffman, of Baltimore, the learned author of the Legal Outlines. But in the state of Maine, by Act of 1823, a deed by an agent in his own name is valid, provided he had authority, and it appears on the face of the deed that he meant to execute the authority.

(c) Appleton v. Blinks, 5 East's Rep. 148. Forster v. Fuller, 6 Mass. Rep. 58.

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[1] See Seaver v. Coburn, 10 Cush. 324; Tanner v. Christian, 29 Eng. L. & Eq. 103; Lennard v. Robinson, 32 Eng. L. & Eq. 127.

[2] See Mahoney v. Kekulé, 25 Eng. L. & Eq. 278; Green v. Kopke, 36 Eng. L. & Eq. 396, where the doctrine of the note is sustained in opposition to that laid down by Mr. Justice Story.

ity, but in the name of the principal, be not personally bound by the instrument he executes, if it contain no covenant or *632 promise on his part, yet there is a remedy *against him by a special action upon the case, for assuming to act when he had no power. (*a*) If, however, the authority of the agent be coupled with an interest in the property itself, he may contract and sell in his own name. This is illustrated in various instances, as in the case of factors, masters of ships, and mortgagees. (*b*) The case of the master of a ship is an exception to the general rule, and though he contracts within the ordinary scope of his powers, he is, in general, personally responsible, as well as the owner, upon all contracts made by him for the employment, repairs, and supplies of the ship. This is the rule of the maritime law, and it was taken from the Roman law, and is founded on commercial policy. (*c*) But it is of course competent for the parties to agree to confine the exclusive credit, either to the owner or to the master, as the case may be. (*d*)

When goods have been sold by the factor, the owner is entitled to call upon the buyer for payment before the money is paid over to the factor; and a payment to the factor, after notice from the owner not to pay, would be a payment by the buyer in his own wrong, and it would not prejudice the rights of the principal. (*e*) [1] If, however, the factor should sell in his own name

Duvall *v.* Craig, 2 Wheat. Rep. 56. Tippets *v.* Walker, 4 Mass. Rep. 595. White *v.* Skinner, 13 Johns. Rep. 307. Stone *v.* Wood, 7 Cowen's Rep. 453. Fash *v.* Ross, 2 Hill's S. C. Rep. 294.

(*a*) Long *v.* Colburn, 11 Mass. Rep. 97. Harper *v.* Little, 2 Greenleaf's Rep. 14. Delius *v.* Cawthorn, 2 Dev. N. C. Rep. 90. Emerigon, Traité des Contrats à le Grosse, tom. ii. pp. 458, 461, 468, lays down the rule, and applies it to the captain of a ship, who, he says, is personally answerable, if he draws a bill in his character of agent, without authority.

(*b*) Paley on Agency, by Lloyd, 207, 208, 288, 289. Story on Agency, § 164.

(*c*) Rich *v.* Coe, Cowper's Rep. 636, 639. Farmer *v.* Davies, 1 Term, 109. Abbott on Shipping, part 2, ch. 2 and 3. Emerigon, tit. 2, 448. Dig. 14, 1. Story on Agency, §§ 294, 296. See *infra*, vol. iii. 161.

(*d*) Story on Agency, § 296.

(*e*) Lasset *v.* Reave, 2 Atk. Rep. 394.

[1] Seiple *v.* Irwin, 30 Penn. State R. 568.

as owner, and not disclose his principal, and act ostensibly as the real and sole owner, the principal may nevertheless afterwards bring his action upon the contract against the purchaser, but the latter, if he *bonâ fide* dealt with the factor as owner, will be entitled to set off any claim he may have against the factor, in answer to the demand of the principal. (*a*) When the party dealing with an agent, and with knowledge of the agency, elects to make the agent his debtor, he cannot afterwards have recourse against the principal. (*b*)

There is a distinction in the books between public and private agents, on the point of personal responsibility. If an agent, on behalf of government, makes a contract, and describes himself as such, he is not personally bound, even though the terms of the contract be such as might, in a case of a private nature, involve him in a personal obligation. (*c*) The reason of the distinction is, that * it is not to be presumed that a *633 public agent meant to bind himself individually for the government; and the party who deals with him in that character, is justly supposed to rely upon the good faith and undoubted ability of the government. But the agent in behalf of the public *may* still bind himself by an express engagement, and the distinction terminates in a question of evidence.[1] The inquiry in all the cases is, to whom was the credit, in the contemplation of the parties, intended to be given. This is the

(*a*) Rabone *v.* Williams, cited in 7 Term Rep. 360, note. George *v.* Clagett, Ibid. 359. Gordon *v.* Church, 2 Caines's Rep. 299. Hogan *v.* Shorb, 24 Wendell, 458. Taintor *v.* Prendergast, 3 Hill, 72. Chambre, J., in 3 Bos. & Pull. 490. Seignor & Wolmer's case, Godb. 360. Story on Agency, §§ 420, 421.

(*b*) Paterson *v.* Gandasequi, 15 East's Rep. 62. Addison *v.* Gandassequi, 4 Taunt. Rep. 574.

(*c*) Macbeath *v.* Haldimand, 1 Term Rep. 172. Unwin *v.* Wolseley, Ibid. 674. Gidley *v.* Lord Palmerston, 3 Brod. & Bing. 275. Brown *v.* Austin, 1 Mass. Rep. 208. Dawes *v.* Jackson, 9 Mass. Rep. 490. Hodgson *v.* Dexter, 1 Cranch's Rep. 345. Walker *v.* Swartwout, 12 Johns. Rep. 444. Rathbone *v.* Budlong, 15 Ibid. 1. Adams *v.* Whittlesey, 3 Conn. Rep. 560. Stinchfield *v.* Little, 1 Greenleaf's Rep. 231. Enloe *v.* Hall, 1 Humphrey's Tenn. Rep 303.

[1] Hence it follows that, although an action cannot be maintained against a public agent, the case is not out of the jurisdiction of the court; and although bad, it is entitled to a hearing. Hammarskold *v.* Bull, 9 Rich. Law, (S. C.) 474.

general inference to be drawn from all the cases, and it is expressly declared in some of them. (*a*)

An agent ordinarily, and without express authority, or a fair presumption of one, growing out of the particular transaction or the usage of trade, has not power to employ a subagent to do the business, without the knowledge or consent of his prin-

(*a*) 12 Johns. Rep. 388. 15 Ibid. 1. Opinions of the Attorneys-General, August 5, 1834. A public agent, as, for instance, a commissioner for paving streets, or the superintendent of repairs on the canals, is personally responsible in damages for misfeasance and excess of authority, through the negligence of workmen under him. Leader *v.* Moxon, 3 Wilson, 461. Hall *v.* Smith, 2 Bing. 156. Shepherd *v.* Lincoln, 17 Wendell, 250. So, money obtained by a public officer, *illegally*, may be recovered back by a suit against him personally. Story on Agency, § 307, and the cases there cited. The general principle is, that an agent is liable to third persons for acts of misfeasance and positive wrong; but for mere nonfeasances and negligences in the course of his employment, he is answerable only to his principal, and the principal is answerable over to the third party.[1] Agents and attorneys, using reasonable skill and ordinary diligence in the exercise of their agency, are not responsible for injuries arising from mistakes in a doubtful point of law. Mechanics' Bank *v.* Merchants' Bank, 6 Metcalf, 13. S. P. 4 Burr, 2060. 12 Clarke & Finelly's R. 91. The case of the postmaster-general is an exception, and he is not liable for any of his deputies or clerks, on obvious principles of public policy. Lane *v.* Cotton, 1 Ld. Raym. 646, 655. S C 12 Mod. 488. Story on Agency, ch. 12. *Supra*, p. 610. So, public officers generally are responsible for their own acts and negligences, but not for those of their subordinate officers. Hall *v.* Smith, 2 Bingham, 156. Nicholson *v.* Mounsey, 15 East, 384. In ordinary cases of private individuals, the principal is liable to third persons for the frauds, torts, misfeasances, negligences, and defaults of the agent, even though the conduct of the agent was without his participation, consent, or knowledge, provided the breach or want of duty arose in the course of his employment, and was not a wilful departure from it.[2] Paley on Agency, by Lloyd, 297–307. Story on Agency, 465–477. Laughter *v.* Pointer, 5 Barn. & Cress. 547. Lonsdale *v.* Littledale, 2 H. Black. Rep. 267. Bush *v.* Steinman, 1 Bos. & Pull. 404. McManus *v.* Crickett, 1 East's Rep. 106. *Vide supra*, pp. 259, 260. But there is also a qualification to this doctrine in the case of masters of merchants' vessels and of steamboats, who are responsible as principals and common carriers, for the misfeasances and negligences of the servants under them; and this responsibility is founded on solid principles of maritime policy. It prevails in the maritime jurisprudence of Europe, and has its foundations laid deep in the Roman law. Dig. 4, 9, 1. See *supra*, pp. 609, 632, note *c*.

[1] In a late case, it is declared to be the settled law, that an agent is not responsible to third persons for an omission or neglect of duty in the matter of his agency; but that the principal alone is responsible. Colvin *v.* Holbrook, 2 Comst. R. 129. Denny *v.* The Manhattan Co. 2 Denio's R. 118. Costigan *v.* Newland, 12 Barb. R. 456.

[2] The principal is not liable for wilful trespass committed by his agent. Vanderbilt *v.* The Richmond T. Co. 2 Comst. R. 479. Wright *v.* Wilcox, 19 Wend. R. 343. *Ante*, p. 260.

cipal. The maxim is, that, *delegatus non potest delegare*, and the agency is generally a personal trust and confidence which cannot be delegated; for the principal employs the agent from the opinion which he has of his personal skill and integrity, and the latter has no right to turn his principal over to another, of whom he knows nothing. (a)[1] And if the authority, in a matter of mere private concern, be confided to more than one agent, it is requisite that all join in execution of the power, and they are jointly responsible for each other; though the cases admit the rule to be different in a matter of public trust, or of power conferred for public purposes; and if all meet in the latter case, the act of the majority will bind. (b)[2]

(a) Combes's case, 9 Co. 75. Ingram v. Ingram, 2 Atk. Rep. 88. Attorney-General v. Berryman, cited in 2 Ves. 643. Solly v. Rathbone, 2 Maule & Selw. 298. Cockran v. Irlam, Ibid. 303, n. Schmaling v. Thomlinson, 6 Taunt. Rep. 147. Lyon v. Jerome, 26 Wendell's Rep. 485. There must be in such cases a special power of substitution. Coles v. Trecothick, 9 Ves. 234, 251. Story on Agency, §§ 11-15. In this latter work, it is said, p. 17, that the substituted agent may still be responsible to the original agent, inasmuch as the latter is responsible to the principal; and if a subagent be employed in the business of the agency, he has the same rights and is bound to the same duties, as if he was the original agent Story on Agency, §§ 386, 387. But in general, subagents, acting without the knowledge or consent of the principal, are responsible only to the immediate agents who employ them, and not to the principal of such agents. Trafton v. United States, 3 Story's R. 646. The conclusion from the case seems to be, that if a subagent be employed by the agent to receive money for the principal, or if such an authority be fairly implied from circumstances, the principal may treat the subagent as his agent, and sue for the money. 1 Peters's R. 25. 1 How. U. S. 234. 3 Ib. 763. See Holcomb's Leading Cases on Commercial Law, p. 22, where the subject and cases are fully discussed in a note. The principal is liable to third persons in a civil suit for frauds, or misfeasances, or neglect of duty in his agent, or in those whom his agent employs, though the principal did not authorize or assent to it. The liability runs through all the stages of the service. Story on Agency, ch. 17, secs. 452, 454. In Sproul v. Hemmingway, 14 Pick. 1, in the case of a brig towed at the stern of a steamboat employed in the business of towing vessels in the Mississippi, and through the negligence of the master and crew of the steamboat, the brig was brought into collision with a vessel lying at anchor, and did damage to it, it was held that the owner of *the brig* was not liable for the damage, and on the ground that the master and crew of the steamboat were not in any sense his agents, and that there was no negligence or misconduct on the part of the master and crew of the towed brig.

(b) Grindley v. Barker, 1 Bos. & Pull. 229. Towne v. Jaquith, 6 Mass. Rep. 46.

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[1] In Newton v. Bronson, 3 Kern. 587, it is held that the agent may ratify the act of a subagent so as to make it valid.

[2] This is so declared by statute in New York. Rev. St. of N. Y. 5th ed. p. 869, sec.

*634 *III. *Of the agent's right of lien.*

The lien here referred to is the right of an agent to retain possession of property belonging to another, until some demand of his is satisfied. It is created either by common law, or by the usage of trade, or by the express agreement of particular usage of the parties. (*a*) A lien, said Ch. J. Tindal, (*b*) only can arise in one of three ways: 1. By an express contract; 2. By a general course of dealing in the trade in which the lien is set up; 3. From the particular circumstances of the dealing between the parties.

A *general* lien is the right to retain the property of another, for a general balance of accounts; but a *particular* lien is a right to retain it only for a charge on account of labor employed or expenses bestowed upon the identical property detained. The former is taken strictly, but the latter is favored in law. (*c*) The right rests on principles of natural equity and commercial necessity, and it prevents circuity of action, and gives security and confidence to agents.

Where a person, from the nature of his occupation, is under obligation, according to his means, to receive, and be at trouble and expense about the personal property of another, he has a particular lien upon it; and the law has given this privilege to persons concerned in certain trades and occupations, which are necessary for the accommodation of the public. Upon this

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Green *v.* Miller, 6 Johns. Rep. 39. Baltimore Turnpike, 5 Binney's Rep. 484. Patterson *v.* Leavitt, 4 Conn. Rep. 50. The King *v.* Beeston, 3 Term Rep. 592. Lawrence, J., in Withnell *v.* Gartham, 6 Term Rep. 388. M'Cready *v.* Guardians of the Poor, 9 Serg. & Rawle, 99. First Parish in Sutton *v.* Cole, 3 Pick. Rep. 244, 24[illegible]. *Ex parte* Rogers, 7 Cowen's Rep. 526. Jewett *v.* Alton, 7 N. H. Rep. 253. Downing *v.* Rugar, 21 Wendell, 178. Johnston *v.* Bingham, 9 Watts & Serg. 56. Story on Agency, 2d edit. §§ 41-44. *Vide supra*, p. 293.

(*a*) Lord Mansfield, in Green *v.* Farmer, 4 Burr. Rep. 2221.

(*b*) Furgusson *v.* Norman, 5 Bingham, N. C. 76.

(*c*) Heath, J., 3 Bos. & Pull. 494. Tindal, Ch. J., 4 Carr. & Payne's Rep. 152. Scarfe *v.* Morgan, 4 M. & W. 270.

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29. But in Perry *v.* Tynen, 22 Barb. (N. Y.) 137, and Horton *v.* Garrison, 23 Barb. (N. Y.) 176, it was held that the statute is subject to the necessary qualification, that if one is notified to attend and refuses, it is the same as if he had attended and dissented from the act of the majority.

ground, common carriers, innkeepers, and farriers, had a particular lien by the common law; (*a*) for they were bound, as Lord Holt said, (*b*) to serve the public to the utmost extent and ability of their employment; and an action lies against them if they refuse without adequate *reason. But though *635 the right of lien probably originated in those cases in which there was an obligation arising out of the public employment, to receive the goods, it is not now confined to that class of persons; and in a variety of cases, a person has a right to detain goods delivered to him to have labor bestowed on them, who would not be obliged to receive the goods, in the first instance, contrary to his inclination. It is now the general rule, that every bailee for hire, who, by his labor and skill, has imparted an additional value to the goods, has a lien upon the property for his reasonable charges. (*c*) [1] A tailor or dyer is not bound to accept an employment from any one that offers it, and yet they have a particular lien, by the common law, upon the cloth placed in their hands to be dyed, or worked up into a garment. (*d*) The same right of a particular or specific lien applies to a miller, printer, tailor, wharfinger, warehouseman, or whoever

(*a*) Naylor *v.* Mangles, 1 Esp. Rep. 109. Yorke *v.* Grenaugh, 1 Salk. Rep. 388. 2 Lord Raym. 866, S. C. Chambre, J., 3 Bos. & Pull. 55. Rushforth *v.* Hadfield, 7 East's Rep. 224. 21 Hen. VI. 5. Keilw. 50. Popham, Ch. J., Yelv. Rep. 67. Carlisle *v.* Quattlebaum, 2 Bailey's S. C. Rep. 452. This lien does not extend to agisters and livery-stable keepers, without a special agreement, or the horse be taken for training. Lord Holt, in Yorke *v.* Grenaugh, *sup.* Bevan *v.* Waters, 3 Carr. & Payne, 520. Wallace *v.* Woodgate, 1 Carr. & Payne, 575. See also Judson *v.* Etheridge, 1 Crompt. & Meeson, 743; Grinnell *v.* Cook, 3 Hill, 492; Jackson *v.* Cummins, 5 Mees. & Wels. 342. Nor does the innkeeper's right of lien extend to the person of his guest, or to his wearing apparel. Sunbolf *v.* Alford, 1 Horn & Hurlstone's Exch. Rep. 13. 3 M. & W 248, S. C.

(*b*) Lane *v.* Cotton, 12 Mod. Rep. 484. 1 Lord Raym. 646.

(*c*) Grinnell *v.* Cook, 3 Hill, 491.

(*d*) Hob. Rep. 42. Yelv. Rep. 67. Green *v.* Farmer, 4 Burr. Rep. 2214. Close *v.* Waterhouse, 6 East's Rep. 523, *in notis.*

[1] The lien extends to all goods delivered under the contract, and is not confined to the portion on which the labor was bestowed. Morgan *v.* Congdon, 4 Comst. R. 551. An innkeeper has no lien upon a horse put in his stable, unless belonging to a guest. Fox *v.* McGregor, 11 Barb. R. 41. Hickman *v.* Thomas, 16 Ala. 666. As to his lien on goods belonging to his guest, see Broadwood *v.* Granara, 28 Eng. L. & Eq. 443; Snead *v.* Watkins, 37 Ib. 384.

takes property in the way of his trade or occupation, to bestow labor or expense upon it; and it extends to the whole of one entire work upon one single subject, in like manner as a carrier has a lien on the entire cargo for his whole freight. The lien exists equally, whether there be an agreement to pay a stipulated price, or only an implied contract to pay a reasonable price. (*a*) The old authorities, which went to establish the proposition that the lien did not exist in cases of a special agreement for the price, have been overruled, as contrary to reason and the principles of law; and it is now settled to exist equally, whether there be or be not an agreement for the price, unless there be a future time of payment fixed; and then the special agreement would be inconsistent with the right of lien, and would destroy it. (*b*)

(*a*) A lien at common law signifies the right of detention in persons who have bestowed labor upon an article, or done some act in reference to it, and who have this right of detention till reimbursed for their expenditure and labor. Whitman, Ch. J., 24 Maine R. 219.

(*b*) Blake *v.* Nicholson, 3 Maule & Selw. 168 Chase *v.* Westmore, 5 Ibid. 180. Crawshay *v.* Homfray, 4 Barn. & Ald. 50. Burdict *v.* Murray, 3 Vt. Rep. 302. The statute laws of the states generally give a lien to mechanics and others on buildings, for labor bestowed and materials furnished in the erection of them, as well as a remedy personally against the owner who employed them.[1] This is the case in Maine, Massachusetts, Connecticut, New York, (Act of New York, May 7, 1844,[2]) New Jersey, Pennsylvania, Ohio. In Ohio, the purchaser of a steamboat, with notice of a debt created on account of it by the original owner, takes the boat, subject to such debt. Steamboat Waverley *v.* Clements, 14 Ohio R. 28. Indiana, Illinois, Kentucky, Mississippi, Tennessee, South Carolina, Alabama, Louisiana, Missouri, Michigan, &c. The New York Statutes of April 20, 1830, ch. 330, and of April 13, 1832, ch. 120, give, *as to the city of New York*, under contracts written or by parol, between the owner and builder, a lien on the moneys due from the owner to the contractor for the same. This privilege does not extend to the master-builder or contractor. He must rely on his contract with the owner of the ground. The New York statutes are remedial only to

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[1] The legislation of the several states exhibits a progressive inclination to extend the right of lien for the security of the claims of mechanics and laborers. By a statute in Connecticut, every person having a claim to the amount of twenty dollars, for labor or material used in the erection of any building, is given a lien on the building and land; and such lien may be foreclosed as a mortgage. Acts of Conn. 1849, ch. 83.

There is a similar provision, which extends also to vessels, in Vermont. Laws of Vt. 1849. The laws of Rhode Island have a like provision, which includes canals, turnpikes, and railroads Acts of R. I. 1847. Corresponding enactments are contained in the laws of Maine and Wisconsin. Laws of Maine, 1849, ch. 72. Laws of Wisconsin, 1849, ch. 120.

[2] This Act extended to the cities of the state only, but has been repealed.

If goods come to the possession of a person by finding, and he has been at trouble and expense about them, he has *a lien upon the goods for a compensation in one case only, and that is the case of goods lost at sea, and it is a *636

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the creditors of the original contractors. 22 Wendell's Rep. 395. The lien by the New York Act of April 29th, 1844, ch. 220, is extended to persons under a contract with the owner or his agent, who shall perform labor or furnish materials upon any building or lot *in the city*. The lien to be upon the building and lot, and the mode of relief is prescribed; and by the Act of May 7, 1844, ch. 305, the same provision is extended to the several cities, and to some specified villages *throughout the state*.[1] So also in South Carolina, the lien does not extend to sub-contractors, who undertake a part of the work from the original undertaker. 1 M'Mullan, 431. So, in Canada, a mason has a special privilege in the nature of a mortgage, upon buildings erected by him, and for repairs, and lasting for a year and a day. Jourdain *v.* Miville, Stuart's Lower Canada Rep. 263. The Statute of Pennsylvania, of 16th June, 1836, gives a proceeding *in rem*, and the building itself is regarded as the principal debtor, and the ground as only an appurtenance to it, and sold with it. Bickel *v.* James, 7 Watts, 1. Purdon's Dig. 683. In the case of an unfinished house sold, and a mortgage taken from the purchaser, who afterwards went on and finished the house, the material men who finished the house and furnished the materials, were held entitled to priority of payment over the mortgagee. 2 Serg. & Rawle's Rep. 138. The mechanic's lien, under the Act of Pennsylvania of 1806, was on the building, without regard to the owner, and a sale under it would carry the right of the remainder-man, and reversioner and tenant. But the Act of 1840, confined the sale under the mechanic's lien to the title vested in the person in possession at the time the building was erected. O'Conner *v.* Warner, 4 Watts & Serg. 223. See, further, Hilliard's Abridgment of the American Law of Real Property, vol. i. 354–361, where the laws and decisions in the several states respecting the lien of mechanics are fully collected and stated; and I take this occasion to observe, that this last work is one of great labor and intrinsic value. The New York law is deemed insufficient to satisfy contractors and furnishers of materials, and they are desirous to have it more extensive and efficient, and to prevent the transfer of the property until their claims are secured, and that the law be made to apply to all parts of the state.[2]

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[1] The New York Act of 1844 has been repealed, and in lieu thereof an Act was passed, July 11, 1851, ch. 513, by which Act a lien is given to every person who shall, by virtue of any contract with an owner or his agent, or in pursuance of any agreement with such contractor, perform labor or furnish materials to any house or other building in the city. This statute has been expounded in a series of able decisions, in the New York Court of Common Pleas, reported in E. D. Smith's Reports.

[2] By an Act passed April 17, 1854, ch. 402, any person who may perform labor on any house, or building, or appurtenances, in certain counties therein named, and any resident of either of said counties who may furnish materials, is entitled to a lien. And by an Act passed in 1858, ch. 204, the provisions of the Act of 1854 are extended to all the counties of the state, except New York and Erie. For those counties special Acts exist.

lien for salvage. (a) This lien is dictated by principles of commercial necessity, and it is thought to stand upon peculiar grounds of maritime policy. (b) It does not apply to cases of finding upon land; and though the taking care of property found for the owner be a meritorious act, and one which may entitle the party to a reasonable recompense, to be recovered in an action of assumpsit, it has been adjudged, (c) not to give a lien in favor of the finder; and he is bound to deliver up the chattel upon demand, and may then recur to his action for a compensation. If the rule was otherwise, says Ch. J. Eyre, ill-designed persons might turn boats and vessels adrift, in order that they might be paid for finding them; and it is best to put them to the burden of making out the quantum of their recompense to the satisfaction of a jury. The statute of New York (d) gives to the person who takes up strayed cattle, the right to demand a reasonable charge for keeping them; and, independent of that provision, there is no lien upon goods found.[1]

A general lien for a balance of accounts is founded on custom, and is not favored; and it requires strong evidence of a settled and uniform usage, or of a particular mode of dealing between the parties, to establish it. General liens are looked at with jealousy, because they encroach upon the common law, and destroy the equal distribution of the debtor's estate among his creditors. (e) But by the custom of the trade, an agent *637 may have a lien upon the * property of his employer, intrusted to him in the course of that trade, not only in respect to the management of that property, but for his general balance of accounts. The usage of any trade sufficient to estab-

(a) Hartford v. Jones, 2 Salk. Rep. 654. 1 Lord Raym. 393, S. C. Hamilton v. Davis, 5 Burr. Rep. 2732. Baring v. Day, 8 East's Rep. 57.

(b) Story, J., 2 Mason's Rep. 88.

(c) Nicholson v. Chapman, 2 H. Blacks. Rep. 254.

(d) Laws of New York, sess. 30, ch. 2.

(e) Rushforth v. Hadfield, 6 East's Rep. 519. S. C. 7 East's Rep. 224. Bleaden v. Hancock, 4 Carr. & Payne's Rep. 152.

[1] If a certain reward be offered for the recovery of a lost article, the finder has a lien for the reward. Wentworth v. Day, 3 Met. 352. But not if the reward offered be indefinite. Wilson v. Guyton, 8 Gill, 213. See however Baker v. Hoag, 7 Barb. 113, where this limitation of the doctrine of Wentworth v. Day is not allowed.

lish a general lien, must, however, have been so uniform and notorious, as to warrant the inference that the party against whom the right is claimed had knowledge of it. (*a*) This general lien may also be created by express agreement; as, where one or more persons gives notice that they will not receive any property for the purposes of their trade or business, except on condition that they shall have a lien upon it, not only in respect to the charges arising on the particular goods, but for the general balance of their account. All persons who afterwards deal with them, with the knowledge of such notice, will be deemed to have acceded to that agreement. This was the rule laid down by the Court of K. B., in *Kirkman* v. *Shawcross;* (*b*) but the judges in that case declared, that the notice would not avail in the case of persons who, like common carriers and innkeepers, were under a legal obligation to accept employment in the business they assume, for a reasonable price, to be tendered to them, and who had no right to impose any unreasonable terms and conditions upon their employers, or to refuse to serve them. The same intimation, that a common carrier could not create any general lien as against the person who employed him, by means of notice, was given by the judges in *Oppenheim* v. *Russell;* (*c*) but a contrary doctrine was strongly implied in the subsequent case of *Rushforth* v. *Hadfield;* (*d*) and the court in that case, while they condemned the injustice and impolicy of these general liens, seemed to admit that a common carrier *might* establish such a right against his employer, by showing a clear and notorious usage, or a positive agreement. It was again stated as a questionable * point in *Wright* v. *Snell*, (*e*) whether * 638 such a general lien could exist as between the owner of the goods and the carrier, and the claim was intimated to be unjust. It must, therefore, be considered a point still remaining to be settled by judicial decision.

Possession, actual or constructive, of the goods, is necessary to create the lien; and the right does not extend to debts which accrued before the character of factor commenced; (*f*) nor where

(*a*) Rooke, J., 8 Bos. & Pull. 50.
(*b*) 6 Term Rep. 14.
(*c*) 3 Bos. & Pull. 42.
(*d*) 7 East's Rep. 224.
(*e*) 5 Barn. & Ald. 350.
(*f*) Houghton *v.* Matthews, 3 Bos. & Pull. 485.

the goods of the principal do not, in fact, come to the factor's hands, even though he may have accepted bills upon the faith of the consignment, and paid part of the freight. (*a*) [1] And though there is possession, a lien cannot be acquired where the party came to that possession wrongfully. (*b*) This would be as repugnant to justice and policy, as it would be to allow one tort to be set off against another. The right of lien is also to be deemed waived, when the party enters into a special agreement inconsistent with the existence of the lien, or from which a waiver of it may fairly be inferred; as, when he gives credit by extending the time of payment, or takes distinct and independent security for the payment. The party shows, by such acts, that he relies, in the one case, on the personal credit of his employer; and in the other, that he intends the security to be a substitution for the lien; and it would be inconvenient that the lien should be extended to the period to which the security had to run. This was the doctrine sustained in *Gilman* v. *Brown*, (*c*) in respect to the vendor's right of lien as against the vendee, and the principle equally applies to other cases; and it was also explicitly declared by Lord Eldon, in *Cowell* v. *Simpson*. (*d*) *639 * The lien is destroyed when a factor makes an express stipulation on receiving the goods, to pay over the proceeds. (*e*) So, if the party comes to the possession of goods without due authority, he cannot set up a lien against the true owner; as if a servant delivers a chattel to a trades-

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(*a*) Kinloch *v.* Craig, 3 Term Rep. 219, 783.

(*b*) Lempriere *v.* Pasley, 2 Term Rep. 485. Madden *v.* Kempster, 1 Campb. N. P. Rep. 12. Story on Agency, § 361.

(*c*) 1 Mason's Rep. 191.

(*d*) 16 Ves. 275. Mr. Metcalf, in his neat and accurate digest of the cases on the doctrine of lien, contained in a note to his edition of Yelv. Rep. 67 a, shows, by cases as ancient as the Year Books, 5 Edw. IV. 2, 20, and 17 Edw. IV. 1, that the lien is extinguished by a postponement of credit to a future day.

(*e*) Walker *v.* Birch, 6 Term Rep. 258.

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[1] Whether the possession by the factor of a bill of lading duly indorsed, will give him the right to take and keep the goods represented by the bill, has been made a question. See Russell on Factors, 202. Patten *v.* Thompson, 5 Maule & S. 350. Rice *v.* Austin, 17 Mass. R. 197.

man without authority; or a factor, having authority to sell, pledges the goods of his principal. (a)[1]

Possession is not only essential to the creation, but also to the continuance of the lien; and when the party voluntarily parts with the possession of the property upon which the lien has attached, he is divested of his lien. If the lien was to follow the goods after they had been sold or delivered, the incumbrance would become excessively inconvenient to the freedom of trade and the safety of purchasers. (b) But if the assignment or delivery to a third person be merely for the benefit of the factor, or by way of pledge or security to the extent of the factor's lien, and with notice of the lien, it is in effect a continuance of the factor's possession, and the lien is retained. (c) Nor is it universally true, that the actual delivery of part of the goods sold on an entire contract, is equivalent to the actual delivery of the whole. It will depend upon the terms of the contract, and the intention of the parties; and whenever the property in the part of the goods not delivered does not *pass to the vendee, the vendor's right of lien for the whole price is of course preserved on the part retained. (d)

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(a) Daubigny v. Duval, 5 Term Rep. 604. Hiscox v. Greenwood, 4 Esp. Rep. 174. M'Combie v. Davies, 7 East's Rep. 5. The lien was held to continue under an agreement that it should continue until payment, though the boards on which the lien attached were removed to ground procured for that purpose by the owner. Wheeler v. M'Marland, 10 Wendell's Rep. 318.

(b) Jones v. Pearle, Str. Rep. 556. Sweet v. Pym, 1 East's Rep. 4.

(c) M'Combie v. Davies, 7 East's Rep. 5. Urquhart v. M'Iver, 4 Johns. Rep. 103. Gansford v. Dutillet, 13 Martin's La. Rep. 284. Nash v. Mosher, 19 Wendell, 431.

(d) Blake v. Nicholson, 3 Maule & Selw. 167. Wilde, J., in Parks v. Hall, 2 Pick. Rep. 213. The rule is the same where a warehouseman delivers from time to time portions of the goods stored in his warehouse, without the storage being paid. He has a lien upon the portion left for the storage of the whole. Schmidt v. Blood, 9 Wendell's Rep. 268.

[1] It is held that the simple refusal by the bailee to give up goods, without alleging the lien as a reason, is a waiver of the lien. Dorrs v. Morewood, 10 Barb. 183. Hanna v. Phelps, 7 Ind. 21. In Lambard v. Pike, 33 Me. 141, it was held that, if a claim for labor and materials secured by a lien be joined, in taking out judgment, with other claims not so secured, the lien is waived. A statutory lien may be destroyed by the repeal of the statute, while proceedings under it are pending, without impairing the obligation of the contract, the lien being only a part of the *remedy*. Bangor v. Goding, 35 Me. 73.

A factor has not only a particular lien upon the goods of his principal in his possession, for the charges arising on account of them, (*a*) but he has a general lien for the balance of his general account, arising in the course of dealings between him and his principal; and this lien extends to all the goods of the principal in his hands in the character of factor. (*b*) The factor

(*a*) A consignee or factor has a charge on the goods and on the gross proceeds of the goods, not only for his commissions, but for all such expenses as a prudent man would have found necessary, in such a case, in the discreet management of his own affairs. Colley *v.* Merrill, 6 Greenleaf's Rep 50. He may sell the goods according to the general usage, and reimburse himself for his advances and liabilities. Brander *v.* Phillips, 16 Peters's Rep. 129. We understand the true doctrine to be, says Mr. Justice Story, (Story on Agency, § 74, n.) that when an assignment is made to a factor for sale, the consignor has a right generally to control the sale thereof, according to his own pleasure, from time to time, if no advances have been made or responsibilities incurred on account thereof, and the factor is bound to obey his order. But if the factor makes advances or incurs responsibilities on account of the assignment by which he acquires a special property therein, he has a right to sell so much of the consignor's property as may be necessary to reimburse such advances, or meet such liabilities, if there be no agreement which affects the right. Brown *v.* M'Gran, 14 Peters, 479. Parker *v.* Brancker, 22 Pick. 40, S. P.[1]

(*b*) Kruger *v.* Wilcox, Amb. Rep. 252. Lord Mansfield, in Godin *v.* London Ass. Co. 1 Burr. Rep. 494. Lord Kenyon, in 6 Term Rep. 262. Chambre, J., 3 Bos. & Pull. 489. Knapp *v.* Alvord, 10 Paige, 205. In Barnett *v.* Brandão, 6 Manning & Granger, 630, the bankers' lien was well discussed, and it was adjudged that bankers have a general lien on the securities of their customers, which come to their possession as bankers, in the way of their business, for their general balance. Exchequer bills pass by delivery to the *bonâ fide* holder for value; and should they and ordinary bills and notes payable to bearer be placed in the hands of a banker to be collected, if the banker is a creditor on a general balance, and *bonâ fide* receives the paper as the property of the customer, he is entitled to his lien, unless there be some agreement, express or implied, affecting the right of lien. In Louisiana, a factor or commission-merchant has no lien over an attaching creditor for a general balance of account; his lien is confined to specific advances on consignments. Gray *v.* Bledsoe, 13 La. Rep. 489. Whenever the relation of principal and factor exists, the right of *lien* attaches to secure all advances made or liabilities incurred in the course of his business by the factor, and the doctrine of *lien* may be enforced, as well by a purchasing as by a selling factor. Bryce *v.* Brooks, 26 Wendell, 367.

[1] The consignor, before the goods have reached the factor, may transfer the title to a third person, though the consignor be indebted to the factor for advances on previous consignments. Bank of Rochester *v.* Jones, 4 Comst. R. 497. A factor, who accepts a bill drawn on goods, placed in the hands of a third person to be delivered to him, acquires a property in the goods against an attaching creditor. Nesmith *v.* Dyeing Co. 1 Curtis, R. 130. His lien extends to goods only, which come to his hands as factor. Dixon *v.* Stansfeld, 11 E. L. & Eq. 528. Elliot *v.* Bradley, 23 Vt. R. 217.

has a lien, also, on the price of the goods which he has sold as factor, though he has parted with the possession of the goods; and he may enforce payment from the buyer to himself, in opposition to his principal. (a) This rule applies when he becomes surety for his principal, or sells under a *del credere* commission, or is in advance for the goods by actual payment. (b)

Attorneys and solicitors, as well as factors, have a general lien upon the papers of their clients in their possession, for the balance of their professional accounts; but the lien is liable to be waived or divested, as to papers received under a special agreement or trust, where they take security from their clients. (c) The solicitor or attorney has two kinds of lien * for his costs; one on the funds recovered, and the * 641 other on the papers in his hands. (d) The client cannot get back the papers without paying what is due, (whatever becomes of the suit,) not only in respect of that business for which the papers were used, but for other business done by him in his professional character. (e) The attorney's lien for costs extends to judgments recovered by him; and yet a *bonâ fide*

(a) Brander v. Phillips, 16 Peters's Rep. 129.

(b) Drinkwater v Goodwin, Cowp. Rep. 251. Chambre, J., 3 Bos. & Pull. 489. Hudson v. Granger, 5 Barn. & Ald. 27. Where a factor indorses bills for his principal, his liability, with a reasonable apprehension of danger, gives him a lien on other bills in his hands belonging to his principal, to meet the event of his indorsement. Hodgson v. Payson, 3 Harr. & Johns. Rep. 339. But a factor who remits a bill to his principal in payment of goods sold on his account, and indorses the bill, does not become personally responsible, if he receives no consideration for guaranteeing, and does not expressly undertake to do so. Sharp v. Emmet, 5 Wharton, 288. The modern cases have relaxed the severity of the old rule.

(c) Lord Mansfield, Doug. Rep. 104. Montagu on Lien, 32, 59. *Ex parte* Sterling, 16 Ves. 258. Cowell v. Simpson, Ibid. 275. *Ex parte* Nesbitt, 2 Sch & Lef. 279. Stevenson v. Blakelock, 1 Maule & S. 535. Dennett v. Cutts, 11 N. H. Rep. 63.

(d) There is a distinction between a lien on papers and one on moneys recovered. The latter lien is only on the moneys recovered in the particular case, and does not extend to any general balance due him for professional services in other cases. Pope v. Armstrong, 3 Smedes & Marshall, 214.

(e) Sir Thomas Plumer, 2 Jac. & Walk. 218. An attorney may, upon reasonable cause and reasonable notice, abandon the conduct of a suit, and still recover his costs for the period during which he was employed. Rowson v. Earle, 1 Mo. & Mal. 538. Vansandau v. Browne, 9 Bing. Rep. 402. Hoby v. Built, 3 B. & Adolph. 350.

settlement or payment by the debtor, before notice of the lien, will prevail against it; and the attorney's lien upon a judgment yields to the debtor's equitable right of set-off. (*a*) We follow, in New York, the rule of the English Court of Chancery, and of the Court of C. B.; and consider the lien as subject to all the equities that may attach on the fund, and as extending only to the clear balance resulting from the equity between the parties. (*b*) Dyers have likewise a lien on the goods sent to them to dye, for the balance of a general account. (*c*) A banker, like an attorney, has also a lien on all the paper securities which come to his hands, for the general balance of his account, subject equally to be controlled by special circumstances. (*d*) The same thing may be said of an insurance broker; and his lien exists upon the policy of insurance, even though the consignor should assign the interest covered by the policy, for the assignee would take, subject to the lien. (*e*) It exists to cover any balance due upon general insurance account, though not as to business foreign to that of insurance. (*f*) If, however, the insurance broker be employed by an agent of the principal, and with the knowledge that he acted as agent, the broker has no lien upon the policy, for any general balance that may be due to him from the *642 agent. (*g*) It was *also decided by Lord Kenyon, in *Naylor* v. *Mangles*, (*h*) and afterwards recognized as settled law, (*i*) that a wharfinger had not only a lien on goods deposited at his wharf, for the money due for the wharfage of those particular goods, but that he was also entitled, by the

(*a*) Vaughan *v.* Davies, 2 H. Blacks. Rep. 440.

(*b*) Porter *v.* Lane, 8 Johns. Rep. [illegible] Mohawk Bank *v.* Burrows, 6 Johns. Ch. Rep 317. This lien, except as to costs, does not extend to the client's money or damages recovered, *before the same is in the possession of the attorney.* St. John *v.* Diefendorf, 12 Wendell, 261.

(*c*) Savill *v.* Barchard, 4 Esp. Rep. 53.

(*d*) Davis *v.* Bowsher, 5 Term Rep 488. Jourdaine *v.* Lefevre, 1 Esp. Rep. 66.

(*e*) Godin *v.* London Assurance Company, 1 Burr. Rep. 489. Whitehead *v.* Vaughan, Cooke's B. L. 316.

(*f*) Story on Agency, sec. 379. M'Kenzie *v.* Nevius, 22 Maine Rep. 188.

(*g*) Maanss *v.* Henderson, 1 East's Rep. 335.

(*h*) 1 Esp. N. P. Rep. 109.

(*i*) Spears *v.* Hartly, 3 Esp. N. P. Rep. 81. Heath and Chambre, JJ., in Richardson *v.* Goss, 3 Bos. & Pull. 119.

general usage of his trade, to retain them for the general balance of his account due from the owner. (*a*)

But it would be inconsistent with my general purpose to pursue more minutely the distinctions that abound in this doctrine of lien; and I will conclude with observing, that a lien is, in many cases, like a distress at common law, and gives the party detaining the chattel the right to hold it as a pledge or security for the debt, but not to sell it. It was once said, by Popham, Ch. J., in the Hostler's case, (*b*) that an innkeeper might have the horse of his guest appraised and sold, after he had eaten as much as he was worth. But this was a mere extra-judicial *dictum*, and it was contrary to the law, as it had been previously, and as it has been subsequently adjudged. (*c*) The right to sell in such a case is allowed by the custom of London, but not by the general custom of the realm.[1] I presume that satisfaction of a lien may be enforced by a bill in chancery; and a factor, having a power to sell, has the means of payment within his control; and a right to sell may, in special cases, be implied from the contract between the parties, as where the goods are deposited to secure a loan of money, (*d*) or where a factor makes advances or incurs liabilities on account of the consignment. (*e*)[2] It would be very convenient to allow

(*a*) The wharfinger has equally a lien on a vessel for wharfage. Johnson *v.* The M'Donough, Gilpin, 101.

(*b*) Yelv. Rep. 66.

(*c*) Waldbrooke *v.* Griffin, 2 Rol. Abr. 85, A. pl. 5. Moore's Rep. 876. Jones *v.* Pearle, 1 Str. Rep. 556. Pothonier *v.* Dawson, 1 Holt's N. P. Rep. 383.

(*d*) Pothonier *v.* Dawson, 1 Holt's N. P. Rep. 383.

(*e*) Brown *v.* M'Gran, 14 Peters, 479.

[1] Innkeeper has no right to sell his guest's horse for his keeping. His remedy is by action in the nature of a bill in chancery. Fox *v.* McGregor, 11 Barb. R. 41.

[2] Since the publication of the Commentaries, the factor's right to sell the goods of his principal has undergone considerable discussion.

In general, a factor has a right to sell at such time, and for such prices, as in the exercise of a sound discretion he may think best for his employer.

If the factor, without making advances, receive the goods subject to instructions, he is bound to obey them. Concerning these propositions, the authorities are agreed. Smart *v.* Sandars, 5 M. G. & S. R. 895. Brown *v.* McGran, 14 Pet. R. 479, 495. Marfield *v.* Goodhue, 3 Comst. R. 62. Further than this, it is not easy to reconcile them.

1. In England, it is held, that a factor to whom goods had been consigned, generally for sale, and who has subsequently made advances on the credit of the goods, has no right to

an innkeeper to sell the chattel without suit, in like manner as a pawnee may do, in a case of palpable default, and on reasonable notice to redeem; for the expense of a suit in equity by an innkeeper, would, in most instances, more than exhaust the value of the pledge. (*a*)

*643 * IV. *Of the termination of agency.*

The authority of the agent may terminate in various ways. It may terminate with the death of the agent; by the

(*a*) In Pennsylvania, by statute, in 1807, innkeepers have a lien on horses delivered to them to be kept in their stables, for the expense of the keeping; and if the expense amounts to $30, and is not paid in fifteen days after demand, the innkeeper may cause the horse or horses to be sold at public sale for his indemnity. Purdon's Dig. 506.

sell them contrary to the orders of his principal, even though the latter, *on request*, refuse to refund the advances, and it be admitted that the sale was a sound exercise of discretion. Smart *v.* Sandars, *supra*, S. P.

Yet, in this case, the court exhibited a decided inclination to recognize an alleged general custom among factors, to sell upon default of the principal, p. 919.

2. In New York, and perhaps in the states generally, the doctrine maintained is, that a factor who has received goods for sale, whether with or without instructions, and has made advances upon them, may, in good faith, though contrary to the instructions of his principal, sell so many of them as are requisite to cover his advances, if the principal, *upon reasonable demand*, refuse to refund such advances. Blôt *v.* Boiceau, 1 Sandf. Sup. C. R. 111. S. C. on appeal, 3 Comst. R. 78. Frothingham *v.* Everton, 12 N. Hamp. R. 239. Parker *v.* Brancker, 22 Pick. 40. Marfield *v.* Goodhue, 3 Comst. R. 62.

3. The Supreme Court of the U. S. has held a still different doctrine in the case of Brown *v.* McGran, 14 Pet. 479, 495. Mr. Justice Story, in delivering the opinion of the court declared the law to be, that "the consignor has no right, by any orders given, after advances made or liabilities incurred, to suspend or control the factor's right of sale, except as to the surplus of the consignment, beyond such advances or liabilities." See also Story on Agency, § 74, and note.

The factor who has made advances on goods consigned, may maintain an action before sale, (Upham *v.* Lefavour, 11 Met. R. 174,) after waiting a reasonable time for sale, in due course of business. Frothingham *v.* Everton, 12 N. Hamp. R. 239. However, there is a dictum, per Woodworth, J., in 6 Cow. R. 184, that no resort can be had to the principal, until a failure of the consignment.

The measure of damages in actions against factors for selling in violation of duty, is the amount of injury which the principal has actually sustained in consequence of such sale. In general, it may be the difference between the price obtained for the goods, and the highest price at which they might have been sold. Marfield *v.* Douglass, 1 Sandf. Sup. C. R. 360. Blôt *v.* Boiceau, 3 Comst. 78. Nelson *v.* Morgan, 2 Martin's La. R. 257. But much will depend upon the time and the circumstances under which the sale took place. Frothingham *v.* Everton, 12 N. Hamp. R. 239. Ainsworth *v.* Partillo, 13 Ala. R. 460. Austill *v.* Crawford, 7 Id. 335. Sedgwick on Dam. 264, 365, 366. Wilson *v.* Little, 2 Comst. R. 443.

limitation of the power to a particular period of time; by the execution of the business which the agent was constituted to perform; by a change in the state or condition of the principal; by his express revocation of the power; and by his death.

1. The agent's trust is not transferable, either by the act of the party or by operation of law. It terminates by his death; and this results, of course, from the personal nature of the trust. (*a*) According to the civil law, if the agent had entered upon the execution of the trust in his lifetime, and left it partially executed, but incomplete at his death, his legal representatives would be bound to go on and complete it. (*b*) Pothier adopts this principle as just and reasonable; and there can be no doubt that the principal will be bound to complete a contract, partly performed by him by the act of his agent, by a suit at law or in equity, according to the nature of the case; but the representatives of the agent will have nothing to do with it, unless the business be in such a situation that it cannot be performed without their intervention. The cases stated in the civil law, and by Pothier, were between the principal and the agent, and not between a third person and the representatives of the agent dealing in the character of agent. Nor can authority given for private purposes to two persons, be executed by the survivor, unless it be so expressly provided, or it be an authority coupled with an interest. (*c*)

2. A power of attorney, or every naked authority, is, in general, from the nature of it, revocable at the pleasure of the party who gave it. (*d*) But where it constitutes part of a security for money, or is * necessary to give effect to such security, or where it is given for a valuable consideration, it is not revocable by the party himself, though it is necessarily *644

(*a*) Dig. 17, 1, 27, 3. Pothier, Traité du Contrat de Mandat, No. 101.

(*b*) Dig. 17, 1, 14, and 17, 2, 40.

(*c*) Pothier, Traité du Contrat de Mandat, Nos. 101, 102. Co. Litt. 112 b, 181 b. Mr. Justice Story (Com. on Bailments, § 202) suggests that the power or mandate might survive as against a surviving partner, where a partnership house was the mandatary.

(*d*) Vinior's case, 8 Co. 81 b.

revoked by his death. (*a*) In the case of a lawful revocation of the power by the act of the principal, it is requisite that notice be given to the attorney; and all acts *bonâ fide* done by him under the power, prior to the notice of the revocation, are binding upon the principal. (*b*) This rule is necessary to prevent imposition, and for the safety of the party dealing with the agent, and it was equally a rule in the civil law. (*c*) Even if the notice had reached the agent, and he concealed the knowledge of the revocation from the public, and the circumstances attending the revocation were such that the public had no just ground to presume a revocation, his acts done under his former power would still be binding upon his principal. (*d*)[1] He can,

(*a*) Walsh *v* Whitcomb, 2 Esp Rep 565 Lord Eldon, in Bromley *v* Holland, 7 Ves 28 Hunt *v* Rousmanier, 8 Wheaton, 174 Gaussen *v* Morton, 10 Barn & Cress 731 Story on Agency, § 209 Ibid on Bailments § 477

(*b*) Pothier, Traite des Oblig No 80 Buller J, in Salte *v* Field, 5 Term Rep 211 Bowerbank *v* Morris Wallace's Rep 126 Spencer & White *v* Wilson, 4 Munf Rep 130 Mellen, Ch J in Harper *v* Little, 2 Greenleaf's Rep 14 Code of Louisiana, arts 2996 2997 Hotchkiss's Code of Georgia, p 404 Beard *v* Kirk, 11 N H Rep 397 United States *v* Jarvis District Court of Maine Feb 1846 N Y Legal Observer, (iv 298) for August, 1846 In this last case the defendant was appointed navy agent to hold his office during pleasure, for a term not exceeding four years, and he was removed without cause and without previous notice, six months before the expiration of the four years and was sued on his bond for a balance of accounts He had hired an office and a clerk, and was responsible for the accruing rent on the unexpired quarter, and for the clerk's salary for an unexpired term It was held that the defendant was entitled, by way of set off for the rent and the clerk's hire accruing after his removal and for which he had become responsible It was declared as a sound and settled principle in respect to agency that though it was revocable, or might be renounced at pleasure yet if revoked without just cause and without reasonable notice, by either party the principal would be responsible for the loss resulting from contracts *bonâ fide* made and entered into in the necessary execution of the trust, before notice, for *nemo potest mutare consilium suum in alterius injuriam*, and this principle of justice and policy applied equally between the government and an individual, and between private individuals This doctrine, so just and true, was illustrated with learning and ability by Mr Justice Ware, the district judge

(*c*) Dig 17, 1, 15 Ib 46, 3, 12, 2 Ib 46, 3, 32, 33, 34 Domat, 1, 16, 3, 9

(*d*) Harrison's case, 12 Mod Rep 346 Pothier, Traité du Contrat de Mandat, No 121 Salte *v* Field, 5 Term, 215, Buller, J Hazard *v* Treadwell, 1 Str 506. Morgan *v* Stell, 5 Binney's Rep 305

[1] Lamothe *v.* St Louis Marine R. & D. Co. 17 Mis 204

likewise, according to Pothier, conclude a transaction which was not entire, but partly executed under the power when the notice of the revocation was received, and bind the principal by those acts which were required to consummate the business. The principal may, no doubt, be compelled to act in such a case and indemnify the agent, (a) but it seems difficult to sustain the act of the agent after his power has been revoked, for he becomes a stranger after the revocation is duly announced.

3. The agent's power is determined, likewise, by the bankruptcy of his principal; (b) but this does not extend to an authority to do a mere formal act, which passes no interest, and which the bankrupt himself might have been compelled to *execute, notwithstanding his bankruptcy. (c) Nor *645 will the bankruptcy of the principal affect the personal rights of the agent, or his lien upon the proceeds of a remittance made to him under the orders of his principal before the bankruptcy, but received afterwards. (d) If the principal or agent be a *feme sole* when the power is given, it is determined, likewise, by her marriage; for the agent, after the marriage, cannot bind the husband without his authority, and the acts of a *feme covert* might prejudice her husband. (e) Her warrant of attorney to confess judgment is countermanded by her marriage before the judgment is entered up. (f)

4. The authority of an agent may be revoked by the lunacy of the principal; but the better opinion would seem to be, that the fact of the existence of lunacy must have been previously established by inquisition, before it could control the operation of the power. Neither the agent nor third persons dealing with

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(a) Dig 17, 1, 15 1 Domat, b 1, tit 15, sec 4, art 1 Ersk Inst 3, 10, 40 Story on Agency, 2d edit § 468

(b) Minnett v Forrester, 4 Taunt Rep 541 Parker v. Smith, 16 East's Rep 382 Pothier, Contrat de Mandat, n 120 Civil Code of Louisiana, art. 2996

(c) Dixon v Ewart, 3 Merivale's Rep 322

(d) Alley v Hotson, 4 Campb N P Rep 325

(e) White v Gifford, 1 Rol Abr 381, tit Authoritie, E. pl 4 Anon. Wm. Jones, 388 Charnley v Winstanley, 5 East's Rep. 266

(f) Anon. 1 Salk. Rep. 117, 399 The cases in Salkeld have been since overruled, and judgment may in case of marriage be entered up against husband and wife. 1 Shower, 91 Hartford v Mattingly, 2 Chitty, 117. 3 Moore & Scott, 800. Eneu v Clark, 2 Barr, Penn. Rep. 234.

him under the power, have any certain evidence short of finding by inquisition of the state of the mind of the principal; and in cases of partnerships, it would at least require a decree in chancery to dissolve the partnership on the ground of lunacy. Insanity does not operate as a revocation of a power coupled with an interest; nor if the agent acts under a written power, or a previously acknowledged authority, and the insanity be unknown to the party. (*a*)

5. The authority of an agent determines by the death of his principal; and a joint authority to two persons terminates by the *646 * death of one of them. This is the general doctrine. (*b*) By the civil law, and the law of those countries which have adopted the civil law, the acts of an agent, done *bonâ fide* after the death of the principal, and before notice of his death, are valid and binding on his representatives. (*c*)

(*a*) Huddleston's case, cited in 2 Vesey, 34. 1 Swanst. Rep. 514, n. Sayer v. Bennet, 1 Cox, 107. Waters v. Taylor, 2 Ves. & Bea. 301. Jones v. Noy, 2 Mylne & Keen, 125. The principle in the Roman law was, that no valid transaction whatever was destroyed by subsequent lunacy. *Neque testamentum recte factum, neque ullum aliud negotium recte gestum, postea furor interveniens perimit.* Inst. 2, 12, 1. Lunacy is no revocation of a power, so far as third persons, ignorant of the lunacy, are concerned in acts done under the power. 1 Bell's Com. 489. Davis v. Lane, 10 N. H. Rep. 156.

(*b*) Litt. sec. 66. Co. Litt. Ibid. Moore's Rep. 61, pl. 172. Mitchell v. Eades, Prec. in Chan. 125. Hunt v. Rousmanier, 8 Wheaton, 201. Peries v. Aycinena, 3 Watts & Serg. 79. Paley on Agency, c. 3, p. 1, § 3. Comyn's Dig. tit. Attorney, C. 10, 11. Rowe v. Alderson, 7 Taunton, 453.

(*c*) Inst. 3, 27, 10. Dig. 17, 1, 26. Ibid. 46, 3, 32. Pothier, Traité des Oblig. No. 81. Pothier, Traité du Contrat de Change, part 1, ch. 6, sec. 168. Emerigon, Traité des Ass. tom. ii. p. 120. 1 Bell's Com. on the Laws of Scotland, 488. Code of Louisiana, art. 3001. If A. proposes, by letter to B., (says Pothier, in his Traité du Contrat de Vente, No. 32,) to buy his goods for a certain price, and A. dies before the letter reaches B., and B. on the receipt of the letter, and ignorant of the death of A., accepts, yet it is no contract, for the will of A. did not continue to the time of the acceptance by B. There was not a concurrence of wills at the time. But if B. acted in pursuance of the letter, and sent the goods, the representatives of A. are bound to execute the proposal, not as a contract of sale, but under an implied obligation to indemnify, according to the rule in equity, that *nemo ex alterius facto prægravari debet. Vide supra*, p. 477. The conclusion to which Pothier arrives is not correct, but he qualifies the mischievous consequences of his doctrine by the infusion of an element of equity. A difficult question arose in the English Court of Exchequer, in Smout v. Ilbery, 10 Meeson & Welsby, 1. The family of A. was supplied with necessaries by B., and A. went abroad, leaving his wife authority to contract with B. and died. The wife continued to be supplied with goods by B., before information of the husband's

But this equitable principle does not prevail in the English law; and the death of the principal is an instantaneous and absolute revocation of the authority of the agent, unless the power be coupled with an interest. (a) Even a warrant of attorney to confess judgment, though it be not revocable by the *act of the party, is nevertheless revoked by his death; *647 and all that the courts can do is to permit the creditor to enter up judgment as of the preceding term, if it was prior to the party's death. (b) Such a power is not, in the sense of the law, a power coupled with an interest. (c) [1]

death had been received by either party. It was held that the wife was not liable, the revocation being the act of God, she being entirely blameless, and chargeable with no omission, and acting in the *character of agent* only. It was conceded, in the same case, that the executors of the husband were not liable, and no one was liable on the contract. I doubt the equity of this decision, and I think it might not unreasonably have been considered that the wife, acting as the agent of her husband, and obtaining credit in that character, took the consequences of that assumption, rather than the tradesman with whom she dealt.

(a) The King v. Corporation of Bedford Level, 6 East's Rep. 356. Watson v. King, 4 Campb. N. P. Rep. 272. Harper v. Little, 2 Greenleaf's R. 14. Shipman v. Thompson, Willes's Rep. 103, n. Wynne v. Thomas, Ibid. 563. Bergen v. Bennett, 1 Caines's Cases in Error, 1. Hunt v. Ennis, 2 Mason's Rep. 244. Hunt v. Rousmainier, 8 Wheaton, 174. To constitute a power coupled with an interest, there must be an interest in the thing itself, and not merely in the execution of the power. Ibid. A naked power, without any interest, or one simply collateral, is when authority is given to a stranger to dispose of an interest in which he hath no estate whatsoever; but if he has, under the instrument creating the power, a present or future interest in the land, then the power relates to the land, and is coupled with an interest. Bergen v. Bennett, 1 Caines's Cases in Error, 1. In Maryland, by statute in 1837, acts done under a power of attorney, unrevoked at the time, are binding upon the representative or assignee of the constituent, though he was dead or had assigned his interest at the time the act was done, provided the other party had no notice of the death or assignment. So, by statute in Georgia, of February 22, 1785, Prince's Dig. 163, a power of attorney is in force until the attorney or agent has due notice of the death of his constituent. So it is held in Pennsylvania, that the acts of an agent or attorney, done after the death of his principal of which he was ignorant, are binding upon the parties. Cassiday v. McKenzie, 4 Watts & Serg. 282. The broad principle is here inculcated, that the determination of an agency by death, like an express revocation, takes effect only from the time of notice. This is substituting the rule of the civil for the rule of the common law.[2]

(b) Nichols v. Chapman, 9 Wendell's Rep. 452.

(c) Oades v. Woodward, 1 Salk. Rep. 87. Fuller v. Jocelyn, 2 Str. Rep. 882.

[1] In Smart v. Sandars, 5 Man. Gran. & Scott, R. 895, 917, Ch. J. Wilde, (now Ld. Ch.

[2] Dick v. Page, 17 Mis. 234.

Hunt v. Ennis, 2 Mason's Rep. 244. But though a warrant of attorney to confess judgment, given by two persons, be revoked by the death of one of them, such a warrant, given to two persons, is not revoked by the death of one of them. Gee v. Lane, 15 East, 592. Raw v. Alderson, 7 Taunt. Rep. 453. The law of principal and agent has been extensively considered, and the judicial decisions at Westminster Hall digested in several English works; but the treatise of Mr. Livermore, on the Law of Principal and Agent, published in two volumes, at Baltimore, in 1818, is a work of superior industry and learning. He has illustrated every part of the subject by references to the civil law, and to the commentators upon that law, and he has incorporated into the work the leading decisions in our American courts. The treatise on the law of Principal and Agent, by Mr. Hammond, of New York, published in February, 1836, is of still more useful application, by reason of his extensive view of all the principles and cases applicable to the subject, brought down to the present time. He has drawn largely from Paley's treatise, and the notes of the learned editor, Mr. Lloyd; but the digest of the American cases, which are very numerous, gives the work a decided superiority. Paley's Agency, with Mr. Lloyd's notes, was in 1847 greatly enlarged by the learned labors of Mr. Dunlap, and his edition probably contains the fullest collection of references to modern decisions that is to be met with. The principal cases under the maxim *qui per alium facit per seipsum facere videtur*, are reviewed and accompanied with judicious reflections and skilful arrangement, in Broom's Selection of Legal Maxims, p. 373, London edit.

Since the third edition of these Commentaries, Mr. Justice Story's Commentaries on the Law of Agency have appeared, and the subject is examined and digested with his usual accuracy and research, and with fulness and completeness of execution. A second edition of the work, revised and enlarged, appeared in 1844.[1]

Truro,) after a consideration of the cases, declared that "the result appears to be, that where an agreement is entered into on a sufficient consideration, whereby an authority is given, for the purpose of securing some benefit to the donee of the authority, such an authority is irrevocable. This is what is usually meant by an authority coupled with an interest. See Marfield v. Goodhue, 3 Comst. R. 62, 73. See, also, Knapp v. Alvord, 10 Paige, R. 205, 209; Houghtaling v. Marvin, 7 Barb. 412; Wilson v. Edmonds, 4 Fost. 517.

[1] The cases relative to the liability of principal and agent, on the contracts of the latter, may be, perhaps, usefully classed as follows: —

I. Where the principal only is liable.

Where the agent, acting within the limits of his authority, makes his principal known; or where (though there were no express statement to that effect) circumstances show, that it was understood at the time that the person contracting acted as agent, and intended to make the contract on behalf of his principal, the contract is entirely the principal's, and the agent incurs no liability.

This proposition, subject to the qualification which follows, is sufficiently established by the commentator. And see Smith on Mercantile Law, (by H. & G.) p. 114; 3 Chitty on Con. and Manf. 211, 212; Paley on Agency, Dunlap's ed. pp. 368, 369; Story on Agency, §§ 261, 263; Roberts v. Button, 14 Vt. R. 195. See, also, Kirkpatrick v. Stainer, 22 Wend. R. 244; Shelton v. Darling, 2 Conn. R. 435; Mott v. Hicks, 1 Cowen's R. 513; Brockway v. Allen, 17 Wend. R. 40; Stanton v. Camp, 4 Barb. S. C. Rep. 274; Hicks v. Hinde, 9 Barb. R. 528; Johnson v. Smith, 21 Conn. 827.

So, also, where a person has been authorized to do an act *in his own name*, for which no one but the principal can be held liable; as where a husband authorizes his wife to do an act *in her own name*. Lindus v. Bradwell, 12 Jurist Rep. C. P. 1848.

II. Where the agent only is liable.

1. When one professing to act as an agent has no authority, or has exceeded his authority, he is generally liable to the other contracting party, so far as he has exceeded his powers.

This is the general rule, but it is subject to several exceptions. The principal may be liable for the acts of a professed agent, though the latter has acted without, or in violation of instructions, if the principal, by the mode of his appointment, the usages of trade, the course of dealing, or other circumstances, has held forth the agent to the world, or allowed him to appear as if clothed with competent authority, and his acts are within the limits of his apparent authority. Whitehead *v.* Tuckett, 15 East, R. 408. Fenn *v.* Harrison, 4 Term R. 177. Sykes *v.* Giles, 5 M. & W. R. 645. Shower's R. 95. Iveson *v.* Conington, 1 Barn. & Cress. 160. Fox *v.* Frith, 10 Mees. & W. 131. See, also, Birdseye *v.* Flint, 3 Barb. S. C. Rep. 500; Ballou *v.* Talbot, 16 Mass. R. 461; Platt *v.* Cathell, 3 Denio's R. 604; Townsend *v.* Hubbard, 4 Hill's R. 351; Perkins *v.* Wash. Ins. Co. 4 Cowen's R. 645.

The liability of a party, professing to act for another, without authority, is clearly set forth in the recent case of Smout *v.* Ilberry, 10 M. & W. R. 1, and considered to exist equally in the following cases, viz:

(1st.) When having in fact no authority, he has fraudulently represented himself as having authority.

(2d.) When he has no authority, and knows it, but nevertheless makes the contract as having authority, although no proof of the fraudulent intention can be given.

(3d.) When the party making the contract as agent, *bonâ fide*, believes that such authority is vested in him, but has, in fact, no such authority. See, also, Polhill *v.* Walter, 3 B. & Ad. 114; Kaye *v.* Brett, 19 Law Journal Rep. May, 1850. See Cassidy *v.* McKenzie 4 Watts & Serg. R. 282. See the Com's, *post*, 646.

Some doubt, however, is thrown over the third position in Smout *v.* Ilberry, by the later cases of Taylor *v.* Ashton, 11 M. & W. 401, and Collins *v.* Evans, 5 Ad. & El. N. S. 820. See, further, Lewis *v.* Nicholson, 12 Eng. L. & Eq. 430; Carr *v.* Jackson, 10 Eng. L. & Eq. 526.

2. When from the form of the contract, if written, or from the attending circumstances, if the contract be verbal, it may be inferred that exclusive credit was given to the agent; and when the technical rules of law will permit no other person to be charged. Chadwick *v.* Maden, 12 Eng. L. & Eq. 180.

(a.) If an agent contracts under seal, although he describes himself as acting for and on behalf of his principal, he will be liable on his express covenants, whether he have authority or not. Hancock *v.* Hodgson, 4 Bing. R. 269. Appleton *v.* Binks, 5 East's R. 148. Stone *v.* Wood, 7 Cowen's R. 453. Spencer *v.* Field, 10 Wend. 87. Hopkins *v.* Mehaffy, 11 Serg. & R. 126. Hall *v.* Cockrell, 28 Ala. 507. But this case last cited lays down the rule, that if the covenants are in the name of the principal, and the instrument is signed by the agent, *as* agent, the latter is not liable personally. Abbey *v.* Chase, 6 Cushing, R. 54.

(b.) So, if the agency and the liability of the principal be known, an election to take the individual note of the agent will be regarded as an election to discharge the principal. Paige *v.* Stone, 10 Met. R. 169. Green *v.* Tanner, 8 Met. R. 411. Wilkins *v.* Reed, 6 Greenleaf's R. 220.

And giving credit to the agent, in the contracting party's book, or otherwise treating him as principal under the like circumstances, will discharge the principal. Addison *v.* Gandassequi, 4 Taunt. 574.

It has been held, that where the agent gives a promissory note or bill of exchange, in his own name, and, it would seem, under circumstances which do not show an election to take the exclusive credit of the agent, the principal cannot be sued on the security; and that parol evidence is not admissible to charge him. Stackpole *v.* Arnold, 11 Mass. R. 27. Taber *v* Cannon, 8 Met. R. 456. Bradford Com. Ins. Co. *v* Covell, 8 Met. R. 442. Fenly *v.* Stewart, 5 Sandf. S. C. R. 101. Dawson *v.* Cotton, 26 Ala. 591.

The right (says Lord Abinger) to sue the principal when disclosed, does not apply to bills of exchange, accepted or indorsed by the agent in his own name; for by the law-merchant, a chose in action is passed by indorsement, and each party who receives the bill is making a contract with the parties upon the face of it, and with no other party whatever. Beckhan v. Drake, 9 M. & W. 92.

Whether, in Massachusetts, the principal will be chargeable in any form of action, seems not to have been *decided*. See Taber v. Cannon, *supra*. In New York, the principal, though not chargeable *on the note*, would be chargeable in another form of action, if he had received the benefit of the contract. Allen v. Coit, 6 Hill's R. 318. Minard v. Mead, 7 Wend. R. 68. Bank of Rochester v. Monteath, 1 Denio's R. 402.

In England, parol evidence would probably be admissible to *charge* the principal, but not to *discharge* the agent. Higgins v. Senior, 8 M. & W 834. Beckham v. Drake, 9 M. & W. 79. Jones v. Littledale, 6 Ad. & El. 486. 2 Smith's Ld. Cases, 225, 305. *Contra*, Fenly v. Stewart, *supra*.

But where the act is done in the name of one partner, upon agreement, for the whole firm, all will be bound. 1 Denio, R. 402, *supra*. Bank of South Carolina v. Case, 8 Barn. & Cress. R. 427. Winship v. Bank of United States, 5 Pet. R. 529.

3. Where there is no responsible principal, a contracting party, though representing himself as an agent, will be personally liable. Eaton v. Bell, 5 Barn. & Ald. R. 34. Thacher v. Dinsmore, 5 Mass. R. 299. Childs v. Monins, 2 Brod. & Bing. 460. Story on Agency, § 280.

4. Where the agent acts for a principal residing in a foreign country. But on the question whether the agent is alone liable, the authorities are conflicting. See *ante*, p. [* 631], n. b.

III. Where both principal and agent are liable.

Subject to the exceptions mentioned above, where an agent, acting within his authority, contracts without naming his principal, the contracting party, on discovering the principal, may elect to charge either him or the agent. The converse of this rule is also well established, viz: that the principal may declare himself, and take advantage of his agent's contracts made without disclosing him. But if the state of accounts between the contracting parties have *bonâ fide*, in due course of dealing, been altered, the right of election is in such case lost. Sims v. Bond, 5 Barn. & Adol. 393. Paterson v. Gandessequi, 15 East, R. 62. Thomson v. Davenport, 9 Barn. & Cress. R. 78. Kymer v. Suwercropp, 1 Campb. R. 109. Pentz v. Stanton, 10 Wend. R. 271. Short v. Spackman, 2 Barn. & Adol. 962. Taintor v. Prendergast, 3 Hill's N. Y. Rep. 72. Raymond v. Crown, &c., 2 Met. R. 319. French v. Price, 24 Pick. R. 13.

IV. When neither principal nor agent are liable *on the engagement*.

Where the agent acts in good faith under an authority which he supposes good, and omits to state nothing which tends to discredit his powers, he is not liable, though his authority may have terminated or have been void. Smout v. Ilberry, 10 M. & W. 1. Jefts v. York, 10 Cush. 392. In the three cases of the agent's liability mentioned *supra*, as laid down in Smout v. Ilberry, it seems that the liability of the agent would not be on the contract, but in *case*. Jenkins v. Hutchinson, 13 Q. B. 744. Lewis v. Nicholson, 12 Eng. L. & Eq. 430. Jefts v. York, 4 Cush. 371. 10 Id. 392. Abbey v. Chase, 6 Cush. 54. Ogden v. Raymond, 22 Conn. 379. A different rule has obtained, in New York, the reasons and limitations of which are stated in Walker v. Bank of N. Y. 5 Seld. 582. See, also, Woods v. Dennett, 9 N. H. 55. Moor v. Wilson, 6 Fost. 332. So no one, it seems, is liable *on the covenants* of a deed which are in the name of the principal, but the deed is signed by the agent. Hopkins v. Mehaffy, 11 Serg. & R. 126. Whether there was a remedy in the latter case, in any form of action, was not decided. Wells v. Evans, 20 Wend. R. 291. Clarke v. Courtney, 5 Pet. R. 319. Stetson v. Patten, 2 Greenleaf, R. 358. Brockway v. Allen, 17 Wend. R. 40.

V. Public agents.

They stand on peculiar grounds. Acting for the state, there is, strictly speaking, no liability of the principal, as no action on behalf of the contracting party lies against a state or the United States.

If the agent act by public authority, and within the limits of his power, he does not render himself liable, though he contracts in his own name, and under seal. Unwin *v.* Wolseley, 1 Term, 674. Hodges *v.* Dexter, 1 Cranch, R. 345. Olvey *v.* Wikes, 18 Johns. R. 122. Dawes *v.* Jackson, 9 Mass. R. 490. Fox *v.* Drake, 8 Cowen, R. 191. Wiggins *v.* Hathaway, 6 Barb. S. C. Rep. 632.

If a public agent exceed his authority, he will be liable. Where a person, under protest, pays illegal duties, he may recover the money paid in an action against the collector. Elliott *v.* Swartwout, 10 Pet. R. 137. Bend *v.* Hoyt, 13 Pet. R. 263. Irving *v.* Wilson, 4 Tenn. R. 485. Clinton *v.* Strong, 9 Johns. R. 370. But the case of Cary *v.* Curtis, 3 How. U. S. 236, denies such liability in the collector, under the Act of Congress of March 3, 1839.

If the fact of public agency does not appear at the time of making the contract, Swift *v.* Hopkins, 13 Johns. R. 313, Belknap *v.* Reinhart, 2 Wend. R. 375, or if a public agent make an express promise, Gill *v.* Brown, 12 Johns. R. 385, or if by his conduct he prevents a remedy against government, Freeman *v.* Otis, 9 Mass. R. 272, a personal liability will be incurred.

And in general, public agents themselves, and not government, are responsible for their negligences, wrongs, and omissions of duty. Story on Agency, §§ 319–322, and notes, where the authorities are collected and reviewed.

VI. There yet remains a numerous and very difficult class of cases, where questions of *fact* or *construction*, as well as questions arising upon the law of agency, are to be decided. Such as, in whose name was the contract made? To whom was the credit given? Or who was intended to be charged?

But such questions are not embraced within the design of the Commentaries; and reference must be had to professed treatises on the law of agency for their solution. Story on Agency, §§ 147–163. Paley on Agency, (by Dunlap,) chap. 3, p. 1, § 3, pp 180–184. See Moss *v.* Livingston, 4 Comst. R. 208.